SUBJECTS OF CASES.

REPORTS

OF CASES RELATING TO

MARITIME LAW;

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

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REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

HOUSE OF LORDS.

Thursday, Nov. 30, 1899.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN and ROBERTSON.)

FOREST STEAMSHIP COMPANY *v.* IBERIAN IRON ORE COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Construction—"Working days of twenty-four hours"—Demurrage.

The appellant shipowners agreed by charter-party to provide the respondents with ships for the carriage of iron ore during a period of twelve months. The charter-party contained a clause as follows: "Charterers or their agents to be allowed 350 *tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . to count from* 6 *a.m. of the day following the day when steamer is reported, unless she be reported before noon. . . . Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used."*

Held (affirming the judgment of the court below), that the charterers were entitled to twenty-four working hours in which to load or discharge each 350 *tons.*

THIS was an appeal from a judgment of the Court of Appeal (Smith and Williams, L.JJ., Rigby, L.J. dissenting), reported in 79 L. T. Rep. 240; 8 Asp. Mar. Law Cas. 438, affirming a judgment of Bigham, J. in the Commercial Court.

The appellants were the owners of the *Forest* steamship. The respondents were the owners of certain iron mines at Pedrosa, in the province of Seville, Spain, and made shipments of ore from the port of Seville to the United Kingdom and elsewhere. The appellants on the 30th April 1898 brought an action against the respondents to recover from the respondents 106*l.* 4*s.* in respect of four days' demurrage of the *Forest* alleged to be due under a charter-party dated the 14th Dec. 1897, a bill of lading dated the 19th March 1898, and an agreement dated the 25th March 1898. The charter, which was partly printed and partly in writing, was in form a single voyage charter, but, by a clause at the end, it was agreed between the appellants and respondents that the charter should remain in force for the conveyance of about 50,000 tons of iron ore by steamers belonging to the appellants or other approved substitutes, in about equal monthly quantities over the year 1898. The present action was one of several actions brought to recover demurrage under the same charter, the question as to the meaning of the particular clause being raised in all the actions. The material clauses of the charter-party were as follows:

The act of God, the Queen's enemies, insurrections, riots, fire, frost, floods, strikes, lock-outs, stoppage of trains, accidents to mines, rolling stock or machinery, or other unavoidable hindrances beyond the personal control of shippers, charterers, or consignees, all and every other dangers and accidents of the seas, canals, rivers, and steam navigation of whatever nature and kind soever always excepted, in such cases lay days not to count and demurrage not to accrue unless previously on demurrage. Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging, same to be reversible and to be averaged voyage by voyage to avoid demurrage and to count from 6 a.m. of the day following the day when steamer is reported at the custom house unless she be reported before noon and in which case time to count from notice of readiness and in every respect ready to load or discharge respectively and in free pratique. Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used. Any days on demurrage over and above the said laying days at sixpence per net register ton per day. The captain to telegraph charterers' agents at port of loading the steamer's departure from outward port of discharge, or in default twelve hours more time to be allowed.

By their statement of claim the appellants alleged that taking the time occupied in loading and discharging together, and making all proper allowances, the ship was three days ten hours on demurrage, and at 6*d.* per ton per day on 1062 tons (the registered tonnage) the total amount of the appellants' claim for demurrage was 106*l.* 4*s.* The appellants, in calculating the lay days, proceeded on the basis that the respondents were to perform the loading and discharging at the rate of 350 tons per working day, such days to be made up of periods of twenty-four hours reckoned from the time specified in the charter-party to the corresponding time on the following day, such hours being consecutive hours, subject, however, to the

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

length of a day being extended by the number of hours (if any) during which the loading or discharging should be prevented by bad weather. The respondents by their defence raised two contentions on the construction of the charter, viz.: (1) that by reason of the clause in the charter, "Time . . . to be averaged voyage by voyage," no demurrage was ascertainable or payable until the whole of the 50,000 tons had been carried; (2) that the respondents were allowed twenty-four working hours for loading or discharging each 350 tons, and that inasmuch as the working hours for each day (at the time in question) at the port of Seville were from 6 a.m. to 6 p.m., they were entitled (the cargo consisting of 2080 tons) to 284 working hours, or twelve days of twenty-four hours each, excluding Sundays and holidays. By an order made by Mathew, J. it was ordered that the action should be transferred to the Commercial List for trial, and it was directed by the judge that the question of construction of the charter should be tried as a preliminary question of law. The action was set down for trial on this preliminary point before Bigham, J., who found that the respondents were entitled, under the charter-party, to twenty-four working hours for the loading or discharging of each 350 tons; that in the calculation of such working hours the respondents were not entitled to exclude meal times; that the meaning of "voyage by voyage" in the charter-party was that the time occupied in loading and discharging for the purpose of demurrage must be calculated at the end of each voyage, and not at the end of the charter-party, and this judgment was affirmed on appeal as above mentioned.

Cohen, Q.C. and *Montague Lush* appeared for the appellants.

J. Walton, Q.C. and *Rufus Isaacs*, Q.C. for the respondents.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury): My Lords: I cannot in this case aver that my mind has been free from doubt as to the construction to be placed on these words, because I think that the parties have endeavoured to do somewhat clumsily what they might have done in more precise language. But on looking at the substance of the matter it appears to me to be tolerably clear what they intended, although I admit that their language has not been as clear and definite as I could wish. I think that the learned judge below, and the majority of the judges in the Court of Appeal, were right in the view which they took of this matter. When once the idea is realised that there was to be a conventional and artificial day, manufactured out of a certain number of hours—and that there was such a day is common ground to both parties—what the parties meant by this elaborate calculation is intelligible. They were not content to use the ordinary language of the charter-party. They wanted to get rid of some particular decision. Or it may be that they thought that some difficulty would occur when they took the periods allowed for loading at the different ports of the world, and they wanted to put more precisely what was the bargain between them. They wanted to keep a precise record of the time occupied. Therefore they have adopted this phraseology. But whatever the meaning of the particular phrase may be, although subject to criticism, I think that they meant, in effect, that they were going to have a conventional day of twenty-four hours, and the twenty-four hours day might be made up of broken portions of time in several days added together to ascertain how many days had been used in loading and discharging. Mr. Cohen admitted that there was to be a debit and credit account in hours, but how that was to be arranged unless these broken periods were to be reckoned together I cannot make out. Mr. Cohen sought to confine the words to the exceptional cases of night work, Sundays, and holidays, but the interpretation of the court below is much more satisfactory. Surely the whole scheme of the parties in breaking up what is the day, in its ordinary commercial and astronomical sense, into periods of twenty-four hours is intended to mean that the day is to consist of twenty-four working hours. There is no such thing as an "ordinary working day of twenty-four hours." The thing is absurd. The phrase shows that the parties intended to put the periods together and to ascertain the number of days by dividing the total number of hours by twenty-four. That is the only intelligible meaning which I can place upon the words, and it is the meaning given to them in the courts below. I do not say that the matter is free from doubt, and I should be sorry to say that this instrument is a model of clearness, but I think that a right decision has been arrived at, and I therefore move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal be dismissed with costs in this House and in the courts below.

Lord MACNAGHTEN.—My Lords: I am of the same opinion, though I admit that the document is very awkwardly expressed. But, on the whole, I prefer the construction adopted by Bigham, J. The difficulty seems to have arisen from the fact that the parties have put twenty-four hours into their conventional working day—the same number of hours as in an ordinary day. If the working day had been fixed at twelve hours there would have been no difficulty at all.

Lord ROBERTSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs here and below.

Solicitors for the appellants, *Botterell* and *Roche*, for *Vaughan* and *Hornsby*, Cardiff.

Solicitors for the respondents, *Cattarns* and *De Vesian*.

March 20, 23, *Nov.* 16, *and Dec.* 14, 1899.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, MORRIS, DAVEY, BRAMPTON, and ROBERTSON.)

RUABON STEAMSHIP COMPANY *v.* LONDON ASSURANCE. (*a*)

Marine insurance—Ship docked for repair of sea damage—Survey while in dock for reclassification—Apportionment of dock charges and expenses.

There is no principle of law which requires a person to contribute to an expenditure incurred by another merely because he has derived a benefit from it.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

In the course of a voyage covered by a policy of marine insurance a ship sustained damage by a peril insured against, and had to go into a dry dock for repairs.

While she was in dock the owners took advantage of the opportunity to have her surveyed for reclassification at Lloyd's, though the time for such survey was not yet due. The survey did not cause the ship to be detained in the dock for any time beyond what was necessary for completing the repairs.

Held (reversing the judgment of the court below), that the underwriters were liable for the whole of the expenses of getting the ship into and out of dock and for the dock dues, and that there should be no apportionment between them and the owners.

Marine Insurance Company *v.* China Transpacific Steamship Company (55 *L. T. Rep.* 491; 6 *Asp. Mar. Law Cas.* 68; 11 *App. Cas.* 573) *distinguished.*

THIS was an appeal from a judgment of the Court of Appeal (Chitty and Collins, L.JJ., Smith, L.J. dissenting), reported 78 L. T. Rep. 402; 8 Asp. Mar. Law Cas. 369; (1898) 1 Q. B. 722, who had affirmed a judgment of Mathew, J., reported 77 L. T. Rep. 402; 8 Asp. Mar. Law Cas. 346; (1897) 2 Q. B. 456, at the trial of the action before him without a jury, in the Commercial Court.

The appellants were owners of the steamship *Ruabon*, which they insured under various policies, including a policy effected with the respondents for 2000*l.*, against loss or damage by perils of the sea.

On the 30th Nov. 1895, while the policy was in force, the *Ruabon*, while on a voyage from Kustendji to England, was stranded and suffered damage, for which it was admitted that the underwriters were liable. She was accordingly taken to Cardiff and put into dry dock for the purpose of having the necessary average repairs effected. After the repairs were completed, an average statement was prepared, according to which the respondents were liable to the appellants in the sum of 82*l.* 5*s.* From this, however, the respondents claimed to deduct 2*l.* 5*s.* for the following reasons: While the ship was in dry dock, in the course of repairing the damage caused by the stranding, the appellants took the opportunity of calling in Lloyd's surveyor to look at the ship, and ascertain whether any repairs were necessary to enable her to pass her No. 1 Lloyd's classification. The surveyor certified that no classification repairs were necessary, and the ship accordingly passed her classification. The time at which it would be necessary for the ship to be surveyed had not at that date arrived, but by the rules of Lloyd's Register the time might be anticipated, and the owners were at liberty to call for a survey at the time when the ship was in the dry dock.

The appellants contended that they did not in fact take the ship into dry dock, and the dock expenses were not incurred for the purpose, or with the intention, of having the ship surveyed and classified, the appellants only having taken advantage of her being there to call in the surveyor to inspect her bottom and see whether classification repairs would be necessary, and that the time during which the dock was used for effecting the underwriters' repairs was not in any way increased and no additional expenses were incurred by reason thereof.

The respondents contended that as the ship in fact underwent her classification survey at the same time that the average repairs were effected the docking expenses ought to be divided between owners and underwriters. They accordingly deducted from the sum of 82*l.* 5*s.* (for which they were liable according to the average statement) the sum of 2*l.* 5*s.* as representing the proportion of that portion of the docking expenses which was attributed to the defendants by the average statement which the defendants contended ought to be borne by owners.

No evidence was called at the trial, the action being tried on admissions made by the parties.

The admissions were:—

1. That the vessel in fact passed her No. 1 Classification Survey at Lloyd's Register of British and Foreign Shipping as required by the rules when she was in dock, the opportunity of her being in dock being taken to see if reclassification repairs were necessary.

2. That docking was necessary for the vessel to pass such survey.

3. That items amounting to 55*l.* were proper charges for the work done.

But the first admission was made subject to the following qualification or limitation: "But not that she went into dock for that purpose, nor that any such repairs were done, nor that the time had arrived at which it was necessary for her to pass such survey."

A similar qualification was attached to the second and third admission.

Mathew, J. decided in favour of the underwriters, the defendants below and respondents in the present appeal, on the ground that the case was covered by the decision in the case of *The Vancouver* (*Marine Insurance Company* v. *China Transpacific Steamship Company*, 55 L. T. Rep. 491; 6 Asp. Mar. Law Cas. 68; 11 App. Cas. 573).

March 20 *and* 23.—The case came on for argument before the Lord Chancellor (Halsbury), Lords Watson, Macnaghten, and Morris.

Cohen, Q.C. and *Montague Lush* appeared for the appellants.

J. Walton, Q.C. and *J. A. Hamilton* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Lord Watson died on the 14th Sept. 1899, and their Lordships requiring further argument, the case was reargued on the 16th Nov. before the Lord Chancellor (Halsbury), Lords Macnaghten, Morris, Davey, Brampton, and Robertson.

Cohen, Q.C. (*Montague Lush* with him), for the appellants, contended that it was held in the court below that the case was governed by *The Vancouver* case (*ubi sup.*), but in that case there were two sets of repairs—owner's repairs as well as underwriter's repairs—which distinguishes it. It was necessary to dock the ship to repair damages which had to be done then, but it was not necessary that she should then go into dock to be surveyed for classification. The survey did not affect or delay the repairs in any way. The underwriters are liable to indemnify the owners, and this liability covers these expenses. The

argument on the other side must go to the extent of saying that, if any incidental advantage is gained by the ship being in dock, such as the opportunity for a survey, the expenses must be apportioned. *The Vancouver* case, so far from deciding that, decides the contrary. In that case it was said that if any portion of the dock charges for the time during which the owner's repairs were going on were borne by the underwriters it would go beyond their indemnity, but the House decided that they were to bear a part. The argument was that the whole expenses were not to be borne by the owner, and it was so decided, but the decision gave the owner a profit beyond his indemnity. The underwriters undertake to indemnify against all damage, and the owner need not account for an incidental profit.

J. Walton, Q.C. (*J. A. Hamilton* with him), argued that the case was covered by the decision in *The Vancouver* case. The only difference is that in that case the ship went into dock in the first instance for owner's repairs, whereas in this case it was for underwriter's repairs. On principle the cases are indistinguishable, only the positions are reversed. The underwriters are contending here for what the owners contended for there. The question is, What was the loss covered by the policy? The contract of insurance is an indemnity measured by the cost of repairs. The test is, for whose benefit was the expenditure made?

Cohen, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 14.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (The Earl of Halsbury).—My Lords: The sum sought to be recovered in this case is a very small one, but the principle discussed and decided is one of very far-reaching importance, and I am unable to concur in the judgment of the majority of the Court of Appeal. The agreed facts may be very shortly stated. The steamship *Ruabon* having been placed in dock for the purpose of repairs, for which the underwriters were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts that the holding of the survey added not a farthing to the cost, or a moment to the period of time during which the execution of the repairs proceeded, and the question raised is whether the owner of the vessel is liable on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed. I notice that in more than one of the judgments it is said that the owner of the vessel used the dock for his own purposes. I think that there is a fallacy in the employment of that word "used." He went on to his own vessel and held a survey, and I think that it is not true to say that the dock was used for his purposes at all. He took advantage of the opportunity which was afforded to him by another person (the insuring company) being under contract to do that themselves which gave him an opportunity of seeing the vessel, and for which, if he had been minded to make a survey, he would have had to pay himself. But unless the phrase "using of the dock" is explained, it seems to me to be fallacious first to say that he used the dock and then to infer that as he used the dock he is called upon to pay for it. I propose to examine in detail the various cases, or rather the various classes of cases, where the right to contribution has been held to be part of our law. But it seems to me a very formidable proposition indeed to say that any court has a right to enforce what may seem to them to be just, apart from common law or statute. The courts, no doubt, will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle, and to my mind the question now in debate—admitted to be absolutely novel—would not be covered by any principle known to the law, except such a general proposition as I have indicated above. Now, I am unable to affirm that that is the condition of the common law.

The doctrine of "Average" has been repeatedly held to be a rule derived from the maritime law of Rhodes. In his judgment in *Strang* v. *Scott* (61 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601) Lord Watson said: "The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text as presented by Paulus (Dig. L. 14, tit. 2) is, 'Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.'" Bramwell, L.J., it is true, in *Wright* v. *Marwood* (45 L. T. Rep. 297; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div. 62), rested it upon an implied contract *inter se* to contribute by those interested. Brett, M.R., on the other hand, in *Burton* v. *English* (49 L. T. Rep. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218), spoke of it as a right arising not from any contract at all, but from the old Rhodian laws, which had been incorporated into the law of England as the law of the ocean. It is not necessary to go minutely into the arguments arising from the difference of opinion as to the origin of the law. It is, at all events, a known principle enforceable by the courts, resting either upon positive enactment adopted into our law or from an implied contract between the parties. So Lord Coke in *Sir William Harbert's* case (3 Rep. 11, *b*) explains very clearly when dealing with "contribution." He says: "Note, reader, when it is said before and often in our books that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him anything by way of contribution, but it ought to be intended that the party, who is only extended for the whole, may by *audita querela* or *scire facias*, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner everyone shall be contributory, *hoc est*, the land of every ter-tenant shall be equally extended." Lord Redesdale in the case of *Stirling* v. *Forrester* (3 Bligh, 596), said that "the

decision in *Dering* v. *Lord Winchilsea* (1 Cox, 318; 2 Bos. & Puller, 270) proceeded on a principle of law which must exist in all countries, that where several persons are debtors all shall be equal. The doctrine is illustrated in that case by the practice in questions of 'Average,' &c., where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally, so it is where goods are thrown overboard for the safety of the ship, the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation." I know of no case in which anything like the present claim has been advanced. There is no debt here for which both the parties in question are bound to some third person. It cannot be denied that the underwriters here were themselves bound to incur all the liability they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, and which liability each is under an obligation to some third person to fulfil. In another part of Lord Redesdale's observations in the case of *Stirling* v. *Forrester*, his Lordship makes clear what he means by his commentary on the case of *Dering* v. *Lord Winchilsea*. He says: "The principle established in the case of *Dering* v. *Lord Winchilsea* is universal, that the right and duty of contribution is founded in doctrines of equity, it does not depend upon contract. If several persons are indebted and one makes the payment the creditor is bound in conscience, if not by contract, to give to the party paying the debt, all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditors to exact or receive payment from one and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract but always in conscience as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Dering* v. *Lord Winchilsea* and in that case there was no evidence of contract as in this. So in the case of land descending to coparceners, subject to a debt, if the creditor proceeds against one of the coparceners the others must contribute. If the creditor discharges one of the coparceners he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions." In all the cases to which I have referred, and in all the observations made by the learned judges, the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation. But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them—there being no obligation by which each of them is bound; and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, he ought upon this principle to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because he has got an advantage from what his neighbour did. I can find no authority for any principle which includes this case.

The heads of "Average," "Principal and Surety," "Joint Debtor," or "Ownership of Lands," all of which are liable in execution and only one of which has been made the subject of execution, are intelligible heads of the law, and are included within well-known and ascertained principles. This case seems to me to go entirely beyond those ascertained principles, and for it there would appear to be no authority. No statute has authorised it; no principle of the common law comprehends it; and I am therefore unable to concur with the judgment of the majority of the Court of Appeal. But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called *The Vancouver* case—*The Marine Insurance Company Limited* v. *The China Transpacific Company Limited* (55 L. T. Rep. 491; 6 Asp. Mar. Law Cas. 68; 11 App. Cas. 573). I cannot think that that case establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent. within the meaning of the warranty. It is necessary to observe somewhat minutely the facts of that case, in order to see whether there is anything in it which affects the question now in debate. *The Vancouver*, the vessel in question, was insured in a time policy which contained the warranty "free from average under 3 per cent." During a voyage covered by the policy she sustained certain damage not known at the time, but when some time after the owners, for their own purposes of cleaning and scraping her, put her into dock, the damage was observed then and there, and the underwriters were of course liable to make good the particular average loss for which under the policy they were liable. The question having arisen in this form, and the owners having paid the whole of the dock dues while the vessel was being scraped and cleaned, and while simultaneously the obligation of the underwriters was being fulfilled by the repair of the damage, it was argued that by the accidental circumstance of the owner having put his vessel into dock, and the underwriter having thereby escaped any liability to the dock owner for dock dues, the cost of repairs to him was brought under the agreed amount of 3 per cent. What the court had to determine was the liability under the policy in question, and with reference to that question which, be it observed, is to be measured by what the damage would cost to repair, the court held that the dock dues were part of the cost, and that under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. Now the owner paid the dock dues, and if he had not done so the underwriter would undoubtedly have had to pay for dock dues

and if he had, the amount paid would have been over 3 per cent. It came, in fact, to a calculation of the extent of the damage done, and that being measured by its cost of repair, it was held that the 3 per cent. was reached. What Lord Herschell meant is, I think, sufficiently explained by what he says in commenting on the case of *Pitman* v. *Universal Marine Insurance Company* (46 L. T. Rep. 863; 4 Asp. Mar. Law Cas. 544; 9 Q. B. Div. 192), as to the mode in which the particular average loss was to be arrived at in that case. He says: "All the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled as a general rule to recover the sum properly expended in executing the necessary repairs, less the usual allowances." Now the facts found in that case which is relied on were that the vessel was put into dry dock on the 4th Jan. 1876. It was discovered on the afternoon of the same day that her stern post was broken. It was found by the special case that if the vessel had required nothing but scraping and cleaning, the purpose for which alone she was put there by her owners, she might have been finished and discharged by the evening of the 6th, whereas for the purposes of her repair, for which the underwriters were responsible, she required the whole time from the 4th to 11th Jan., when in fact she was discharged. How a mode of thus calculating the particular average loss so as to satisfy the contract between the two parties to it can justify such a proposition as is here insisted on, I am wholly unable either to understand or to agree to, and I think this judgment should be reversed.

Lord MACNAGHTEN.—My Lords: I concur. I agree with my noble and learned friend on the woolsack that there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it, nor is there, I think, any authority to be found for the application of such a proposition, unless it is to be found in *The Vancouver* case. *The Vancouver* case has been supposed to go some way in that direction in a question between shipowner and underwriter, where ship's repairs and underwriter's repairs are carried out simultaneously. But it must be borne in mind that the question for decision in that case was "whether a particular average loss sustained by the respondents exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance underwritten by the appellants," and that (as Lord Herschell was careful to point out) was the sole question for decision. It was not decided that the shipowner was liable for one half the cost of the use of the dock, including dock charges, but that the underwriter in respect of his obligation was liable at least for one half of the cost. That was enough in the particular case to give the victory to the shipowner, and in this House he could not have asked for more.

Lord MORRIS concurred.

Lord DAVEY.—My Lords: I have had the opportunity of reading the judgment of my noble and learned friend Lord Brampton. It expresses my opinion so much better than I could express it myself that I will not trouble your Lordships with any observations of my own.

Lord BRAMPTON.—My Lords: I entirely concur in the judgment which has been delivered by the Lord Chancellor. I take the general rule to be correctly stated by Lord Herschell in *The Vancouver* case, "that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the necessary repairs, less the usual allowances, as the measure of his loss." I take it also as admitted that, but for the matter which I am about to mention, it would not be disputed that the respondents were liable under their policy to pay as an indemnity against the loss by perils of the sea which occurred, the full sum of 82*l.* 5*s.* claimed. This represents *primâ facie* their responsibility. The respondents seek to reduce this amount by the sum of 2*l.* 5*s.* by reason of a survey of the ship which the plaintiffs, the owners, caused to be made by Lloyd's surveyor, during the period in which the vessel was under repair on the pontoon, which, for this purpose, I may call a dry dock. If they are right in making a reduction on this account, no question being raised as to the amount, the respondents are entitled to retain the judgment pronounced in their favour by the majority of the Court of Appeal. Since the decision of *The Vancouver* case (*ubi sup.*), by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea, one of such operations being to effect repairs for the cost of which underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, neither of which operations could be performed unless the ship were drydocked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous drydocking, in such cases the cost of docking and all dock dues during the period in which the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it. I do not, however, find anything in *The Vancouver* case which would justify such division of dock dues, unless in such cases as I have mentioned. The present is a very different case. The *Ruabon* was drydocked solely to enable the underwriters to effect the repairs for which they were liable and with no other object, and no other repair was, in fact, done or required to be done on the ship; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to reclassification at Lloyd's, and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary if she were afterwards surveyed to have incurred the expense of again drydocking her at the

owners' expense, and to that extent the owners might have been benefited. I say might, because the owners might have sold the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another drydocking was in this way saved, and that to that extent the owners were benefited, I think that circumstance immaterial, and it does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations. I think that such contribution can only be insisted upon in those cases where work is done to the vessel itself by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, drydocking being necessary for each. If the respondents' claim for contribution were allowed, I see no reason why such a claim might not be made against an owner who, while his ship was in dry dock sold her, subject to immediate inspection and survey by his purchaser. A variety of other cases similar in character might be suggested. I think that the owners, in causing the survey to be make in this case, were taking what Lord Herschell termed "an incidental advantage" from the fact that a damage arising from a risk within the policy had necessitated repairs at the expense of the underwriter; and he puts by way of illustration the case of a vessel in ordinary course requiring scraping and painting at intervals of five years, and before the time for such operation has arrived meeting with a disaster by perils of the sea and docked for repairs for which underwriters were responsible; and the shipowner taking the opportunity of scraping and painting his ship. In repudiating the notion that the entire time occupied in that operation should be borne by the shipowner, he adds, "if they were to be borne by him at all." This observation of that noble and learned Lord makes it clear to me that he did not contemplate his judgment covering such a case as this, where nothing was in fact done on the ship, and the survey did not in the smallest degree delay the completion or add one farthing to the expense of the repairs done for the underwriter. I think, therefore, that this appeal should be allowed.

Lord ROBERTSON concurred.

Judgment of the Court of Appeal reversed, with costs here and below.

Solicitors for the appellants, *Botterell* and *Roche*, for *Vaughan* and *Roche*, Cardiff.

Solicitors for the respondents, *Waltons, Johnson, Bubb*, and *Whatton*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Nov. 14, 1899.

(Before SMITH, COLLINS, and WILLIAMS, L.JJ.)

WEIR AND CO. *v.* GIRVIN AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Advance freight—Destruction of goods by fire on board while loading—Charter-party—Construction.

By a charter-party the charterers agreed to load on the ship a full and complete cargo for carriage from the Tyne to San Francisco. Freight was to be paid at a certain rate per ton on the quantity to be delivered to the consignees; and was to be paid two-thirds in cash three days after sailing, ship lost or not lost, the balance on unloading and right delivery of the cargo. Fire was a peril mutually excepted. Part of the cargo after being loaded was destroyed by fire before the ship sailed. The charterers subsequently loaded more cargo of sufficient amount, taking the amount destroyed into consideration, to fill up the carrying space of the vessel. Three days after sailing the owners claimed advance freight on two-thirds of a full cargo.

Held, affirming the judgment of Lord Russell, C.J., that the owners were not entitled to advance freight on the part of the cargo which had been destroyed by fire.

THIS was an appeal from the judgment of Lord Russell, C.J. at the trial of the action without a jury, which is reported in 79 L. T. Rep. 596; 8 Asp. Mar. Law Cas. 470; (1899) 1 Q. B. 193.

The action was upon a charter-party, of which the material parts are as follows:—

London, 31st March 1898.—It is this day mutually agreed between Messrs. A. Weir and Co., owners of the good ship or vessel called the *Olivebank* . . . and Messrs. Girvin, Roper, and Co., of London, as agents for Girvin and Eyre, of San Francisco, that the said ship . . . shall with all convenient speed . . . proceed to a loading berth . . . in the river Tyne . . . and there, always afloat, in the usual and customary manner load . . . a full and complete cargo of coke and lawful merchandise (excluding coals, subject to stipulations in margin, scrap iron, acids, gunpowder, and explosives) cargo being of such a nature as will load vessel to Lloyd's freeboard (subject to provisions of side clause) weight cargo to be supplied and shipped before the coke . . . which the said charterers bind themselves to ship, and being so loaded shall therewith proceed to San Francisco, California, and deliver the same in the usual and customary manner . . . the captain to sign bills of lading for the weight of cargo taken on board as presented without prejudice to the tenor of this charter, providing same equal the amount of chartered freight. . . . Charterers liability with respect to this charter to cease, except for freight as provided, on the vessel being loaded, the owner or captain to have an absolute lien on the cargo for all unpaid freight and demurrage . . . freight for the said cargo to be paid on final discharge at the rate of 16*s.* per ton of 2240lb. on the quantity to be delivered to the consignees, except on cargo shipped in Hull as hereinafter provided; the freight to be due and paid as follows:

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, the balance on unloading and right delivery of the cargo to be paid in United States gold coin at the exchange of four dollars eighty cents. per pound sterling; the act of God, the Queen's enemies, restraint of princes and rulers, fire . . . always mutually excepted. . . .

In the margin of the charter-party was written the following note:

Charterers undertake to ship and owners to load 1000 tons of dead weight cargo (of which 500 tons may be Cannel coal in charterers' option) in manner required by master in Hull on due notice being given, vessel being where cargo can be delivered in usual manner: freight on cargo shipped at Hull being paid at 14s. per ton: in event of charterers not loading vessel to her marks it is agreed that freight shall be paid on the basis of 4350 tons, which owners hereby guarantee to be vessel's capacity of cargo for this voyage less *pro rata* freight on any quantity of cargo short delivered in San Francisco.

While the ship was being loaded a fire broke out on board and destroyed 1478 tons of cargo.

The charterers subsequently loaded 2590 tons more cargo, an amount which, with the 1478 tons previously shipped, would have exhausted the carrying space of the vessel, but would not have loaded her down to her marks.

The ship then sailed for San Francisco.

Three days later the owners asked for payment of the advance freight due under the charter-party, and claimed to be entitled to two-thirds of the freight on 4350 tons.

The defendants contended that they were liable to pay only on 4350 tons less the 1478 tons destroyed by fire.

At the trial of the action Lord Russell, C.J. decided in favour of the defendants.

The plaintiffs appealed.

Carver, Q.C. and *J. A. Hamilton* for the plaintiffs.—The plaintiffs are entitled to the advance freight which they claim, because the defendants were bound to pay two-thirds of the freight upon all goods shipped in advance three days after the sailing of the ship. If the goods are loaded and the vessel is able to sail, the right to the advance freight is complete, and it is immaterial what happens to the cargo if it is once shipped:

The Oriental Steamship Company Limited v. *Tylor and another*, 69 L. T. Rep. 577; 7 Asp. Mar. Law Cas. 377; (1893) 2 Q. B. 518.

Though freight is only payable upon safe delivery of the goods, yet "advance freight" is payable whether the goods are delivered or not. The placing of the cargo on board is the condition which has to be performed in order to make "advance freight" payable:

Kirchner v. *Venus*, 12 Moore P. C. 361;
Allison v. *Bristol Marine Insurance Company*, 34 L. T. Rep. 809; 2 Asp. Mar. Law Cas. 312; 1 App. Cas. 209.

That condition was performed as soon as this cargo was placed on board, and what happened afterwards is immaterial:

Aitken, Lilburn, and Co. v. *Ernsthausen and Co.*, 70 L. T. Rep. 822; 7 Asp. Mar. Law Cas. 462; (1894) 1 Q. B. 773.

The fact that fire was one of the perils excepted does not affect the payment of "advance freight," for fire would not prevent the payment of advance freight for cargo which had in fact been loaded.

Joseph Walton, Q.C. and *Scrutton* for the defendants.—The charter-party says that two-thirds of the freight is to be paid three days after the ship has sailed. That must refer to the freight mentioned in the preceding clause, which is payable at the rate of 16s. per ton on the cargo to be delivered to the consignees. That must be the cargo estimated to be delivered. Therefore, if, before the ship sails, it is known that some of the cargo cannot be delivered, such cargo ought not to be taken into the calculation. If a full cargo were put on board so that the ship is loaded down to her marks, 4350 tons would be the basis on which the two-thirds freight would be calculated, unless part of the cargo actually put on board is so dealt with by excepted perils that it cannot be delivered. The marginal clause provides an agreed measure of damages in case of a breach of contract if the ship is not loaded down to her marks. A payment of advance freight is a payment on account of freight. How, then, can there be a payment on account of a sum which can never become payable?

Smith, Hill, and Co. v. *Pyman, Bell, and Co.*, 64 L. T. Rep. 436; 7 Asp. Mar. Law Cas. 7; (1891) 1 Q. B. 742.

Carver, Q.C. in reply.

SMITH, L.J.—The question in this case arises on the construction of a charter-party, and the dispute is between insurers on advance freight payable under the charter-party and insurers on freight. The charterers were bound to load a full and complete cargo, and they were also bound to load the vessel down to her marks. A clause in the contract provides that in case of a breach of that agreement a certain conventional figure is to be taken on which the charterer is to pay freight at the agreed rate per ton. That conventional figure is 4350 tons. Now, the question is as to the amount of advance freight which the charterers are to pay. The charterers were bound by the charter-party to load in the river Tyne a full and complete cargo of coke and lawful merchandise, excluding certain specified things, the cargo to be "of such a nature as will load vessel to Lloyd's freeboard (subject to provisions of side clause)," and the ship being so loaded was to proceed therewith to San Francisco and deliver the cargo there. Freight was agreed "to be paid on final discharge at the rate of 16s. per ton of 2240lb. on the quantity to be delivered to the consignees." If the charterers should not load a full and complete cargo of such a nature as to load the vessel to Lloyd's freeboard, then the side clause, which has reference to the vessel's capacity of cargo for the voyage, was to come into effect. Then the charter-party goes on to provide that freight "is to be due and paid as follows: Two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the cargo." Now what happened was this: Some of the cargo was shipped, but before the time arrived for payment of the advanced freight, 1478 tons of it were destroyed by fire. The charter-party contains an exception of loss by fire, and it seems to me that the case of *Aitken, Lilburn, and Co.* v. *Ernsthausen and Co.* (*ubi sup.*) is applicable. Since part of the cargo after being put on board was destroyed by an excepted peril, the charterers were not bound to ship further

cargo in place of what was destroyed, although they were bound to load a full and complete cargo, neither can they be called upon to pay freight in respect of what was destroyed. In respect of that destroyed part of the cargo there was no further duty on the charterers to load the ship nor was there any duty on the shipowners to carry. The part of the ship that would have been taken up by the destroyed cargo was at the disposal of the shipowners to fill up as they might desire provided that the contemplated voyage was not thereby delayed. It is clear that the 1478 tons of destroyed cargo were out of the question altogether before the time came for paying the advance freight. Then comes the question on what was advance freight to be paid? Freight, as I have said, was to be paid at the rate of 16s. per ton "on the quantity to be delivered to the consignees." I agree with the Lord Chief Justice that, in consequence of the destruction by fire of the 1478 tons, the conventional sum of 4350 tons is to be taken as the basis on which the calculation is to be made. As no freight is payable on the 1478 tons, that number of tons must be deducted from the 4350 tons, leaving a balance of 2872 tons. That is the freight earning capacity of the ship for the voyage in question, and the two-thirds freight, which is payable in advance, must be calculated on that number of tons. That is the true meaning of the charter-party. I think that the judgment of the Lord Chief Justice was right, and that this appeal must consequently be dismissed.

COLLINS, L.J.—I am of the same opinion. Though my mind has fluctuated a good deal, I confess, in the course of the argument, I have come to the conclusion that the judgment of the Lord Chief Justice is right. The difficulty arises from the fact that the sum to be paid as advance freight is an aliquot part of another sum, and the question is, what is that other sum? That depends on the terms of the charter-party. On the one side it has been contended that the amount of freight payable under the charter-party is finally ascertained as soon as the cargo is put on board, and that, therefore, the aliquot part of it, which is payable as advance freight, is determined when the cargo is put on board irrespective of what cargo may be eventually delivered. On the other side it is said that the charter-party declares that freight is only payable on the quantity of cargo finally delivered to the consignees. The mode of payment of the freight is, by the charter-party, to be "two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the said cargo." On that part of the charter-party the criterion of what is to be paid for freight is so much per ton on the quantity delivered to the consignees. Then there is a side clause which comes into play in consequence of the fire which destroyed part of the cargo. The charterers did not put on board enough cargo to load the ship down to her marks, and therefore 4350 tons is to be taken as the full capacity of the vessel for cargo, and freight is to be paid on that basis. It was contended that freight was to be paid on the entire 4350 tons, and that the advance freight payable was, therefore, two-thirds of the freight on 4350 tons. But the words of the side clause do not support that contention, because, though it mentions 4350 tons as the agreed capacity of the vessel, it provides for a deduction of "*pro rata* freight on any quantity of cargo short delivered in San Francisco." So that the sum to be paid as freight is one which is to be ascertained either by knowledge or by speculation as to what amount of cargo may be delivered at San Francisco. For the plaintiffs it was argued that, in providing for the payment of two-thirds of the freight in advance, the parties must be supposed to have excluded from consideration everything that might happen at San Francisco, because they have inserted into the clause the expression "ship lost or not lost," showing thereby an intention that the obligation to pay advance freight should not depend on any speculation as to what might happen subsequently. The Lord Chief Justice held that that argument could not be sustained, and I agree with him. I think that the advance freight is payable on the amount of cargo to be delivered. The parties have agreed that in one event, the loss of the ship, it is payable on cargo which cannot be delivered, but the provision with regard to that one event does not cut down the rights of the parties in other events. Here certainty has been substituted for speculation, and a certain part of the cargo has been excluded from the possibility of earning freight. The delivery of that part of the cargo is not prevented by reason of the loss of the vessel, but by reason of fire, which the charterers are entitled to rely upon as relieving them from liability. That is the result of considering the obligations contained in the body of the charter-party. Then, taking the side clause, it seems to me to be worded still more favourably to the charterers, because in a certain case, in the event of a short delivery of cargo, a deduction is to be made of *pro rata* freight. Here it was known to both parties at the time for paying the advance freight, that in respect of a certain number of tons of cargo no freight would ever become payable. That is a fact which must be taken into consideration. Therefore, taking 4350 tons as a basis for our calculation, I think we must deduct the number of tons in respect of which both parties knew that no freight would be payable. I agree, therefore, with the decision of the Lord Chief Justice.

WILLIAMS, L.J.—I agree. I think that the word "freight" is used in this charter-party in one sense only. There was a time in the history of our law, after the judgment in *Kirchner* v. *Venus* (*ubi sup.*) in 1859, when it was supposed that advance freight and freight were different things; that advance freight was not merely something paid on account of freight, but was a loan or money paid in consideration of goods being put on board the ship. Even Blackburn, J. entertained that view at the time when he gave his opinion to the House of Lords in *Allison* v. *Bristol Marine Insurance Company* (*ubi sup.*). But it is clear from the judgments delivered in the House of Lords that that is not a correct view. "Freight" has the same meaning whether it is payable as advance freight or not. It may be agreed to be payable on the delivery of the goods to be carried, or it may be stipulated to be payable partly in advance. Still, each payment is a payment of freight. But of course it is plainly within the competence of the parties to a charter-party to make stipulations regulating the

payment of each part of the entire freight, and they constantly agree that the payment of that which is payable in advance shall not be dependent on the delivery of the goods or the performance of the voyage. That is what has been done in the charter-party we are now considering. The stipulations regulating the payment of part of the freight do not alter the nature of the whole of it. What has happened in this case is that by reason of a fire, a peril within the mutual exception clause, part of the ship became vacant space, having no relation to the charter-party and not available for carrying goods under the charter-party. This seems to me to alter the total freight out of which parts are payable at different times, but it does not alter stipulations affecting the payment of those parts. The charter-party continues to apply in its entirety, and the side clause also, but in consequence of the fire the total amount of cargo in respect of which freight is payable has been altered. This seems to me to be the outcome of the decision in *Aitken, Lilburn, and Co.* v. *Ernsthausen and Co.* (*ubi sup.*), but I wish to say that I should have arrived at the same conclusion even if that case had never been decided. The practical difference between advance freight and freight is a difference arising from the stipulations agreed upon as to payment of one part and another, but they still remain parts of one whole, and the alteration of the amount of the whole freight does not affect the stipulations as to the payment of the different parts.

Appeal dismissed.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Hollams, Sons, Coward,* and *Hawksley.*

Wednesday, Nov. 15, 1899.

(Before SMITH, COLLINS, and WILLIAMS, L.JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF BRISTOL *v.* THE OWNERS OF THE STEAMSHIP GLANMIRE; THE BRUNEL. (*a*)

*Collision—Limitation of liability—Meaning of "*15 *tons burden"—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 2, 3, 503.

The words "ships not exceeding 15 *tons burden" in sect.* 3, *sub-sect.* 1, *of the Merchant Shipping Act* 1894 *mean ships, the net register tonnage of which, ascertained according to the provisions of that Act, does not exceed* 15 *tons; hence an unregistered ship, the gross tonnage of which, ascertained according to the Act, exceeds* 15 *tons, but whose net registered tonnage, ascertained for the purpose of registration according thereto, is less than* 15 *tons, is exempt from registration, and her owners are entitled to limit their liability calculated upon a tonnage so ascertained.*

Judgment of Barnes, J. (79 *L. T. Rep.* 527; 8 *Asp. Mar. Law Cas.* 477) *upheld.*

THIS was an appeal from a decision of Barnes, J. holding that the plaintiffs, the owners of the steam-tug *Brunel*, were entitled to limit their liability in respect of a collision which occurred in Oct. 1897 between the *Brunel* and the steam-tug *Iris*. In consequence of the collision, the defendants' vessel, the *Glanmire*, which was in tow of the *Iris*, sustained damage.

An action was instituted by the defendants against the plaintiffs for the damage so caused, and the plaintiffs subsequently admitted liability for the collision.

The plaintiffs then brought this action to limit their liability. The facts of the case were as follows: The gross tonnage of the *Brunel*, measured in accordance with the provisions of the Merchant Shipping Act 1894, was 35·99 tons, the allowance for propelling power space was 31·15 tons, and for crew space 6·73 tons, making the net register tonnage a minus quantity.

The defendants resisted the plaintiffs' claim to limit their liability upon the ground that the vessel was unregistered, although not exempt from the obligation to be registered.

The plaintiffs claimed that she was exempt from registration under the Act as being a vessel under 15 tons burden, and so was entitled to claim the protection of sect. 503.

It was admitted by the defendants that the *Brunel* was a vessel employed solely in navigation on the rivers or coasts of the United Kingdom: (see sect. 3, sub-sect. 1).

Sect. 2, sub-sect. 1, of the Act provides that every British ship shall, unless exempted from registry, be registered under the Act.

Sub-sect. 2 provides that if a ship required by the Act to be registered is not registered under the Act, she shall not be recognised as a British ship.

Sect. 3 provides that the following ships are exempted from registry under this Act:

Sub-sect. 1. Ships not exceeding 15 tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of the ships are resident.

By sect. 503, sub-sect. 1, the owners of a ship, British or foreign, are entitled to limit their liability to an amount not exceeding 8*l.* per ton, in circumstances which would include those of this case.

Barnes, J. held that the plaintiffs were entitled to limit their liability.

The defendants appealed.

Joseph Walton, Q.C. and *Aspinall,* Q.C. for the defendants.—The *Brunel* is not entitled to the protection of sect. 503. She was not registered, and unless she was exempted under sect. 3 (1) she ought to have been registered by sect. 2 (1), and for her failure to be so registered she was not by sect. 2 (2) entitled to be recognised as a British ship. Sect. 72 declares that in such a case a vessel is not entitled to the protection and privileges afforded by the Act, and consequently the owners of the *Brunel* were not entitled to the protection of sect. 503. This depends upon whether she was a vessel not exceeding 15 tons burden: see sect. 3 (1). It is submitted that "tons burden" in that section means gross tonnage ascertained according to the provisions of the Act. From this certain deductions have to be made to ascertain the "net registered tonnage." Barnes, J. held that "tons burden" means "net registered tonnage." *The Andalusian* (39 L. T. Rep. 204; 4 Asp. Mar. Law Cas. 23; 3 P. Div. 182) throws some light on the meaning of a

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

"recognised British ship." Sect. 77 (3) and sect. 78 show that "tonnage" means "gross tonnage," because that section says that the "tonnage" of every ship to be registered shall be ascertained, &c.; and then proceeds to deal with the deductions to be allowed therefrom for the purpose of ascertaining the registered tonnage. "Tonnage" all through the Act means *primâ facie* gross tonnage: see sect. 78. In this case one and three-quarter times the propelling power space has been deducted, which leaves the net register tonnage a minus quantity. [COLLINS, L.J.—You might have a ship the size of the *Great Eastern* brought below 15 tons register by means of deductions.] See sched. 2 of the Act, rr. (1), (2), and (3). These rules are referred to for the purpose of showing that the "tonnage" has first to be ascertained, and then the deductions are to be made to find out the "net registered tonnage." So in the form of bill of sale under sched. 1, "gross tonnage" is used. [SMITH, L.J. referred to sect. 77 (2).] That sub-section only applies to vessels with cargo on board, and which do not require to be measured for the purpose of registration, but for, *e.g.*, light dues. What is the meaning of "burden" in sect. 3? "Register" is only a conventional thing. "Gross" and "net" tonnage have both to be registered. It would seem an odd result if "burden" means also a conventional thing, which may result in a minus quantity. [COLLINS, L.J.—It would be no indication of the size of a ship.] See sect. 92 There might be two vessels of (say) 400 tons each; one an ordinary tramp steamer, the other a fast passenger boat with large engine-room space such as runs between London Bridge and Margate, carrying hundreds of passengers; the former would have to carry a mate and the latter not. See sect. 622 (2), which presents the same absurdity with regard to pilotage. "Burden" must be something fixed proportionately to the actual size of a ship. Sects. 113 and 119 seem at first sight against the appellants; but really they have nothing to do with one another, and deal with totally different subjects. [SMITH, L.J.—The meaning of the words "registered tonnage" in sect. 113 seems synonymous with that of "tons burden in sect. 119.] The terms "burden," "tonnage," "gross tonnage," and "registered tonnage," are all found in the Act. Surely, each must have a different meaning? [WILLIAMS, L.J.—It seems as if the two expressions sometimes mean the same thing, and sometimes different things; and that one must have regard to the part of the Act and the context. Here, since the words in question are in that part of the Act headed "Registry," does not the word "burden" mean "register tonnage"?] The natural meaning of the word "burden" is carrying capacity. The exception is only meant to apply to unimportant and small craft. The history of legislation concerning merchant shipping, which was so much discussed in the court below, has nothing to do with the question.

Robson, Q.C. and *Batten* for the respondents.—The argument in the court below was that burden meant carrying capacity: that point is given up and the appellants now say that "tons burden" means "gross tonnage." In the Act of George III. (13 Geo. 3, c. 74) tonnage means "true" tonnage; that is, the carrying capacity of the ship; because the Act is entitled "An Act for the better ascertaining the tonnage and burden, &c." In this case the part of the Act in question has to do with the registration; therefore "burden" means "registered tonnage." Why should there be two different ways of measuring a ship; one for ascertaining her burden, and a totally different one for determining whether or not she is to be registered? It is submitted that wherever the Act intends "gross tonnage" to be the basis for assessing liabilities it says so in plain terms; see sects. 503 and 78. The word "burden" is sometimes synonymous with registered tonnage: see sects. 113 and 119. Or rather "registered tonnage" only means "true tonnage"; that is, the tonnage which is to be registered: it may be "gross" or "net" in some parts of the Act. In schedule 2 tonnage means "net tonnage," [WILLIAMS, L.J. referred to 7 & 8 Will. 3, c. 22; 13 Geo. 4, c. 60; 26 Geo. 4, c. 60; and 59 Geo 4, c. 5.] Tonnage, *simpliciter*, never means gross tonnage; it means tonnage ascertained in some way prescribed by the Act, which is to be determined by the context. There is no instance in the whole Act where "gross tonnage" is meant to be ascertained and acted on unless the word "gross" appears: in every other case "tonnage" means "net" tonnage.

Walton, Q.C. in reply.

SMITH, L.J.—This is an appeal from my brother Barnes. The question raised in this case is, When must a vessel be registered? This steam-tug *Brunel* was not registered, and she, by her negligence, ran into a ship which brought an action against her owners, and the steam-tug was condemned in the damages. Upon this the owners of the tug took proceedings for the purpose of getting a limitation of liability under sect. 503 of the Merchant Shipping Act 1894, and the point taken against the steam-tug was that she ought to have been registered, and, inasmuch as she was not registered—to put it shortly without reading sect. 1—her owners could not call in aid the provisions of the limitation sect. 503. Barnes, J. has held otherwise, since he has held that the tug in question did not exceed 15 tons burden within the meaning of sect. 1 of the Merchant Shipping Act 1894. Now, the question here is, What is the meaning in this section of the words "not exceeding 15 tons burden?" Does it mean not exceeding the gross tonnage of 15 tons burden, or does it mean not exceeding the registered tonnage of 15 tons burden? Because it is conceded that if the meaning of this section is "not exceeding 15 tons registered tonnage," this tug did not exceed that, and was, therefore, exempt from registry. Upon an ordinary computation to find out what is to be the registered tonnage of this ship (after first of all calculating what is to be taken into account, and then by calculating what is to be deducted from that amount, namely, propelling power space, and so on), her gross tonnage was 35·99 tons. There was to be deducted from that 31 tons odd as allowance for propelling power, and 6 tons odd for crew space, and the allowances coming to more than the plus quantities which had to be added together for the purpose of ascertaining the gross tonnage, the registered tonnage was really *nil*. Barnes, J. has held the proper construction of this section is that ships not exceeding 15 tons burden means not

exceeding 15 tons registered tonnage. Now, in the court below it was argued by learned counsel—I am told, by the late Mr. Aspinall—that the meaning of tons burden in this section was really "the carrying capacity of the ship," and that argument was dealt with by Barnes, J. in a most careful and exhaustive judgment, in which he went as far as was necessary into the history of how the word "burden" came into play. Williams, L.J. has also gone into that question, with which I shall not deal further. That argument is abandoned to-day by Mr. Walton. Mr. Walton sees that after the judgment of the learned judge he cannot maintain the point argued for in the court below. He now contends that although it does not mean "carrying capacity," it does mean "gross tonnage." That is really his argument, although he does not like it being stated in that way, because, he says, it is the gross tonnage before the authorised deductions are made therefrom. Now, what foundation has he for saying that "tons burden" means gross tonnage? He was challenged by Mr. Robson to give some reason, and what he does is to give the only reason which he could possibly give. He says that tonnage in the 2nd schedule to this Act means the sum of all the dimensions of a vessel, without the deductions to be allowed in the case of a steamship. I cannot read the rule in that way, because it is reading, in my judgment, half the rule. Tonnage, in those rules, in my opinion, means gross tonnage less deductions—that is, registered tonnage. I wish also to point out that the words "tons burden" which we have to construe are in the group of sections in Part 1 of this Act, which has relation to the registration of ships, and, as I have said before, I say again, it seems to me to throw no light upon the words in one group of sections to call attention to words which are to be found in another part of the Act which has reference to something entirely different to the words in the first part of the Act. This first part, with which we have to deal to-day, has reference to the question of the registration or non-registration of ships. The words which were relied upon by Mr. Walton, namely, the words "tons burden," are found also in the next group of sections, which relate to seamen, and may well bear another interpretation when those sections have to be discussed than they do in the group of sections which are now under consideration. It seems to me that in these sections dealing with the registration or non-registration of ships, the words "tons burden" mean what they do undoubtedly mean when you come to the question of registering ships, namely, net tonnage, which is the gross tonnage after allowing the deductions. For these reasons I am of opinion that my brother Barnes is right, and that as the *Brunel* did not exceed 15 tons registered tonnage the appeal must be dismissed.

COLLINS, L.J.—I confess I have felt some doubt in this case, which has not been wholly removed by the arguments of Mr. Robson, but I think, on the whole, that the judgment of my brother Barnes and that of my Lord here is the safer conclusion to adopt. When one looks, as one always likes to do, at the history of this matter, one seeks to find what was the principle upon which the Legislature excluded certain ships from the benefit or the burden, it may be, of registration. In the first instance, it provided that certain British ships alone should be entitled to registration, and it then proceeded to give a certain class of ships the benefit of being British ships without registration. That class was the class of ships not exceeding 15 tons burden, employed solely in navigation on the rivers and coasts of the United Kingdom; and, looking at that from a common-sense standpoint, it does seem to me as if "size" was what the Legislature meant to be material in deciding the question whether it would insist upon a vessel getting registered before claiming the benefits of being a British ship within that legislation. At the time that that legislation was initiated, of course, steam was not known, and the carrying capacity of a ship was practically the same thing as its size. It was necessary to have a uniform method of arriving at the carrying capacity, but up to the introduction of steam that corresponded more or less accurately with the size of the ship. The result of that was that certain small vessels, which were not supposed to be capable of crossing the seas, were excluded from registry. Then the Legislature, having had some difficulty before as to the best method of ascertaining the capacity, found itself face to face with a new difficulty, by reason of the introduction of steam, and it had to substitute a new standard to ascertain the carrying capacity, which was the thing which was important to be ascertained for many purposes. It introduced a new standard of carrying capacity, which in the 5 & 6 Will. 4 for the first time involved the exclusion of engine-room space and so on. Now we stand in this position, that the exception remained the same, but a different standard of measuring capacity was introduced. Now, the argument of Mr. Walton does not seem to me to be open to the criticism which was addressed to it by Mr. Robson. It seems to me that it would be perfectly possible to still make size—but size scientifically ascertained—the standard of calculation. It seems to me, that the principle of determining whether a vessel comes within the legislation or not, need not necessarily be the same as in ascertaining what is her registered tonnage. But there is this anomaly also, which appears to me to be involved in the position resulting from the judgment of Barnes, J., and that is that if size was the ground upon which the vessels were excluded, you have, under the method which Barnes, J. has applied, this possible anomaly—that ships which are very large in actual fact, and which certainly could not have been contemplated at the time the exemption was introduced as coming within it, may, and very often do, come within the exemption. But, on the whole, I think it is, perhaps, wiser to hold that one standard, and one standard only, is to be applied, when you are seeking to ascertain the tonnage of the ship, and that is the standard laid down by the Legislature, and which results in the registered tonnage. It is perfectly true that, in the process of ascertaining that, the gross tonnage is first ascertained, but it seems to me that that is obtained and stated, not by the mandate of the Legislature, as being the result which has to be ascertained, but merely as arising, from this, that the Legislature thought it right that the process by which the result was obtained should be stated so that, I suppose, it could be checked. That which has to be ascertained, and which the Legislature makes the object of the calculation, is the registered tonnage,

and not one of the steps in ascertaining the registered tonnage. Therefore I think there is real difficulty once you are driven away from the point taken in the court below, namely, that what is really meant is carrying tons as differing from the registered tonnage. I think, when once you are driven from the contention that it was the actual possible amount that the ship could carry, there is something anomalous in stopping short in the middle of the calculation which the Legislature has enacted, and accepting one of the steps towards the goal, instead of the goal itself—namely, the gross tonnage, which is only a step towards ascertaining the registered tonnage, instead of the registered tonnage itself, which is the object of that. I think, therefore, that on the whole it is safer to adopt the decision of Barnes, J. I add this, that it seems to me Mr. Walton is perfectly well founded in saying that in some parts of this Act before us the word "tonnage" is capable of meaning, and necessarily must mean, gross, as distinguished from net, tonnage. I also think that in some parts of the Act burden means gross as distinguished from net, but that does not carry him far enough. We have to say, from the context and from the best view we can form of what the object of the Legislature was in making this standard of inclusion or exclusion, what interpretation is to be put upon it by ourselves. It is capable of either, and I think that on the whole the safer is that which has been adopted by Barnes, J.

WILLIAMS, L.J.—I agree, and the reasons which have been given by other members of the court seem to me so ample and satisfactory, that I only propose to say a word or two. As I understand Mr. Walton's argument, it is not based in any degree upon the use of the word "burden" in the 3rd section of the Merchant Shipping Act of 1894. His argument would have been equally applicable to all the words of sub-sect. 3, which runs: "Ships not exceeding 15 tons," &c. I do not wish to seem to be critical, but I cannot help thinking that the case has taken longer than it need have done, because during a great part of the argument I was under the impression that Mr. Walton was largely relying upon the employment of the word "burden." Having got rid of that, let us see how the matter stands. The question is, what is the meaning of the words "ships not exceeding 15 tons will be exempted from registry." Can anyone doubt that *primâ facie* you are to use the same standard in arriving at the 15 tons which is to exempt from registry, as you will have to use when you ascertain the tonnage of a vessel which has to be registered? It is said here that you ought not to do it, and the reason which is suggested for applying what I cannot help calling an unnatural interpretation to these words, is this: if you apply a natural interpretation you will, having regard to the various purposes of this Act of Parliament in reference to the parts of the Act where "tonnage" is used, arrive at a result which is not likely the Legislature could have contemplated. I say, in answer to that, in the first place, that I have only to deal with the construction of these words in this particular part of the Merchant Shipping Act, which deals with registration. With regard to the words that appear in this part of the Act, the word "burden" does become of importance, not as the basis of an argument, but as enabling us historically to arrive at really what was the purpose of this section. One cannot really doubt, if one looks at it, that the whole of this section, which has appeared in various shapes since, is derived from 7 & 8 Will. 3, c. 22. That was an Act passed for the purpose of preventing frauds and regulating abuses in the plantation trade. There is a provision that only British ships should have the benefit of the trade between this country and our plantations, which in those days included the whole of what are now the United States of America, and the Act provides for registration. In doing so it describes the kind of ship which may be registered—broadly, ships built at ports in England and certain places in the plantations—and then says that the registration shall be upon the oath of the master as to the tons burden. That shows the origin and reason of the registration Presently, when you come to 26 Geo. 3, c. 60, it was desired to amend this Act, and to include some of those ships which had been excluded before, and it is in the 3rd section of the Act of 26 Geo. 3 that one first finds this limitation of 15 tons. I cannot doubt myself that when the 15 tons limitation was first introduced it was intended that that 15 tons—which was the 15 tons, be it observed which was introduced, among other reasons, at all events, as a limitation of the class which should be entitled to the privilege of being registered for the purpose of navigating between this country and the plantations—I cannot doubt that that 15 tons was to be measured by the standard that was introduced into that statute. It is true that is not the standard with allowances which is now used. That standard with allowances was first introduced into the Act of 13 Geo. 3, amended by 26 Geo. 3, which was amended by 59 Geo. 3. The Act of Will. 3 introduced the necessity for registration of the use of the word "burden," but excluded the smaller ships altogether. The amended statutes included the smaller ships which are above 15 tons, and provides a measure for that 15 tons, which was a measure of the interior capacity of the ship, without any deduction at all. Then comes the later statute, which was necessitated by the introduction of steam navigation in boats. That was the statute which introduced substantially the mode of measurement which still exists in the last Merchant Shipping Act. Under the circumstances, for myself I have no doubt whatever that the 15 tons mentioned in the 3rd section of the present Merchant Shipping Act is 15 tons registered net tonnage, and not 15 tons gross tonnage.

Solicitors for the plaintiffs, *Robins, Hay, Waters*, and *Hay*, agents for *D. Travers Burges*, Bristol.

Solicitors for the defendants, *T. Cooper* and *Co.*

Nov. 7 and 22, 1899.

(Before SMITH, COLLINS and WILLIAMS, L.JJ.)

WEIR *v.* UNION STEAMSHIP COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Duty to supply ballast.

By a charter-party it was agreed that a vessel with officers and crew should be placed at the disposal

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

of the charterers or their assigns for the conveyance of merchandise and (or) passengers between certain ports, the vessel being let for the sole use of the charterers, with liberty to sub-let, for three voyages commencing not later than a certain day when she was to be placed with clear holds at the charterers' disposal at New York, they having the whole reach or burden of the vessel, sufficient room being reserved to the owners for the officers, crew, and tackle, &c., of the ship. The vessel was not to be required to load more than she could reasonably stow and carry over and above her tackle, stores, &c. The captain was to be under the orders of the charterers as regards employment, agency, and other arrangements, and in case of dissatisfaction of the charterers the owners agreed to make any necessary change in the appointment of the captain or crew. The freight payable by the charterers was a fixed monthly amount, and was payable until the charterers delivered up the vessel to the owners. The owners were to have a lien on the cargo and freight for arrears of hire, and the charterers were to have a lien on the ship for the freight payable in advance.

The charterers sent the ship upon one of the voyages contemplated by the charter-party without any cargo. It consequently became necessary for the proper navigation of the ship to take on board some ballast in addition to her usual water ballast. In an action to decide at whose cost this extra ballast was to be supplied:

Held, that there was nothing in the charter-party which relieved the shipowners from the ordinary obligation of shipowners to supply the necessary ballast for the proper navigation of the ship.

THIS was an appeal from the judgment of Bigham, J. on a preliminary point of law arising in the action.

The action was brought by the owners of the steamship *Elleric*, to recover from the charterers balance of freight due under the charter-party.

The defendants counter-claimed in respect of the time lost during the execution of repairs to the vessel's propeller, and for the cost of ballast supplied to the vessel by the defendants under protest.

The charter-party so far as is material to the present case was as follows:

London, 10th June 1897.—It is this day mutually agreed between Messrs. Andrew Weir and Co., owners of the good steamship or vessel called the *Elleric*, of the measurement of 3583 tons gross and 2322 tons net or thereabouts, now at Greenock, and the Union Steamship Company Limited of London, charterers of the said steamship.

1. That the said vessel or steamer being tight, staunch, and strong, and in every way fitted for the service and to be maintained by the owners with sufficient complement of officers, seamen, engineers, firemen, and stewards, shall be placed at the disposal of the said charterers or their assigns to be employed by them in the conveyance of lawful merchandise (including live stock) and (or) passengers as follows: between all good and safe ports and places in the United Kingdom and (or) United States and (or) ports of South and East Africa. . . .

2. The said vessel is let for the sole use of the said charterers and for their benefit, and with liberty to sub-let (subject to owners' approval of trade) for two or three round voyages at charterers' option, commencing not later than the 15th July next, by which day she is to be placed with clear holds at the disposal of the charterers at the port of New York, they having the whole reach or burthen of the vessel, including passengers' accommodation (if any), proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores; and the vessel is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel. The owners guarantee that vessel has just been in dry dock and painted, and undertake to maintain her in a thoroughly efficient state during the currency of her charter. . . .

3. The captain shall use all and every reasonable despatch in prosecuting the voyage or voyages, sails are to be set whenever practicable and of advantage to the charterers, and the crew are to render all customary assistance in loading and discharging, which, however, is to be carried out by and at the risk and expense of the charterers. . . .

4. The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, and other arrangements and the charterers hereby agree to indemnify the owners against all consequences or liabilities that may arise from the captain signing bills of lading or in otherwise complying with such orders and directions.

5. If the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall on receiving particulars of the complaint investigate the same, and if necessary make a change in the appointments.

7. The coals for the steam engines shall be supplied by and at the cost of the charterers, who shall also bear all port and dock charges, pilotage, light dues, agency commissions, delivery, labourage, and all other duties, charges, and expenses, the owners providing and paying for all ship's stores, insurance, crew's wages and victualling. . . .

8. The freight for the hire of the said vessel shall be paid as follows, at and after the rate of 1050*l.* per month, but should the vessel be kept on hire over twelve months, all extra time to be paid for at the rate of 1150*l.*, and to be paid monthly in cash in advance in London, and continue payable . . . until the vessel is again returned by the charterers to the owners at New York to be delivered in like good condition as when chartered, fair wear and tear excepted. . . .

10. The owners to have a lien upon the cargo and freight for arrears of hire, including the monthly freight in advance, but the charterers to have a lien upon the ship for such last-mentioned freight.

13. In default of payment of hire when due, owners to be at liberty immediately to resume possession of the vessel and to claim damages.

16. Charterers have the option of cancelling this charter-party if the vessel is not placed at their disposal as and at the time stipulated above.

The *Elleric* made three voyages under this charter-party each time without cargo.

On the first voyage there was no ballast in the ship beyond the ordinary water ballast, and in consequence of this damage was caused to her propeller which had to be repaired at New York.

In consequence of this the captain refused to sail on the second and third voyages unless the defendants supplied the necessary extra ballast, and the defendants thereupon under protest provided the necessary amount of sand ballast.

By an order made by Kennedy, J. in chambers it was directed that the following question should be tried as a preliminary point of law: Whose duty was it under the charter-party to provide any ballast beyond water ballast that might be

necessary for the safe sailing of the *Elleric* on the chartered voyage and at whose expense?

Bigham, J. held that it was the duty of the shipowners under the charter-party to supply the ballast, and he gave judgment accordingly.

The plaintiffs appealed.

Carver, Q.C. and *D. C. Leck* for the appellants.—The defendants were under the obligation to pay the expense of providing the ballast in question by reason of the provisions of this charter-party. Under the charter-party the obligation of the shipowners was to provide and place at the disposal of the charterers a ship with clear holds, that is, free from ballast in the holds, and to maintain her, that is, to keep her in repair. If the shipowners were obliged to provide ballast in the holds, they could not fulfill their obligation to provide a ship with clear holds. It would be the duty of the charterers, who were entitled to have clear holds at their disposal, to so load the ship that she would be seaworthy or, if not so loaded, to provide and pay for the necessary ballast. This ship was provided with the necessary tanks and equipment for water ballast, and that was a part of the equipment of the ship which would have to be worked by the ship. That is quite a different thing from sand or similar ballast which would necessarily take up part of the cargo space. The proper construction of this charter-party is that the shipowners were to provide a ship with water ballast and were to manage and work that ballast as part of the equipment of the ship, but that, if by reason of the manner in which the charterers used the ship further ballast became necessary for the purpose of safely navigating the ship, then the charterers should pay the expense of such further ballast. There is a difference between a charter of this kind and an ordinary voyage charter. This was not a mere contract of carriage but was a demise of the ship.

Joseph Walton, Q.C. and *T. E. Scrutton* for the respondents.—As to the general law, it is well settled that the charterer of a ship is not bound to provide ballast, but that it is the duty of the shipowner to provide the necessary ballast, unless there is something special in the charter-party to alter the general rule:

> *Southampton Steam Colliery Company* v. *Clarke*, 19 L. T. Rep. 651; 3 Mar. Law Cas. O. S. 197; L. Rep. 6 Ex. 53.

The obligation under a charter-party such as this is precisely the same as under a charter-party for a single voyage There is nothing special in this charter-party to alter the ordinary liability. Under this charter-party the charterers can put any cargo they choose on board, or a part cargo only, or no cargo, or passengers only; there is no obligation upon the charterers to load any particular kind of cargo, or any cargo at all. The obligation of the shipowners is to provide a vessel for that purpose, and, if necessary for that purpose, to provide ballast; they must put the ship into the condition to perform the voyage when loaded or not loaded, according to the choice of the charterers. The shipowners have a right to put ballast into the holds, if it is necessary, as part of the equipment, tackle, and furniture of the vessel. There is no authority upon the point, but there can be no distinction in principle between a voyage charter and a time charter. [WILLIAMS, L.J. referred to *Irving* v. *Clegg* (1 Bing. N. C. 53.]

Carver, Q.C. replied. *Cur. adv. vult.*

Nov. 22.—SMITH, L.J. read the following judgment:—The question in this case is whether a shipowner or a charterer is the person to supply ballast for the shipowner's ship, and this point depends upon the terms of a charter-party dated the 10th June 1897, made between the owners of the steamship *Elleric* (Messrs. Weir and Co.) of the one part and the charterers (The Union Steamship Company Limited) of the other, which charter I will particularly refer to in a moment. On the voyage out from New York to the Cape, which was one of the voyages contemplated by the charter, the steamship was loaded up with such a cargo as to render the water ballast in tanks, with which the ship was provided, sufficient, but on the voyage back from the Cape to New York, also a voyage contemplated by the charter the ship came without cargo in her, so that ballast in addition to the water ballast had to be taken on board. This ballast consisted of sand, which was placed in the holds of the ship, and it is as to the cost and expense attending this sand ballast that the question arises, the shipowners asserting that the charterers are liable thereto. My brother Bigham has held the contrary, and that this liability falls upon the shipowners, and they appeal. Before I go to the charter-party I must point out that, under an ordinary charter of a ship, the shipowner is bound to provide the necessary ballast for his ship, the reason being that, as he is responsible for the navigation of the ship by his captain, he is responsible for the ballast necessary to enable his ship to perform the contemplated voyage. Mr. Carver well points out, in his work on Carriage by Sea, sect. 262, that not only is it the duty of the shipowner, but it is his privilege, to ballast his ship, for he is entitled to carry merchandise as ballast, bearing freight, provided it occupies no larger space than the ordinary ballast would do, and leaves to the charterer the full space of the vessel proper to be filled with his cargo. The question, therefore, comes to this, does the charter-party in this case, to use my brother Bigham's phrase, relieve the shipowner of his ordinary duty? Now, what is this charter-party? It is a charter-party by which the shipowner agrees that his vessel, being tight, staunch, and strong, and in every way fitted for the service, and to be maintained by owners with sufficient complement of officers, seamen, engineers, firemen, and stewards, shall be placed at the disposal of the charterers to be employed by them in the conveyance of lawful merchandise and passengers between ports and places in the United Kingdom, and (or) the United States, and (or) South and East Africa, for two or three round voyages at charterers' option, commencing not later than the 15th July 1897, when she is to be placed with clear holds at the disposal of the charterers at the port of New York; and it is agreed by the charter-party that the vessel is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel; and the freight to be paid by the charterers is the sum of 1050*l.* per month, but, should the vessel be kept on hire over twelve months, all extra time is to be paid for at the rate of 1150*l.*

monthly in cash in advance in London. By the charter-party the captain is to be appointed by the shipowners, though he is to be under the directions of the charterers, and it is agreed that the captain shall use all reasonable despatch in prosecuting the voyage and that the crew shall render all customary assistance, and that, if the charterers have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners are, after inquiry, to, if necessary, make a change in the appointments. I cannot doubt that, under this charter-party, the ship was to be navigated by the servants of the shipowners; that the captain was the shipowners' captain and not the captain of the charterers, and the crew were the crew of the shipowners and not of the charterers, and that the whole control and management of the ship, as regards navigation, was left in the hands of the owners, who remained in possession of the ship by their servants, although the charterers might direct where the ship was to go and with what she was to be laden and were to pay the various named disbursements. When a question arises as to whether a charter-party constitutes a demise of a ship or not, the ordinary test is, whose servants are those who are to navigate the ship. If the shipowners' servants, then they act as carriers of the cargo for the charterers, whereas, if they are the servants of the charterers, the shipowners generally cease to be carriers and the contract is one of hiring. In the former case there is no demise of the ship, in the latter there may be. In my opinion, in the present case there is no demise of the ship, and the *primâ facie* rule as to the owner supplying ballast applies. Before going to other clauses of the charter, upon which the shipowners rely, I will point out that the charterers are under no obligation to load on board the ship a full cargo or any particular cargo. They might load just what they liked, two-thirds or a half or one-third of a cargo or no cargo at all; they might put on board passengers only. The sole obligation of the charterers as to loading was not to overload the ship. They might underload her as much as they liked. They contracted to pay the 1050*l.* freight per month, irrespective of whether they loaded cargo or passengers or not, and in my opinion they had the right of sending the ship upon the contemplated voyages loaded or not as they thought fit. They might send the ship out from New York to the Cape empty or with only passengers on board, and the owners had no cause of complaint if they did so. Now, suppose the charterers, being, as they would be, well within their rights under this charter, determined to send the ship out, say, with only pasengers on board on the first half of the first round voyage from New York to the Cape, which necessitated for the safety of the navigation of the ship sand ballast in addition to the water ballast in the tanks, whose duty was it to put the sand as well as water ballast on board at New York? The shipowners have to admit that they, by their captain, had to put the water ballast on board, and why, I ask, are they not also bound to put the sand ballast on board, if such was necessary for the stability and due navigation of the ship. Unless there are clauses in the charter showing that the shipowners are exempt from the obligation (the charter not constituting a demise of the ship), the shipowners are clearly liable thereto. Similar circumstances existing at the Cape as to the return voyage to New York, I am of opinion that the duty of the shipowner by his captain is to do the same as regards sand and water ballast at the Cape as at New York, and there is nothing in the charter-party, so far as I have cited it, to show that the owners are relieved from this ordinary liability.

But it is said, on behalf of the charterers, that this is not so, for the charter-party in some of its clauses shows that the owners are relieved from this obligation. Firstly, it is said, because by the charter-party the shipowners are to tender their ship at New York to the charterers with clear holds, and that if ballast other than water ballast was to be used by the shipowners this could not be done, for ballast other than water ballast would have to be put in the holds, and, as they had to tender the ship with clear holds, the shipowners were not to put ballast other than water ballast on board. In other words, that this clause shows that the charterers were bound to put such cargo on board as would cause the ship to stand up with water ballast alone, or, if not, that the charterers were to put in other ballast themselves to make her stand up. The answer to this argument is that the charterers are only to have clear holds to stow what the ship can reasonably stow over and above her tackle, provisions, stores, and fuel. If a light cargo is put on board, which the charterers are clearly entitled to put on, so as to necessitate ballast in addition to water ballast, it is obvious that that ballast must be put on by someone, and where in this clause is there anything to say that this must be put in by the charterer and not by the shipowner? The truth is, if the charterer puts on board the cargo he is entitled to under the charter, and it is so light that the ship will not stand up without further ballast, as it is the duty of the shipowner by his captain to properly navigate the ship, so he must by his captain put on board the necessary ballast. It was next said that clause 3 exempted the shipowners from putting in the sand ballast. I do not agree. This clause relates to loading and discharging cargo; it has nothing to do with ballast. Clause 4, which relates to indemnity, in my opinion is wholly foreign to the question of ballast, and it should be pointed out that this clause does not, as it appears to me, extend to the improper navigation of the ship. The word "labourage" in clause 7, which is relied upon by the shipowners, in my opinion has no reference to ballast. In my judgment, if a shipowner is to be relieved from the obligation of ballasting his ship, the charter-party not constituting a demise of the ship, there must be in the charter-party a clause to that effect, and I can find nothing like such a clause in the charter-party in this case. For these reasons, I think my brother Bigham was quite right, and that this appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. The case does not appear to me to raise any question of principle, but to depend upon the special terms of the bargain made between the parties. As is admitted on all hands, the law is perfectly clear that in ordinary charter-parties the obligation of finding the necessary ballast for the ship rests upon the shipowners; but it was contended by Mr. Carver that a different

rule applies to the case of time charters. Now, it seems to me that the presumption as to the shipowners being under this obligation is exactly the same in the case of a time charter as it is in the case of an ordinary voyage charter, unless the time charter is in point of fact not a contract of carriage but a contract of hire—that is to say, a contract by which there is a complete demise of the ship so that the duty and obligation of managing the ship is taken from the owner and the captain and is placed in the hirer or charterer. For the reasons which have been given in the judgment that has just been delivered, I am clearly of opinion that in the charter-party now before us there is nothing like a complete demise of the ship so as to convert the contract from a contract of carriage into a contract of hire. I think that the master of the ship was the agent of the owners in all matters relating to the navigation of the ship, and as such had the usual rights and responsibilities. Therefore we start upon the investigation of this charter-party with the presumption that the obligation as to ballast rests where it does in ordinary charter-parties—namely, on the owners. Of course, that does not decide the question, because there may be clauses in the charter-party which shift the burden from the owners on to the charterers, and it was contended by Mr. Carver that there are such clauses. But I think that, when the various clauses of the charter-party are examined, it is abundantly clear not only that the presumption is not rebutted, but that there are clauses which, as I read them, contemplate and provide for the obligation resting on the owners. Now, there is one clause in particular on which Mr. Walton relied, and which, I think, supports his contention. It is this: "The vessel is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel." Mr. Walton put as an instance the loading of a cargo too light to weigh the ship down to the necessary depth, and he contended that in such a case the owners must have the right to insist upon room being found for such ballast as would be necessary to weigh the ship to the proper depth. I think that contention right. The owners must put the ballast into the ship in order to carry out their right and obligation to navigate the vessel properly, and it may be that they would be entitled to carry the ballast for reward to themselves, as in the case of *Towse* v. *Henderson* (4 Ex. 890). But then comes clause 2—the clause which Mr. Carver most relied upon, and which, he says, completely removes the presumption which arises in the case of ordinary charter-parties. The clause runs thus: "By which day she (the ship) is to be placed with clear holds at the disposal of the charterers at the port of New York, they having the whole reach or burthen of the vessel, including passenger accommodation (if any), proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores." That is said to amount to an absolute contract to place the whole reach and burthen of the vessel at the disposal of the charterers, and therefore to negative the right of the owners to fill up any part of that space with ballast. I do not think that that contention can be sustained in view of the meaning that has been put in other cases upon provisions which are precisely similar in meaning to what we have to deal with in this charter-party, though they are not, I agree, worded identically the same. *Towse* v. *Henderson* (*ubi sup.*) was an action by a shipowner against the charterers for not providing a full cargo of tea. The contract was that the defendants should load a full and complete cargo, and the owner was therefore bound to offer the ship in a condition to receive a full and complete cargo. The owner had put on the ship a large quantity of antimony as ballast, and the charterers refused to load on two grounds—one, that the owner had not given them the full amount of space which they were entitled to, the other ground being one that it is immaterial for me to mention now. The court disposed of the first point on the motion for a rule *nisi* to set aside the verdict, but it is referred to again in the judgment of the court which was delivered by Parke, B. He there said: "The court have already disposed of another objection, namely, that the plaintiff had no right to ship a part of the cargo as ballast, for that the defendants were entitled to the full capacity of the ship, exclusive of all other merchandise, for the purpose of storing tea." The court there accepted the contention that the defendants were entitled to the "full capacity of the ship," which, in my opinion, is the same thing as the "whole reach or burthen of the vessel," the expression used in the charter-party in the case now before the court. Parke, B. continued thus: "The court has said that the owner may take on board merchandise as ballast, provided it occupies no larger space than the ballast would have done, leaving to the charterers the full space of the vessel proper to be filled with tea." In the present case I think that all that is stipulated for is the full space of the vessel proper to be filled with cargo—that is to say, allowing space for the ballast, which is a necessary factor in the proper navigation of the ship. I agree, therefore, with the judgment that has been already delivered, and for the reasons there given.

WILLIAMS, L.J.—This is a case on the construction of a charter-party, and the question raised is whether or not the shipowners, according to its true construction, were bound to supply ballast for the ship; that is, ballast beyond the water ballast in the ballast tanks. The case is one of some difficulty, and there is much to be said on both sides. I am not sure that if left to myself I should have arrived at the same conclusion as the other members of the court, but I am not disposed to differ from them and from Bigham, J. upon a question of doubtful construction of a private document. The other members of the court think that the shipowners are the persons bound to supply the ballast. Now I propose in the first instance to say a word or two on the question whether according to the true construction of this charter-party there was a demise of the ship by the shipowners to the charterers; that is, whether the shipowners parted with the possession of the ship altogether to the charterers. The cases run very fine upon this question. No case is more important than the decision of the House of Lords in 1832, *Colvin* v. *Newberry* (1 Cl. & Fin. 283), and there is a passage in the judgment of Lord Tenterden there which contains a very concise statement of the two possible views of a charter-party. That

passage runs thus: "Two propositions of law are clear as applicable to a case like this: the first is, that in the common case of goods shipped on board a vessel belonging to a person of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions, and everything else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship and who is considered the owner *pro tempore* during the voyage for which the ship is chartered." It is plain from that passage that Lord Tenterden did not consider the fact that the absolute owner was to provide the master, crew, provisions, tackle, and the rest of it, was conclusive against there being a demise of the ship or a parting with possession of the ship; and, in another case, *Trinity House* v. *Clark* (4 M. & S. 288) when dealing with this subject the illustration was taken by Lord Ellenborough, C.J. of the letting of a waggon and horses in which the person letting the waggon and horses insists upon providing the waggoner, who shall have the charge of the waggon and horses, and again in that case it was held that the appointment of the master and crew is not conclusive on that question. Now as I am not going to differ from my brethren upon the question whether there was a demise of the ship, or a parting with possession of the ship in this case, I do not think that I should be justified in reading at length the various clauses in this charter-party which go to show that there was an intention to part with possession of the ship by the shipowners to the charterers, but I may say generally that if the bill of lading clauses are looked at there is a great deal to show that it was intended that the charterers should be the carriers of whatever cargo was put on board, and it is a remarkable fact that in this charter-party there is a power given to the charterers to sub-let the ship itself; and, in addition to that, when one comes to deal with the lien clauses, one finds that there is a lien on the ship given to the charterers and that there is no lien whatsoever on the ship given to the shipowners. The charter-party concludes with a provision that, at the conclusion of the time of the charter, the charterers are to restore possession of the ship to the shipowners. All that goes a long way to show that there is a very arguable point, to say the least of it, that there was a demise of the ship and a parting with possession of the ship according to the true construction of this charter-party. But I have looked, I think, at all the cases, and it seems to me plain that since the decision in *Colvin* v. *Newberry* (*ubi sup.*) in 1832, the tide of the cases, if I may so call it, has set very much against construing any charter-party as amounting to a demise of the ship by the shipowner to the charterer.

Having said that, I will now proceed to deal with the other question in this case. Now although the proper conclusion may be that there was no demise of the ship and that the shipowners did not part with possession of her and were not the carriers, it may yet be that, as in *Omoa and Cleland Coal and Iron Company* v. *Huntley* (37 L. T. Rep. 184; 3 Asp. Mar. Law Cas. 501; 2 C. P. Div. 464), the master and crew were the servants of the shipowners and not of the charterers for the purpose of navigating the ship, but it does not seem to me that this, *i.e.*, the fact that the shipowners remain in control of the navigation, is conclusive that the shipowners are bound, on the construction of the charter-party, to provide the ballast beyond the water-tank ballast at their own expense. This will depend, in my judgment, on what effect is to be given to the clause in the charter-party, which requires the shipowners to place the ship at New York at the disposal of the charterers with clear holds, they having the whole reach or burthen of the vessel, including passenger accommodation (if any), proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores. If, according to the true construction of this provision, the shipowners would not have been entitled at New York, if they chose so to do, to place the ship at the disposal of the charterers with sand or a sufficiently heavy cargo to be carried for the benefit of the shipowners—and I will say upon this point that the case of *Towse* v. *Henderson* (*ubi sup.*) shows that the obligation on the shipowners to put ballast on board the ship is co-extensive with their privilege to furnish that ballast in the shape of cargo to be carried for their own benefit—it is difficult to come to the conclusion that the shipowners were bound at New York or elsewhere to provide ballast at their own expense. But I have read the judgment of Smith, L.J., and I understand that he and Collins, L.J. have come to the conclusion that this provision does not relieve the shipowners from the obligation to provide ballast which *primâ facie* undoubtedly rests on those who have the control of the navigation; and, as I have already said, I am not disposed to differ from the rest of the court as to the conclusion to be drawn from the balance of considerations arising on the construction of a charter-party so involved as this, but I have thought it my duty to call attention to these matters in order to show that I have not overlooked the considerations. One word more about the distinction between water ballast and sand ballast and I have done. There is this great distinction, to my mind, between the two: the obligation to supply the water ballast is really an obligation to supply that which, according to the construction of the ship, may be necessary. There is no real difference between putting water into a water tank which is built as part of the ship for the purpose of trimming it in the course of navition, and putting a mast into a place which is provided for its reception; and, to my mind, although the water does operate as ballast, it is deceptive to treat the obligation to fill the water tanks with water as being something analogous to or on the same basis as the putting of sand or of cargo into the hold by the master for the purpose of the trimming of the ship.

Appeal dismissed.

Solicitors for the plaintiffs, *Lowless* and *Co.*
Solicitors for the defendants, *Bircham* and *Co.*

Thursday, Jan. 11, 1900.

(Before SMITH, RIGBY, and COLLINS, L.JJ.)

THE CAWDOR (No. 2). (a)

Action of restraint—Part owners—Bail bond for safe return to named port—Forfeiture of bond—Discretion of court—Practice.

Where, in an action of restraint, a bond was given for the safe return of the vessel to a named port and the vessel was not, at the conclusion of the voyage, brought back to the named port, the forfeiture of the bond (affirming the order of Barnes, J.) was ordered.

Semble, *a bond for safe return in an action of restraint is in the nature of a recognisance given to the court, and the court has jurisdiction, subject to the terms of the bond, to make such order as may adequately protect the interests of the plaintiffs.*

THIS was an appeal from an order of Barnes, J., dated the 1st Nov. 1899 (reported 81 L. T. Rep. 391; 8 Asp. Mar. Law Cas. 607), upon a motion by the plaintiff in an action of restraint that the bail bond ordered to be given in that action by the defendants be forfeited.

The facts of the case were as follows:

The plaintiff William Edward Arnold Graham was owner of eleven sixty-fourth shares in the sailing vessel *Cawdor*, and the defendants were the owners of the balance of the shares in the vessel and were also her managing owners.

On the 2nd Aug. 1898 the plaintiff gave the defendants notice that he declined to participate in the further trading of the ship, and that he would, if necessary, apply for bail for her safe return.

On the 19th Aug. 1898 the plaintiff instituted an action of restraint against the owners of the *Cawdor* other than himself.

The indorsement on the writ was as follows:

The plaintiff, as owner of eleven sixty-fourth shares of the sailing ship or vessel *Cawdor*, of the port of Liverpool, being dissatisfied with the management of the said ship by his co-owners, claims that his co-owners shall give bail in the sum of 2750*l.*, the value of liabilities, for the safe return of the said ship to the port to which she belongs, namely, the port of Liverpool.

Bail was in this action ordered to be given by the court in the sum of 1718*l.* 15*s.*, and a bail bond for that amount was on the 1st Sept. 1898 entered into by Messrs. Wallace and Sproule, of Liverpool, in the following form:

Whereas an action of restraint has been commenced in the High Court of Justice on behalf of William Edward Arnold Graham against the owners of the sailing ship or vessel *Cawdor* other than William Edward Arnold Graham. Now, therefore, we the undersigned John Blackwood Wallace, of 28, Tower-buildings West, in the city of Liverpool, general broker, and William Bouch Sproule, of 26, Old Hall-street, Liverpool, ship-owner, hereby jointly and severally submit ourselves to the jurisdiction of the said court, and consent that if the said sailing ship or vessel *Cawdor* shall not safely return to the port of Liverpool, and the defendants, the owners of the said sailing ship or vessel *Cawdor* other than William Edward Arnold Graham shall not in such case pay to the plaintiff or to his solicitor the sum of 1718*l.* 15*s.*, execution may issue forth against us, our heirs, executors, and administrators, goods or chattels, for a sum not exceeding the said sum of 1718*l.* 15*s.*

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

The *Cawdor* sailed on her voyage, and in Aug. 1899 returned to the port of Dundee, whence she sailed on the 4th Oct. on a voyage to New York, to load for Sydney or Melbourne. She never returned to any port in England or Wales.

In Sept. 1898 the plaintiff, while the vessel was at Dundee, withdrew his notice of the 2nd Aug. 1898, and expressed his desire to participate in the voyage then in contemplation. This, however, the defendants, at that time, declined to permit.

The plaintiff then served the defendants with the following notice of motion:

Take notice that the court will be moved on Monday, the 30th day of October, 1899, at 11.30 a.m. in the forenoon, or so soon thereafter as counsel may be heard by of counsel for the plaintiff, that the bond given in this action for the safe return of the *Cawdor* to the port of Liverpool may be pronounced to be forfeited, and that the amount thereof may be ordered to be paid into court if the said vessel do not return within one month to the port of Liverpool; or, in the alternative, for a declaration that the plaintiff is entitled to participate in the future working of the said vessel on delivery up of the said bond to the defendants to be cancelled.

The motion came on before Barnes, J. on the 31st Oct. 1899, when it was adjourned in order that the parties might come to terms of settlement.

The defendants then offered to allow the plaintiff to participate in the future working of the ship upon his agreeing to bear his proportion of the expenses incurred in view of that voyage.

This offer was declined by the plaintiff, who insisted on his legal rights under the bond.

The matter was again heard by Barnes, J. on the 1st Nov. 1899, when the following order was made:

Upon hearing counsel on both sides the judge ordered that the bail bond given by the defendants for the safe return of the ship *Cawdor* to the port of Liverpool be forfeited, and the sum of 1718*l.* 15*s.*, the amount of such bond, be paid into court within ten days. The judge further ordered that the sureties bound by the said bond to have leave to appear and show cause why the aforesaid amount should not be paid into court, and that a copy of this order be forthwith served upon the said sureties, and he condemned the said defendants in the costs of this motion.

The defendants appealed.

Carver, Q.C. (with him *Aspinall*, Q.C.) for the appellants.—The bond did not become forfeited because the defendants did not bring the *Cawdor* to Liverpool at the end of the voyage upon which she was engaged when it was given. [RIGBY, L.J.—Do you contend that managing owners can go on rechartering a vessel for ever without forfeiting the bond?] In this case the managing owners were not withholding from the plaintiff the use of his eleven sixty-fourth shares, for they were willing to allow him to come in again upon his paying his share of the expenses of the proposed voyage. It was only on his being told he must contribute to that expense that he insisted on forfeiture. [SMITH, L.J.—It appears to me that he is entitled to it.] It is submitted not: the learned judge below treated this bond as if it were a contract between the plaintiff and the defendants, that the defendants would bring the vessel back to Liverpool or pay the plaintiff the value of his shares. But a

bond in an action of restraint is not a contract, but is security given to the court for the safe return of the ship, in the nature of a recognisance:

Lambert v. *Aertree*, 1 Ld. Raymond, 223.

The decision of the learned judge is without precedent, no similar order has ever been pronounced on a bond of this nature. And, further, this bond was not given by the defendants, but by two other parties who were not before the court, whereas, the order of the learned judge is that the bail bond given "by the defendants" be forfeited. [RIGBY, L.J.—It seems to be in the nature of a bond given by independent persons for the good conduct of a receiver.] But a receiver is put under a personal liability, whereas the majority owners of a ship are under no personal liability for the safety of the ship. At any rate, it is submitted the bond is not a contract of the absolute kind supposed by the learned judge. To ascertain the real nature of this bond one must consider the principles which the Admiralty Court follows in these co-ownership matters. They are two: (1) That the majority owners shall work the vessel; (2) that the minority owners shall have security. See Abbott's Merchant Shipping, 13th edit., p. 85, where Lord Tenterden says: "The law of this country appears to possess an important advantage over all the ordinances that have been cited; because while it authorises the majority in value to employ the ship 'upon any probable design,' it takes care to secure the interest of the dissentient minority from being lost in the employment of which they disapprove. And for this purpose it has been the practice of the Court of Admiralty from very remote times to take a stipulation from those who desire to send the ship on a voyage in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship or to pay to them the value of their shares." The point is that the bond is not a contract with the minority owners that their shares shall be bought if the ship does not come back, but is only a weapon in the hands of the court to safeguard the interests of the minority owners. [COLLINS, L.J.—Do you say that in no case has the whole penalty been enforced, but that only damages have been recovered where the vessel has returned, but in a damaged state?] I think if the vessel returned damaged, the majority owners would have to make good to the minority owners their actual loss. I admit that the court has a discretion, and that if the majority owners were to keep the ship away for an unreasonable time and refused to allow the holders of a bond to share in the adventures, the bond might be forfeited, but here Barnes, J. has not exercised any discretion. In *The Margaret* (2 Hagg, 275) the court declined to hold a bond forfeited which was given for the safe return of a vessel to a particular port of this kingdom. [RIGBY, L.J.—But there the majority owners, through no fault of theirs, could not bring the vessel back to the particular port.] On the question whether or not the bond continues in force in spite of the vessel not having been brought back, see

The Regalia, 51 L. T. Rep. 904; 5 Asp. Mar. Law Cas. 338;

The Vivienne, 57 L. T. Rep. 316; 6 Asp. Mar. Law Cas. 178; 12 P. Div. 185.

Laing, Q.C. (with him *Balloch*).—The order of the learned judge is only to bring the money into court. The plaintiff could take no other steps than those he has taken, since the defendants have never brought the vessel back within the jurisdiction; therefore the plaintiff could only proceed on the original bond. It is clear that there has been a breach of the condition of the bond. *The Margaret* (*ubi sup.*) shows that the court has jurisdiction, though it did not exercise it in that case, to order the forfeiture of the bond even though the ship is in safety. In *The Regalia* (*ubi sup.*) the form of bond was different, and the point of that case was that a second bond was unnecessary. *The Robert Dickinson* (52 L. T. Rep. 55; 5 Asp. Mar. Law Cas. 341; 10 P. Div. 15) shows that the bond is given for the safe return of the vessel to a named port.

Carver, Q.C. in reply.

SMITH, L.J.—This is an appeal from an order made by Barnes, J. dated the 1st Nov. 1899. It is an appeal brought by the gentlemen who are affected by this order. The learned judge ordered that the bail bond given by the defendants for the safe return of the ship *Cawdor* be forfeited, and that the sum of 1718*l.* 15*s.*, being the amount of such bond, be paid into court. He then further ordered that the sureties bound by the bond were to have leave to appear and show cause against the order. The plaintiff in this case was the owner of eleven sixty-fourths, and the defendants are practically the owners of the residue. In Aug. 1898 the plaintiff was dissatisfied with the way in which the vessel was being worked by the majority owners, and upon the 19th Aug. 1898 he commenced an action to restrain. Upon his writ the plaintiff, as owner of eleven sixty-fourth shares of the sailing ship or vessel *Cawdor* of the port of Liverpool, being dissatisfied, claimed that the co-owners should give bail in the value of his shares for the safe return of the said ship to the port to which she belonged—namely, the port of Liverpool. At this period the ship was at Hartlepool, and the proposed voyage was a voyage to Calcutta. The plaintiff having brought this action to restrain, upon the 1st Sept. 1898 this bond was given which is the subject-matter of the present proceedings. It is dated, as I have said, the 1st Sept. 1898, and is a bond given in the action of *Graham* v. *The Owners of the Sailing Ship Cawdor*, and it is a bond for the safe return of that ship to the port of Liverpool. I think—speaking for myself—that what Mr. Carver said about the nature of this bond has foundation in fact. It is a class of security given by sureties to the court, to be enforced by the court, when the court thinks right to enforce it, against the sureties. Then the question arises, first of all, as to whether it is a bond with regard to which the sureties can in no case be called upon by the court to pay into court that which they have undertaken to pay, unless the ship is lost, and, therefore, does not return to the port of Liverpool; or is it a bond which the Admiralty Division has jurisdiction to enforce, if it considers the circumstances of the case are such that enforcement of that bond is right as between the parties? The bond is in this form—"Now, therefore, we, the undersigned . . . hereby jointly and severally submit ourselves to the jurisdiction of the court, and consent that if

the sailing ship *Cawdor* shall not safely return to the port of Liverpool"—I stop there for a moment to observe that it is impossible to read that as "If the sailing ship *Cawdor* is lost, and therefore shall not return to the port of Liverpool"—it is in general terms—"and the defendants shall not in such case pay to the plaintiff the sum of 1718*l.* 15*s.*, execution may issue against us, the two sureties." What was that bond given for? It was given for the safe return of this vessel to the port of Liverpool, and the enforcement of it, it appears to me, was left to the judge of the court when he thinks reasonable to do so. Now, what happened? The ship returned to Dundee, and not to the port of Liverpool, and she there, as we are told by Mr. Laing, unknown to the plaintiff, was loaded with a cargo—at that port, over which the Admiralty Court of this country has no jurisdiction—and sent off on a voyage to New York, and thence to Australia. She set sail upon that voyage on the 4th Oct. 1899, the plaintiff not being aware that she was at Dundee. He had been trying, apparently, to get a share, notwithstanding the bail bond, in the future voyage, and the majority owners said, "No! you shall not have a share"; and the result is that having got this bail bond, which is very cold comfort if it is not to be enforced, he has to stand out without a penny of interest, whilst the majority owners go sending the vessel to all parts of the globe. Graham, being in that position, invokes the assistance of the Admiralty Court. He takes up the only position which he could take up. He asks that the vessel shall be returned to the port of Liverpool within a month or the bail forfeited, or for a declaration that he is entitled to participate in the future working of the said vessel on delivery up of the bond. In the order which has been drawn up in this matter, the alternative has been left out. What is the position? As a matter of law, in my judgment, Barnes, J. had jurisdiction to make this order. None of the three or four authorities which have been cited show that he has not. Indeed, one of them—*The Margaret* (*ubi sup.*)—rather seems to say that he had. What was the order which was made? He made an order that the sum which the sureties have bound themselves to pay if the ship does not come back to Liverpool shall be paid into court. Was it right to make that order? The majority owners say "No! he should not have made that order, but let this ship go on a voyage"—as far as I can see, all over the face of the globe—and not come back to the port of Liverpool till the majority owners agree to let her do so. I asked Mr. Carver several times during the argument, "How long do you say? What limit do you put?" He said, "You need not put any limit at all." With all respect I think that some limit ought to be put. To keep this man out of his money for one or three, or fourteen or fifteen years is not, I think, a thing which the court ought to do. For these reasons I am of opinion that the order made by Barnes, J. is quite right, and that the appeal should be dismissed with costs.

RIGBY, L.J.—This is the class of case which arises from the fact of there being co-owners—owners in common of a ship. If they cannot agree they must disagree, and the majority may take the ship to themselves and use her, and neither the Court of Admiralty nor any other court has any right to restrain them from using the ship. It is very hard upon the minority owners that they should get nothing at all out of the ship. If they choose to bring an action to restrain, the limit of what they can get is that two sureties shall be procured by the majority owners, who shall give, not directly to the minority owners, but to the Court of Admiralty, a bond which will at any rate secure to the minority owners some rights. What are the rights? The thing is perfectly clear. The majority owners do not undertake to bring the ship back—they do not undertake anything, as I read it, but they only say, "If we do not bring the ship back, and if whilst we keep the ship we do not pay the assessed value of the shares, 1718*l.* 15*s.*, why, then, the sureties, who are willing to come under that obligation, undertake and bind themselves to pay the 1718*l.* 15*s.* That is perfectly simple, and I do not see why the court should not have what I think they plainly were intended to have—the jurisdiction to make use of that bond in such a way as justice may require. Now, in this case the ship, at the end of the current voyage, came back to Dundee, which is out of the jurisdiction of the English Admiralty Court. It is probably for business considerations quite right of the owners to bring her there. They had no intention of bringing her to Liverpool, and were under no obligation to do so, and they probably never thought of such a thing as bringing the ship to Liverpool. But then they might go on for twenty years taking her wherever they please, and is it to be supposed that this device of the Court of Admiralty for keeping some hold over majority owners is so feeble that it can only be applied to the case where the ship has gone to the bottom of the sea and is lost altogether, and to no other case? I looked with great curiosity at the case cited of *The Margaret* (*ubi sup.*), and I found no such statement contained there at all, and, in fact, I find that there is cited by the learned judge who is delivering judgment a decision in another case, upon which I should rather suppose the motion in this very case was founded. In this case it is ordered that if the defendants do not bring the vessel back to Liverpool within a month, then the money shall be paid into court. I cannot say what may be done in a further stage of the case, but I cannot see that there is anything wrong in what the learned judge has ordered—namely, that the money shall be paid into court, unless the sureties can show reason to the contrary. That being so, I must decline to overrule the order of the learned judge.

COLLINS, L.J. concurred.

Solicitors for the plaintiff, *Chas. E. Harvey.*

Solicitors for the defendants, *Pritchard* and *Sons.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Oct. 31, *Nov.* 1 *and* 6, 1899.

(Before BIGHAM, J.)

GEORGE BOOKER AND CO. *v.* POCKLINGTON STEAMSHIP COMPANY LIMITED. (*a*)

Charter-party—Construction—Clause in charter-party that "all salvage shall be for owners and charterers' equal benefit"—Salvage services—Deductions from salvage before division.

A charter-party made between the charterers and owners of a steamship provided that the shipowners should maintain the vessel in a thoroughly efficient state for and during the service; that if any damage prevented the working of the vessel for twenty-four hours, the hire should cease until the vessel was again in an efficient state; that the vessel was to be at liberty to tow and assist vessels in distress, and to deviate for the purpose of saving life and property; and clause 20 *provided that "all derelicts and salvage shall be for charterers and owners' equal benefit." During a voyage under the charter-party the vessel rendered salvage services for which the owners were awarded a large sum in an action in the Admiralty Division. In consequence of performing these salvage services the owners of the vessel incurred certain expenses, including repairs, the cost of renewing a fractured tail end shaft, of ropes and gear used in towage, of extra oil and coal, a port bill, and the loss of hire during the time the vessel was under repair. In an action by the charterers against the shipowners to recover under clause* 20 *half the salvage money:*

Held, that the salvage which under clause 20 *was to be for the "equal benefit" of the parties was not the amount awarded in the Admiralty Court, but the net pecuniary result of the salvage operations, and that, in arriving at the sum to be divided the shipowners were entitled to deduct from the salvage award the expenses and losses incurred by them (including the loss of hire) in earning the salvage, and that the balance was the sum to be equally divided.*

COMMERCIAL action tried before Bigham, J.

The action was brought by the plaintiffs as charterers against the owners of a ship to recover under the charter-party the plaintiffs' share of a sum of money awarded to the defendants for salvage services rendered by the ship.

The agreed statement of facts was as follows:—

1. The defendants are the owners of the steamship *Pocklington*. The plaintiffs at the time material to the questions in this action were the charterers of the steamship.

2. By a charter-party, dated the 9th Aug. 1898 and made between the plaintiffs and defendants, the plaintiffs chartered the *Pocklington* for three round voyages between the United Kingdom, the West Indies, and (or) Bermuda at the rate of 525*l.* per calendar month. The following, amongst others, were clauses in the charter-party:

(2) That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, donkey engineers, firemen, and crew . . . and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

(6) That in the event of loss of time from deficiency of men or stores, breakdown, repairs, or stoppage of machinery, or causes appertaining to the duties of the owners, or damage preventing the working or sailing of the vessel at any time for more than twenty-four hours, the hire shall cease until she be again in an efficient state to resume her service, and if in consequence of such deficiency, breakdown, repairs, stoppage, or other causes the vessel puts into any port or ports other than those to which she is bound, port charges, pilotages, &c., at those ports shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall be at the charterers' expense. In the event during this charter of a cessation of hire under this clause or clause 7, all coal consumed during the period of such cessation shall be for owners' account.

(13) The steamer has liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

(14) The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers, and people, collisions, strandings, and other accidents of navigation mutually excepted, even when occasioned by the negligence, default, or error in judgment of pilots, masters, mariners, or other servants of the shipowners; but this clause is not to be construed as in any way affecting or cancelling the provision for cessation of hire as provided for in this charter-party.

(20) All derelicts and salvage shall be for owners and charterers' equal benefit. Penalty for non-performance of this contract, estimated amount of damages.

3. The plaintiffs' claim is to a moiety of some salvage earned by the *Pocklington* during the charter-party and to a return of hire.

4. On the 3rd Jan. 1899, during the second voyage under the charter-party, the *Pocklington* fell in with the disabled steamer *Dart*, and rendered salvage services to her by towing her into Queenstown Harbour.

5. On the 9th Jan. 1899 the owners of the steamship *Pocklington* (the defendants in this action) and others commenced an action in the Admiralty Division of the High Court of Justice to recover salvage from the owners of the steamship *Dart*, her cargo and freight.

6. At the conclusion of her voyage in Jan. 1899, the *Pocklington* was docked and repairs were being executed upon her from the 11th Jan. until the 24th Jan.

7. By their statement of claim in the above action the owners of the *Pocklington* alleged in paragraph 11 as follows:

The *Pocklington* towed the *Dart* 313 miles and stood by at request for a very long time, and lost four days. Her hull, engines, and towing gear were strained and damaged and part of her cargo lost, and losses and expenses have been incurred.

Particulars of the claim of such losses and expenses were delivered on the 23rd Jan. 1899 in the said action, and consisted of the cost of (1) repairing damage done to vessel; (2) renewing fractured tail end shaft; (3) ropes and gear used in towage; (4) extra oil and coal; (5) port bill at Queenstown; and (6) detention during repairs.

8. On the 29th Jan. 1899 the action for salvage came on for hearing before Phillimore, J., who by his judgment awarded to the owners of the steamship *Pocklington* the sum of 2750*l.*, as well as the costs of such action.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

9. The defendants contend that before dividing the award there should be deducted therefrom (1) the amount of the repairs attributable to the salvage services; (2) the cost of renewing the fractured tail end shaft; (3) the cost of ropes and gear used in towage; (4) the cost of extra oil and coal consumed; (5) the port bill at Queenstown; (6) the hire for the period during which the *Pocklington* was under repair; and (7) the balance of costs incurred in the salvage action over and above the taxed costs recovered from defendants, and that the balance is divisible between the present plaintiffs and defendants.

10. The plaintiffs contend that the amount to be divided should be the amount of the award, namely, 2750*l.*, less the extra costs in the salvage action as above, and that half of the balance is due from the defendants. The plaintiffs further contend that, if the defendants are entitled to deduct the amounts set out in paragraph 9 hereof, the plaintiffs are also entitled to have deducted from the award and paid to them in full the loss of time during the services, and the cost of extra coal consumed. This contention the defendants admit.

11. The plaintiffs further contend that the defendants are not entitled to deduct the hire during the time the *Pocklington* was under repair, inasmuch as the same does not represent hire earned under the terms of the charter-party.

The opinion of the court is desired upon the above contentions.

Carver, Q.C. and *Bateson* for the plaintiffs.

Aspinall, Q.C. and *A. Lennard* for the defendants.

Cur. adv. vult.

Nov. 6.—Bigham, J. read the following judgment:—If clause 20 of the charter-party stood alone, there could, I take it, be no doubt as to its meaning. "Equal benefit" cannot be accorded to shipowner and charterer without taking into account what each has contributed towards securing the benefit. Salvage in this clause does not mean the amount recovered in the suit in the Admiralty Court. It means the net pecuniary result of the salvage operations. Therefore it follows that from the sum awarded by the Admiralty Court all the losses mentioned in paragraph 9 of the case must be deducted by the shipowner, and the balance only divided. Such a division will satisfy the requirements of clause 20. But it is said that clause 20 must be read by the light of the other clauses of the charter-party, and particularly of clauses 2 and 6. I agree that the document is to be read as a whole, and that, if it appears that some clauses are intended to qualify the interpretation of others, effect must be given to such intention. I do not, however, think that any clause in the charter-party is intended to affect or alter what I conceive to be the clear meaning of clause 20. Clause 2 provides that the shipowner is to maintain the vessel in a thoroughly efficient state for and during the service; and clause 6 provides that if any damage prevents the working of the vessel for more than twenty-four hours, the hire shall cease. The charterers say that the interpretation which I put on clause 20 relieves the shipowners of the burdens which these two clauses impose upon them, and does it at the charterers' expense, inasmuch as it has the effect of reducing the amount of salvage to be divided. I do not, however, agree with this contention. It is the salvage operations which have caused the damage and the loss of hire, and the Admiralty Court, though not awarding to the ship a specific sum in respect thereof, has taken both heads of loss into consideration in fixing the amount payable by the salved vessel. In other words, if there had been no loss of hire and no damage to the vessel, the award would have been proportionately less, and the charterers would have got what they get now, neither more nor less.

Judgment for the defendants.

Solicitors for the plaintiffs, *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the defendants, *Downing, Bolam*, and *Co.*, for *Bolam* and *Co.*, Sunderland.

Tuesday, Dec. 5, 1899.

(Before Bigham, J.)

Lyle Shipping Company Limited v. Corporation of Cardiff and Churchill and Sim, Third parties. (a)

Charter-party — Construction of — Demurrage — Discharge of cargo "with all despatch as customary"—Contract by charterers with railway company for supply of trucks for discharge —Insufficient supply of trucks by company— Liability of charterers.

A charter-party provided that "the ship is to be discharged with all despatch as customary."

The custom and practice of the port of discharge was to discharge the cargo into railway trucks, and to procure such trucks from one railway company.

For the discharge of the cargo the consignees, in accordance with the custom, had contracted with a railway company for the supply of trucks to receive the cargo.

A delay in the discharge of the ship was caused by the railway company not providing a sufficient supply of railway trucks alongside to receive the cargo; but the consignees had not been guilty of any personal neglect, and had done their best to get the customary appliances for the discharge of the ship, and had used such appliances, when obtained, with proper despatch.

In an action by the shipowners against the consignees for demurrage or damages for the detention of the vessel:

Held, that the consignees, having done their best to get the customary appliances for the discharge of the ship, and having used the same with proper despatch, had discharged the ship "with all despatch as customary," and were therefore not liable for the delay of the vessel caused by the insufficient supply of trucks.

Commercial action tried before Bigham, J.

The action was brought by the plaintiffs, as owners of the ship *Cape Wrath*, against the defendants as indorsees (to whom the property in the goods passed) of a bill of lading for the cargo of the ship, dated the 6th June 1899, and the plaintiffs claimed to recover demurrage or damages for detention of the ship at Cardiff, her port of discharge.

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

The bill of lading incorporated the terms and conditions of a charter-party, dated the 14th Dec. 1898, which provided (*inter alia*) that "the ship is to be discharged with all despatch as customary, weather permitting."

The defendants (the Corporation of Cardiff) had bought a quantity of jarrah wood from Messrs. Churchill and Sim (brought in by the defendants as third parties), of which the cargo now in question was a part, and by the contract of sale the vendors contracted to indemnify the defendants against all claims and demands in respect of demurrage; and the defendants claimed under this indemnity to be indemnified by the third parties against any sums which the plaintiffs might recover in the action.

The ship was loaded with a cargo of the jarrah wood at Freemantle, and sailed for Cardiff, her port of discharge.

She arrived and was berthed at Cardiff on the 2nd Oct., and the discharge began on the following day, the 3rd Oct.

The discharge was not completed until the 23rd Nov., and occupied forty-five working days. The plaintiffs alleged that if the defendants had taken delivery "with all despatch," as provided by the charter-party, the *Cape Wrath* would have completed the discharge on the 27th Oct., and they claimed damages for each day's detention of the ship since the 27th Oct. at the charter-party rate of 24*l.* 19*s.* 6*d.* per day.

For the discharge of the cargo at Cardiff the defendants had contracted with the Great Western Railway Company for the supply of trucks to receive the cargo, and the usual practice of the port of Cardiff was to discharge the cargo into railway wagons, and to procure such wagons from one railway company.

The delay in the discharge was caused by there being an insufficient supply of railway trucks alongside the vessel to receive the cargo, and this insufficiency of trucks was owing to a pressure of work on the railway at the time.

The learned judge found as a fact that the defendants were not personally guilty of any neglect in taking the discharge, and that they had done their best to get the appliances which were at the time available at the port, and which were customarily used for the purpose of discharging vessels, and that when they had obtained these appliances, they had used them with proper despatch.

The question now was whether the defendants, who had contracted with the railway company for the supply of the railway trucks, were liable to the plaintiffs for the delay caused under the above circumstances by the insufficient supply of trucks by the railway company.

Joseph Walton, Q.C. and *Leck* for the plaintiffs.—The defendants are liable for the detention of the vessel at Cardiff beyond the time when the cargo might have been discharged if all despatch had been used according to the terms of the charter-party. The defendants were bound to discharge the cargo with all despatch, and if they had done so the cargo would have been discharged in a much shorter time. The fact that there was an insufficient supply of railway trucks alongside to receive the cargo does not relieve the defendants from their obligation, and the fact that they could not get a larger number of wagons at that particular time does not relieve them from liability. That was a misfortune for which the loss ought to fall on them, and not on the plaintiffs. It is not sufficient for the defendants to have done their best to get a sufficient supply of wagons; they ought to have provided a sufficient supply, and for not having done so they are liable:

Wright v. *New Zealand Shipping Company*, 40 L. T. Rep. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165;

Kruuse v. *Drynan and Co*, 18 Sc. Sess. Cas. 4th series, 1110.

R. Isaacs, Q.C. and *Bailhache* for the defendants.—The case of *Wright* v. *New Zealand Shipping Company* (*ubi sup.*) is distinguishable, as in that case the words "as customary" were not in the charter-party. Here the cargo was to be discharged with all despatch "as customary," that is, as customary at the port of discharge. At the port of discharge the custom was for the cargo to be discharged into railway trucks brought alongside the ship, and it was the custom and practice for the charterers to contract with one railway company for the supply of these trucks. The defendants in this case contracted with the railway company for the supply of the railway trucks for the discharge, and in doing so they were following the custom of the port. Owing to pressure of work on the railway sufficient trucks were not supplied; but for that insufficient supply the defendants are not responsible. They were not guilty of any personal negligence in the matter; they have taken all precautions to obtain the appliances that are customarily used at this port for the discharge of vessels, and when they obtained these appliances they used them with all the despatch possible. They have therefore effected the discharge of the cargo "with all despatch as customary" within the meaning of the charter-party, and, that being so, the cases clearly show that they are not liable for the detention:

Postlethwaite v. *Freeland*, 40 L. T. Rep. 601; 4 Asp. Mar. Law Cas. 302, 129; 4 Ex. Div. 155, affirmed in H. L. 42 L. T. Rep. 845; 5 App. Cas. 599;

Wyllie v. *Harrison and Co.*, 13 Sc. Sess. Cas. 4th series, 92;

Castlegate Steamship Company Limited v. *Dempsey and Co.*, 66 L. T. Rep. 742; 7 Asp. Mar. Law Cas. 186; (1892) 1 Q. B. 854;

Good and Co. v. *Isaacs*, 67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555.

Carver, Q.C., *Scrutton*, and *Mackinnon* for third parties.

Bigham, J.—This action is brought by the shipowners against the defendants, who are the indorsees of a bill of lading for the cargo of the ship, in which bill of lading are incorporated the terms of the charter-party, so that the defendants are liable to the plaintiffs for the performance of the conditions of the charter-party. The action is brought to recover demurrage or damages for detention at the port of discharge, and the terms of the charter-party are that the cargo is to be discharged with all despatch as customary. That is all that need be said about the contract. The defendants are charged with a breach of the contract by which they were bound to discharge the vessel with all despatch, as customary. [His Lordship stated the facts, and

proceeded:] It is alleged that the number of days taken to discharge the cargo was in excess of the time permitted by the charter-party, and that is the question in the case. I am satisfied that the defendants were not personally guilty of any neglect at all in taking discharge of the cargo They did their best to get the appliances which were available at the port at the time, and which were customarily used for the purpose of discharging vessels, and having done their best to get those appliances, in my opinion they made the best possible use of them, and therefore no blame of any kind can be imputed to them. I have carefully considered the evidence, and particularly the letters and documents which have been read, and I see plainly that when that vessel arrived at Cardiff there was a great stress of work, and difficulties had to be contended with in taking discharge of this cargo, which was of an exceptional character. But I repeat that the defendants, in my opinion, did their best to deal with those difficulties, and took delivery of this cargo as quickly as it was practically possible for them to do. It is, however, said on behalf of the plaintiffs that the ship should have been discharged in a much shorter time if the defendants had furnished the vessel with a larger number of wagons, and the fact that they were not able to get a larger number of wagons is a misfortune of which the defendants and not the plaintiffs must bear the loss.

In order to see if that is so, it is necessary to consider the meaning of the contract: "To be discharged with all despatch as customary"; and to assist me in ascertaining what these very few words mean, a number of authorities have been referred to. The first in order of date is *Wright* v. *New Zealand Shipping Company* (*ubi sup.*). In that case the contract in the charter-party was that the charterers should deliver into lighters, and there was nothing at all about the custom of the port, but the simple contract was that the charterers were to deliver into lighters. The discharge of the ship was delayed by reason of insufficiency of lighters, and the charterers, in the action against them for damages for that delay or for demurrage, alleged that they had done their best to get the only lighters which were available at the port, and if they had not succeeded in getting more than were sufficient for the necessities of the case, they were not to be blamed for it. As I understand the decision in that case, it was this: It was in accordance with the ordinary common law rule that if a person will undertake to do a thing in a particular way, he must do it or answer for the consequences. That seems to be the effect of that case; but when the case is explained in later decisions it seems to me that the real effect of it is this: That all that the charterer is required to do is to do his best, and that in that case he did not do his best, and therefore he was held responsible. I do not think that is the meaning of the judgment of the learned judges in that case. Lord Herschell in the case of *Hick* v. *Raymond and Reid* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22), in dealing with that case, says this: "The learned judge who tried the case, in summing up, told the jury that they were to take into consideration the circumstance that the port was full of vessels; but he did not directly tell them not to consider the deficiency of lighters caused by the large number of ships, so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time; nor that they were bound to allot the lighters proportionately among the vessels or to use the lighters for them in the order in which they arrived. The jury found in favour of the defendants, and the appeal was against the judgment of the Queen's Bench Division making absolute a rule for a new trial. It will thus be seen that the circumstances which prevented the vessel being discharged within the ordinary time were not beyond the control of the defendants. It was not shown that they could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place"; and then he says: "Under these circumstances I think the decision was perfectly right, and a new trial properly granted." I do not think that the judgment in *Wright* v. *New Zealand Shipping Company* (*ubi sup.*) proceeded upon those grounds at all, but Lord Herschell evidently thought, when he was delivering his judgment in *Hick* v. *Raymond and Reid* (*ubi sup.*), that that judgment in *Wright* v. *New Zealand Shipping Company* (*ubi sup.*) can only be justified on those grounds. His view, in my opinion, was that there were circumstances in that case to show, and which did show, that the defendants had not taken proper care to obtain the appliances which were required for discharging the ship, and did not, when they had obtained those appliances, take proper care to use them in a business-like way, and upon those grounds he thought that the decision of the Court of Appeal directing a new trial was a right decision. The next case in order of date is *Postlethwaite* v. *Freeland* (*ubi sup.*), which is a different case in this sense, that the wording of the charter-party introduces the expression "as customary." In *Postlethwaite* v. *Freeland* (*ubi sup.*) itself and in other cases, judges have entertained a doubt as to whether the introduction of those words in a charter-party really makes any difference. For my part, I should have thought that the introduction of the words did make a difference, and did make all the difference; but I cannot help seeing that Lord Herschell and many other judges have read the case of *Wright* v. *New Zealand Shipping Company* (*ubi sup.*), as being a case in which there would not have been any difference at all even if the words "as customary" had been introduced. That is to say, that in those charter-parties where the undertaking is to deliver with due despatch the introduction of the words "as customary" adds nothing to or takes nothing from the obligation of the charterer. For my own part I think that the introduction of those words is of importance. What does "as customary" mean? I think it means that attention must be given to the rules of the port which affect the discharge of vessels—rules which affect the place where the vessel is to go, and rules which affect the times during which a vessel may work. I think the words, moreover, mean that the practice as to the kind of appliances to be used in the discharge must be taken into account, and that the practice as to the source from which those appliances are to be obtained, must be taken into account.

Applying those considerations to this case, I observe that the rule of the port of Cardiff in this particular case was that the goods should be delivered into wagons, and in no other way. The practice was to deliver into wagons, and the course of business was for the consignees to obtain those wagons from specific railway companies. That was, I find in this case, the custom of the port. So, in *Postlethwaite* v. *Freeland* (*ubi sup.*), the custom was to discharge into lighters—lighters belonging to one company. The custom was for those lighters to be warped across the bar by means of one rope. Those were the appliances, and the words in *Postlethwaite* v. *Freeland* (*ubi sup.*) being in effect the same as the words in the present case, the House of Lords were of opinion that the charterers had performed their duty—their part of their contract under the charter-party—when they had taken diligent and proper steps to obtain the services of the appliances which were customarily used, and had utilised those appliances, when obtained, with proper and business-like despatch. I can see no difference in principle between *Postlethwaite* v. *Freeland* (*ubi sup*) and this case. There is also a Scotch case, *Wyllie* v. *Harrison and Co.* (*ubi sup.*), which was decided in 1885. That case appears to be nearly on all fours with the case now before me. In that case the cargo—a cargo of iron—was to be discharged as fast as the steamer could deliver after being berthed as customary. The custom of the port there was to deliver by steam cranes into wagons brought alongside, and a further custom was that no pig-iron should be put upon the quay. Only two railway companies were in the habit of supplying the wagons upon the lines which had access to the quay. One of these companies failed to supply sufficient trucks or wagons, and thereby delay was caused. It was held by the court that for such delay the charterers were not liable, and I read some passages in that judgment to show the grounds on which it proceeded. The Lord Justice-Clerk (Lord Moncreiff) said: "Under this charter-party the cargo was to be delivered as customary—that is, subject to the custom of the port. Now, from the nature of the cargo and the place of delivery the goods could not be delivered except into trucks. Under the general rules regulating maritime carriage the charterer is responsible for the goods to be conveyed until loading is complete. After loading is complete, and until the vessel arrives at its destination, the owners are responsible. When the vessel has arrived the duty of taking delivery is on the charterer, but when delivery is to be taken at the port subject to regulations not in the power either of charterer or owners there may occur difficulties, and there may be entailed delay for which neither party is responsible to the other. They both contracted subject to the regulations of the port of discharge." In my opinion every word of that applies to the particular circumstances of this case. He then goes on to say: "Now, one of the rules of the port of discharge selected, Glasgow General Terminus, was that no cargo should be laid down on the quay, but that all cargo should be delivered into trucks. That being so, and there being no trucks available, or not sufficient trucks available, I think a delay occurred for which neither party was responsible to the other." It is to be observed that the Lord Justice-Clerk there relies upon the words in the charter-party "as customary." When I look at Lord Young's judgment, I cannot help seeing that his decision would have been the same if the words "as customary" had not been there, for he says the charter-party happens to add "as customary," but the addition is a superfluity, for unless the contrary is expressed "as customary" is implied. That is to say, he takes the view which apparently many of the English judges have taken, that these words "as customary" are to be implied, and ought to have been implied, in the case of *Wright* v. *New Zealand Shipping Company* (*ubi sup.*). He says further: "Delivery into trucks furnished by the railway companies and brought to the ship side was by the custom of the place the recognised method of delivery. The trucks, we must take it, were only those of two railway companies, and all that the charterers could do was, as the sheriff says, to give notice that trucks were wanted, and then, if necessary, hurry and stir up the railway companies to provide them. This the sheriff and I think they did—that is, they have committed no breach of their duty to take delivery as fast as it could be taken at that place." Having regard to these authorities, it seems to me that the whole obligation in this case upon the charterer is to do his best to procure the appliances that are customarily used at this port for the purpose of discharging such vessels. The appliances customarily used, in my opinion, were the wagons of certain specified railway companies, and no others. I find as a fact that they did use their best exertions to get the services of those appliances; but their contractual obligation goes further, however, than the mere obligation to obtain the appliances. It goes this far, that having obtained them, they must use them with proper despatch, and I find as a fact in this case that they did use them with proper despatch; and I think, under these circumstances on this part of the case, my judgment must be for the defendants. I ought to add that in my opinion the view I take of this case is amply supported by the observation of Lord Selborne in the case of *Postlethwaite* v. *Freeland*, to be found at 42 L. T. Rep. 848; 4 Asp. Mar. Law Cas. 304; and 5 App. Cas. 610, which was referred to during the course of the arguments.

Judgment for the defendants.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Riddell, Vaisey*, and *Smith*, for *J. L. Wheatley*, Cardiff.

Solicitors for third parties, *Burn* and *Berridge*.

Dec. 1 *and* 11, 1899.

(Before Bigham, J.)

British Marine Mutual Insurance Association Limited *v.* Jenkins and others. (*a*)

Marine insurance—Mutual insurance association—Insurance of ship by agent of shipowner—Agent as member liable to contributions—Failure of agent to pay—Liability of shipowner, not being member, to pay contributions and premiums.

The defendants, who were the owners of a certain

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

ship, authorised their agent to insure, and the agent did insure the ship by an ordinary Lloyd's policy in the plaintiff association, the object of which association was the mutual insurance "of ships which the members might be authorised to insure in their own names," and a "member" was defined to be "any person who, on behalf of himself or any other person, insures any ship in the association." By so entering the ship the agent became a "member," and was personally responsible to the association for the payment of the contributions and premiums due in respect of the insurance. In practice these contributions were collected from the members, that is, from those who entered ships in the club, and the members then got the money from their principals, and a committee were empowered to assess members rateably to provide a fund to meet losses. The policy, the memorandum and articles of association and the rules, which together formed the contract of insurance, contained no express provision either that the defendants should be liable for the contributions and premiums, or that they should be relieved from such liability. The defendants' agent became insolvent, and unable to pay the contributions and premiums, and the association brought an action to recover the same from the defendants as owners of the ship.

Held, that as the defendants alone had an insurable interest as owners of the ship, and as it was for their benefit the insurance was effected, they, as well as their agent were liable to pay the contributions and premiums unless they could show that their contract in unmistakable terms relieved them from such liability, which the contract in this case did not do.

Action tried before Bigham, J. in the Commercial Court.

The plaintiffs, the British Marine Mutual Insurance Association, sued the defendants, who were the owners of the ship *Vigil*, to recover from them, as such owners, the amount of the contributions or premiums payable in respect of an insurance of their ship in the plaintiffs' club.

The defence set up by the defendants was that by the agreement sued on the plaintiffs had contracted to look only to the defendants' agent, one William Grove, for payment, and not to the defendants themselves.

The plaintiffs were a marine mutual insurance association, and clause 4 of the memorandum of association declared that one of the objects of the association was the mutual insurance "of ships which the members may be authorised to insure in their own names"; and clause 4 of the articles of association defined a member to be "any person who, on behalf of himself or any other person, insures any ship in the association."

The defendants wished to insure their ship, the *Vigil*, in the plaintiffs' club, and they authorised one William Grove, who was managing the ship on their behalf, to enter the ship in the club.

Grove accordingly entered the ship in the plaintiffs' club, and by so doing he made himself a member of the club within the meaning of the memorandum and articles of the club as being a person who was authorised to insure the ship in his own name.

Grove, by reason of his becoming a member of the club, became personally liable to pay the contributions or premiums, which, under the articles of association and the rules, might be levied by the club in respect of the insurance.

Grove became insolvent, and was unable to pay the contributions, and the plaintiffs' association thereupon brought the present action against the defendants as owners of the ship to recover the contributions or premiums due in respect of the insurance.

The question now was whether the plaintiffs were, under the circumstances of the case, entitled to look for payment to the defendants, as being the persons for whose benefit the insurance was effected.

The facts are fully stated in the judgment, and the clauses in the policy of insurance, the memorandum and articles of association of the club, and the rules annexed to the policy, are, so far as is now material, set out in the judgment.

Joseph Walton, Q.C. (*James Fox* with him) for the plaintiffs.—Although Grove was no doubt liable for these contributions and premiums, that does not exclude the defendants' liability, and the defendants were also liable. They were the persons to whom the ship belonged and who therefore had the insurable interest. They alone could insure the ship, and it was their interest which was insured. They, as the assured, and the plaintiffs, as the insurers, were the parties to the contract of insurance, and Grove merely acted as the agent of the defendants in effecting the insurance; and although by doing so he, by the rules of the association, made himself a member of it and became responsible as such for these contributions, still the fact of his liability did not prevent the defendants also being liable. The effect really was that the plaintiffs had the security of two parties for these contributions, namely, Grove and the defendants. If there were any losses incurred for which under the policy the plaintiffs would have been liable, the plaintiffs would have been bound to pay those losses to the defendants, and the defendants, as owners of the ship, could have sued to recover them. The consideration for the payment of these losses to the defendants was the liability of the defendants to pay the contributions and premiums, and if the defendants were not liable to make these payments to the plaintiffs, then there would have been no consideration from the defendants for the plaintiffs undertaking the risk. The case of *United Kingdom Mutual Steamship Assurance Association Limited* v. *Nevill* or *Nevill's* case (19 Q. B. Div. 110; 6 Asp. Mar. Law Cas. 226n.) will be relied on by the defendants. That case is distinguishable, as there the policy by its special wording was held to exclude the liability of the shipowners, whereas in the present case the policy is an ordinary Lloyd's policy and cannot be construed to exclude the defendants' liability. In the cases of *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie* (*Wyllie's* case) (60 L. T. Rep. 916; 6 Asp. Mar. Law Cas. 398; 22 Q. B. Div. 710) and *Ocean Iron Steamship Insurance Association Limited* v. *Leslie* (*Leslie's* case) (57 L. T. Rep. 722; 6 Asp. Mar. Law Cas. 226; 22 Q. B. Div. 722n.), where the documents were similar to those in the present case, the defendants, the shipowners, were held to be liable to the contributions. In *Montgomerie* v. *United Kingdom Mutual Steamship Assurance*

Association Limited (64 L. T. Rep. 323; 7 Asp. Mar. Law Cas. 19; (1891) 1 Q. B. 370), the form of contract was the same as in *Nevill's* case (*ubi sup.*), and it was held that the action was not maintainable, as the terms of the policy expressly excluded liability on the part of the defendants to any person other than the person described as "a member." There is therefore nothing either in that case or in *Nevill's* case (*ubi sup.*), to prevent the plaintiffs from recovering these contributions from the defendants.

F. Laing, Q.C. (*Balloch* with him) for some of the defendants.—Grove was the person who was liable to the plaintiffs. He was the "member" of the plaintiffs' association, and to him, and to him alone, the plaintiffs were to look for the payment of these contributions. The defendants found Grove, who was willing to enter into this contract, and who in effect promised and undertook to pay the contributions and the premiums, and that was the consideration given by them for the insurance. The fact that Grove was liable to the plaintiffs negatives any liability on the part of the defendants. With regard to the authorities, *Nevill's* case (*ubi sup.*) is a clear authority in favour of the defendants. That case shows that it is the "member"—in this case Grove—who is liable, and not the shipowners. The contract in the present case is substantially the same as in *Nevill's* case (*ubi sup.*), and, according to that case, the only person who can be held liable is the member—that is, Grove. In *Wyllie's* case (*ubi sup.*) there was an express contract on the part of the assured—the shipowners—to pay, and there it was held that the shipowners were liable to pay, but it was based very clearly upon the fact that, as Bowen, L.J. there says, "there was an express contract by the 'assured' to pay the contributions." So Lord Esher, M.R. there says: "It shows that the defendants are liable on this policy by reason of their express contract." The liability is there based on an express contract. Here there was no such express contract making the defendants liable, and the only person liable is the "member." That was the view taken by the plaintiffs until the insolvency of Grove.

J. A. Hamilton for other defendants.—There is in this policy an express liability upon members which excludes any right to look to co-owners who are not members of the association for calls. There cannot be any right to look to co-owners for calls unless there is an express contract giving power to do so. Here, as in *Nevill's* case (*ubi sup.*), the liability is imposed upon members only, and consequently here, as in that case, the defendants ought not to be held liable. Then *Wyllie's* case (*ubi sup.*) shows that express words are necessary to make the defendants liable; and all the three Lords Justices in that case said they relied on the express words of the contract as showing that the defendants had expressly contracted to pay the contributions. There is no such express contract here, and on that ground *Wyllie's* case (*ubi sup*) is distinguishable.

Joseph Walton, Q.C. in reply. *Cur. adv. vult.*

Dec. 11.—Bigham, J. read the following judgment.—This is an action brought against the defendants who are the owners of a ship called the *Vigil* to recover the amount of the contributions and premiums payable in respect of an insurance of their ship in the plaintiffs' club. The defence is that by the agreement sued on the plaintiffs have contracted with the defendants to look only to the defendants' agent for payment and not to the defendants themselves. The question is whether that defence is made out. The facts are quite simple. The defendants wishing to effect an insurance with the plaintiffs, authorised one Grove, who was managing the ship on their behalf, to enter the *Vigil* in the club. Grove accordingly entered the ship and so made himself a member of the club within the meaning of the memorandum and articles of association, and by reason of his membership he became personally liable to pay the contributions or premiums which under the articles of association and the rules might be levied by the committee of the club. Grove became insolvent and was unable to pay, whereupon the plaintiffs brought the action against the defendants as being the persons on whose behalf and for whose benefit the insurance had been effected. It is necessary to remember that no one other than the defendants could have effected the insurance. They might do it by themselves, or they might do it through an agent acting for them. But they in whom the interest existed could alone effect the insurance; a contract entered into by any one else who did not possess the interest, would be a wager policy and therefore void. Thus when Grove entered the ship in the plaintiffs' club he effected a contract of insurance, the parties to which were the association on the one hand and the defendants whose interests were being insured on the other. He might, at the same time, and in my opinion in this case he did, make himself personally responsible for the payment of the contributions; but the contract of insurance was and could only be between the parties I have named. If any losses occurred within the meaning of the contract of insurance, they would have to be made good to the defendants, who alone were entitled to be indemnified, and they would have to be made good by the plaintiffs. What then was the consideration for the plaintiffs' promise to make good such losses? It must of course be a consideration moving from the defendants. Then what consideration? In the ordinary course of things one would expect the consideration to be the payment by the defendants of the contributions, or in other words, of the price to be paid to the plaintiffs for taking the risk. Apart from any stipulation or practice embodied in the contract to the contrary, the person who gets the benefit under a contract is the person who pays for it. But it is said in this case on behalf of the defendants that the consideration consisted of their finding someone else (namely, Grove) to promise to pay, and that the plaintiffs accepted the procurement of this bare promise—not its performance—as the consideration and so contracted themselves out of their *primâ facie* right to look to the defendants. Such a consideration appears to me to be very improbable, but it is legally possible, and it is therefore necessary to examine the documents to see whether it is to be found in them. The contract of insurance is required by law to be contained in a written policy. In this case the policy is made up of three documents which are (1) the policy itself; (2) the memorandum and articles of the plaintiff

association; and (3) the rules annexed to the policy. The first of those three, which for convenience I shall call the policy, begins in the ordinary old-fashioned Lloyd's form: "Know all men that William Grove as well in his or their own name or names as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all doth make assurance and cause himself or themselves, and them and every other of them to be insured, &c." Now, beyond all doubt the persons here referred to are the persons interested in the vessel, that is to say, the defendants, for by law they can be no others; they are the assured. Then comes the valuation clause: "The said ship for so much as concerns the assured (the defendants) by agreement between the assured and assurers in this policy shall be valued at *l.*" This valuation not only fixes the amount to be paid in case of loss, but it also affords one of the data for calculating the amount of contributions or premiums payable in respect of the insurance. There is then the usual description of the perils which the plaintiffs are to bear, followed by the Lloyd's form of the sue and labour clause: "It shall be lawful for the assured" (the defendants) "to sue and labour in and about the recovery of the said ship . . . to the charges of which the assurers promise to contribute." Then the policy finishes with these words, "and so the association is contented and does hereby promise and bind itself to the assured" (the defendants) "for the due performance of the premises subject to the articles and annexed rules of the association which it is mutually agreed shall form part of and be of the same force and effect as if inserted in the body of this policy." These concluding words contain a clear promise by the plaintiffs to make good to the defendants any losses that may occur under the policy, and they give the defendants a right of action in case of breach. The policy, however, contains nothing to indicate what premiums are to be paid, or by whom, or when they are to be paid; in fact, there is no reference to the consideration for the promise. It becomes necessary, therefore, in order to find out what the consideration is and by whom it is to be paid, to refer to the incorporated documents. I take the memorandum and articles of association first. Clause 4 of the memorandum declares that one of the objects of the association is the mutual insurance of ships which the members may be authorised to "insure in their own names." Whose ships? Obviously the ships of those persons who authorise the insurance. And how are they to be "mutually" insured? One would naturally suppose by the owners who give the authority contributing among themselves to make good any losses that may happen. Thus the memorandum would seem to point to a liability on the part of each shipowner to contribute his share towards the losses; in other words, to pay the contributions or premiums levied in respect of his ship. The defendants, however, contend otherwise, and say that the ships are to be mutually insured by means of contributions or premiums to be paid by the agents who enter their ships in the club and by no one else; in other words, by the "members" of the club. Now, clause 4 of the articles of association defines a "member" to be any person who, on behalf of himself or any other person, insures any ship in the association; and clauses 44 and 46 empower a committee of the association to assess the members rateably, so as to provide a fund which shall be sufficient to meet losses. Clause 41 stipulates that the association shall not be liable to make good losses except to the extent of the funds which it may be able to recover from the members or persons liable to the same. The defendants contend that the words "or persons liable for the same" in this rule mean the legal representatives of the members, as, for instance, their trustees in bankruptcy. There is some authority for this contention to be found in the judgment of Fry, L.J. in *Nevill's* case (*ubi sup.*), to which I shall have to refer hereafter. But, for my own part, I see no reason why these words should not bear their plain meaning, and be taken as including the owners of the ships insured in the club, who would naturally be the persons liable.

It is argued that inasmuch as these clauses fix the members with liability (as I think they do), they especially relieve the shipowners from liability. I do not think they do anything of the kind. It by no means follows that because the plaintiffs stipulate for and secure the responsibility of one class of persons (the members) therefore they release from liability the persons for whose sole benefit the association is giving its undertaking. The association has, in my opinion, a double remedy, one against the member whom they have permitted to enter a ship on the terms that he should be personally responsible for the contributions, and another against the shipowners on whose behalf and for whose benefit the insurance has been effected. It remains then to examine the rules annexed to the policy to see whether they make any difference. Rule 1 declares that "these rules are subject to the memorandum and articles of association" and rule 2 that "members shall mutually insure each other against risks." In the latter rule the word "members" must mean the persons who own the insured interest, for, as I have said before, no other persons can lawfully be insured in respect of it. Rules 7 to 10 inclusive deal with the subject of premiums. Rule 7 provides that ships shall be divided into classes according to their age and assessed upon their entered value at certain rates. Rule 8 provides that when ships are employed in southern trades, they shall have a return of 50 per cent. of the premium. Rule 9 is as follows: "The managers are hereby empowered to levy contributions of one-fourth part of the annual premium as above, which shall be paid in cash on the 1st April, July, Oct., and Jan. in each year, such premiums of insurance to form a fund for the payment of claims and expenses." Rule 10 provides that the "premiums on policies" shall be kept as a separate fund and in the event of the claims under the said policies exceeding such fund, an additional percentage shall be levied as per rule 7 in such manner and at such time as the committee may determine; in the event of the separate fund being more than sufficient to meet claims, the surplus is to be divided rateably among the members. These rules supply some of the deficiencies of the policy, for they settle what premiums are to be paid and when they are to be paid; but they are silent as to who is to pay; "ships" are to be assessed for premiums, and "ships" are to be entitled to the return of 50 per cent.

Does this silence indicate any intention that the persons for whose benefit and on whose behalf the insurances are effected shall not be liable? I think not. No doubt in practice the contributions or premiums are collected from "the members"—that is to say, from the persons who as agents enter the ships in the club—and they in turn get the money from their principals, but this practice does not affect the liability; that remains where by law it ought to be—namely, on the shipowner. There is, however, another rule which requires notice. It is rule 15, which provides, amongst other things, that "a member shall be uninsured in respect of any interest entered if he becomes bankrupt or insolvent unless before a claim accrues an approved undertaking registered by the managers has been given to pay all contributions due or to become due." It is said that this rule shows that the "member" is alone liable, and that no undertaking would be necessary if the owners were also liable. I do not, however, agree. As I have already said, the association has two remedies, one against the members, the other against the shipowner, and this rule is merely intended to provide a substitute for the member in the event of the latter being unable to pay; it does not in any way affect the shipowner's liability. Finally, it is to be observed that rule 17 in terms refers to the liability of the owner for premiums. It says, "in case of loss the owner shall be liable only for the amount of the twelve months' estimated annual premium on the policy under which the loss occurs." The owner here in my opinion means the shipowner, and the rule is intended to cut down, in the events mentioned, a recognised liability on him for the payment of the contributions or premiums.

The conclusion at which I arrive upon an examination of the documents, and apart from authority, is that the defendants are liable. I am told, however, that the question is covered by the judgments in *Nevill's* case (*ubi sup.*). In that case the action was brought (as here) to recover contributions from the shipowners—their agent, one Tully, who had entered the ship in the plaintiffs' club, having failed to pay; and it was held that, upon the true construction of the documents, consisting, as here, of the policy, the articles, and the rules, the plaintiffs had contracted with the defendants to look only to the agent. The articles and the rules in that case were practically identical with those which I have just been considering. But when the two policies are compared it will be seen that they differ materially. In *Nevill's* case (*ubi sup.*) the policy, instead of being in the ordinary Lloyd's form, was in a very special form, which began by reciting that Tully had become a member of the association and that, having entered the steamer for insurance he had become entitled to a policy; it then witnessed that, in consideration of the premises and of the observance by the said insured (that is, by Tully) of the rules, the association did agree with the said insured that the members of the association should, subject to a proviso thereinafter contained, be liable to make good all losses, &c. The proviso was to the effect that the policy was granted on the condition that the association should be liable only to the extent of so much of the goods as the said association might be able to recover from the members and their heirs, executors, and administrators liable for the same. That policy appears to me to be quite different in its meaning, as it certainly is in its wording, from the policy in the present case. In the policy before me the name of Grove only appears at the beginning in the way in which the name of any insurance broker would appear in an ordinary Lloyd's policy. Whereas in the policy in *Nevill's* case (*ubi sup.*) Tully is the person who is expressly named as the person who is to observe the rules, one of which requires the payment of the premiums. In a more recent case, *Wyllie's* case (*ubi sup.*), Bowen, L.J., examining the policy in *Nevill's* case (*ubi sup.*), says: "The policy treated Tully, the managing owner of the ship, as alone contracting with the association. It did not purport to be made on behalf of anyone else. The association had contracted themselves out of the power of saying that anyone but Tully was liable to them." The policy now before me does not treat Grove as alone contracting with the association; and it does purport to be made on behalf of others. In my opinion the judgments in *Nevill's* case proceeded on the special wording of the policy, and afford no authority for saying that the defendants in this case are not liable. There are two other authorities to be noticed, which, so far as they are applicable at all, go to support the plaintiffs' view. They are *Leslie's* case (*ubi sup.*) and *Wyllie's* case (*ubi sup.*) to which I have already referred. Both of them were actions to recover contributions from shipowners in cases where the agents who had entered the ships had made default in payment. The first of the two cases was tried by Mathew, J. at the Newcastle Assizes in 1887, and in his judgment will be found a short but very clear history of mutual insurance. He examines *Nevill's* case (*ubi sup.*), and points out that the shipowners were parties to the contract by which Tully bound himself to pay, and that they took the benefit of the contract upon the footing that they were not to be looked to, and that their agent was, for the payment of the premiums; and he recalls the fact that this course is in a manner followed at Lloyd's, because a Lloyd's policy always recites (contrary to the fact) the payment of the premium of the assured, and then by the practice the underwriters look to the broker exclusively for the payment of the same. The recital and the practice together have the effect of shifting the liability from the shipowner to the broker. But he points out that in the policy before him there is no recital of the payment of the premiums, so that there is no discharge of the liability of the shipowner, and no contract that he shall be free in consideration of someone else taking the responsibility. No doubt in *Leslie's* case (*ubi sup.*) the policy contained an express provision that the shipowners (they are called the assured) shall pay the contributions—a provision which, in the opinion of the learned judge, cleared away all question as to the shipowners' liability. He adds, however, that they are liable not merely on that ground, but also on the ground that they are the persons to whom the policy is issued and who are to have the benefit of it. In *Wyllie's* case (*ubi sup.*) there was also a special clause in the policy by which the assured were made liable for the contributions. It was attempted to be said in that case, as in *Leslie's* case (*ubi sup.*), that the word "assured" meant the entering member, and no

one else; but the Court of Appeal held otherwise, and affirmed the judgment against the defendants. Neither of the cases is very much in point, because of the presence in the policies of the express clause fixing the "assured" with liability—a clause which is not in fact in the policy in the case before me. But, looking at all three cases—*Nevill's* case (*ubi sup.*), *Leslie's* case (*ubi sup.*), and *Wyllie's* case (*ubi sup.*)—I come to the conclusion that, in order to get rid of their *primâ facie* responsibility to pay the price of the benefit which they receive under their policy, the defendants must show that their contract relieves them in unmistakable terms from their responsibility. The documents forming the policy in this case when taken together do not, in my opinion, show anything of the kind. There must therefore be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *W.* and *W. Stocken.*

Solicitors for the defendants, *Spencer, Chapman,* and *Co.*, for *Moy Evans,* and *Thomas,* Swansea; *Richard White,* for *Hartland, Isaac,* and *Watkins,* and for *H. Wilson Paton,* Swansea.

Friday, Feb. 16, 1900.

(Before CHANNELL and BUCKNILL, JJ.)

MILLER *v.* BORNER AND CO. (*a*)

Charter-party—Construction of—Contract to load "a cargo, say about 2800 *tons"—Obligation of charterer to load* 3 *per cent. more than* 2800 *tons.*

By a charter-party made between shipowners and charterers, the charterers were to load "a cargo of ore, say about 2800 *tons." The carrying capacity of the ship was* 2880 *tons, and the charterers actually loaded* 2840 *tons, or forty tons more than the stipulated quantity of* 2800 *tons:*

Held, that the charterers were not bound to load 3 *per cent. more than the* 2800 *tons provided the ship could carry so much, and that in loading* 2840 *tons they had performed their obligation under the charter-party to load "a cargo, say about* 2800 *tons."*

Morris *v.* Levison (34 *L. T. Rep.* 576; 3 *Asp. Mar. Law Cas.* 171; 1 *C. P. Div.* 155) *distinguished.*

APPEAL from the Mayor's Court in an action tried before the Common Serjeant with a jury.

The action was brought by the plaintiffs, Messrs. Miller and Richards, the owners of the steamship *Marie,* against the defendants, as charterers of the ship, to recover a sum alleged to be due for dead freight on 40 tons of cargo said to be short shipped.

By the contract of charter-party of the 20th Dec. 1898 made between the plaintiffs, the shipowners, and the defendants, the charterers, it was provided that:

The ship . . . shall, after the delivery of her present cargo, proceed with all convenient speed in ballast to Elba, and there load in the customary manner as soon as and where ordered by the shipper or his agent . . . a cargo of ore, say about 2800 tons, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall forthwith proceed to Glasgow, and there deliver the same as customary . . . where and as directed by consignee. . . .

Freight to be paid at and after the rate of eight shillings and sixpence per ton.

The defendants in point of fact loaded 2840 tons.

The jury found as a fact that the ship could hold 2880 tons, and that that was her carrying capacity. The plaintiffs said that the words of the charter-party being "a cargo, say about 2800 tons," the defendants were, under those words, bound to load 3 per cent. more than the 2800 tons, if that did not exceed the carrying capacity of the vessel, and as 3 per cent. on the 2800 tons would be 84 tons, the defendants would have been bound to load 2884 tons if the vessel could have carried that quantity, and that as the carrying capacity was 2880 tons, the defendants were bound to load 2880 tons.

The amount actually loaded was 2840 tons, and the plaintiffs brought the present action for the dead freight on the 40 tons alleged by them to be short loaded.

The judge at the trial held that the case came within *Morris* v. *Levison* (34 L. T. Rep. 576; 3 Asp. Mar. Law Cas. 171; 1 C. P. Div. 155), and that, on the authority of that case, the defendants were bound, in order to satisfy their contract to "load a cargo, say about 2800 tons," to load 3 per cent. in excess of the 2800 tons, provided the ship was capable of holding that amount; and as the ship was capable of holding 2880 tons, he gave judgment for the plaintiffs for the freight on forty tons short shipped.

The defendants appealed.

Laing, Q.C. and *Balloch* for the defendants.—The learned judge was wrong in law in entering judgment for the plaintiffs; and upon the facts judgment ought to have been entered for the defendants. The defendants loaded 2840 tons, that is, forty tons more than the 2800 tons stipulated for; but the learned judge thought that, on the authority of *Morris* v. *Levison* (34 L. T. Rep. 576; 3 Asp. Mar. Law Cas. 171; 1 C. P. Div. 155), the defendants, in order to fulfil their obligation under the charter-party, were bound to load 3 per cent. (that is, eighty-four tons) more than the 2800 tons, provided the ship could carry so much, and, as the ship could carry eighty tons more than the 2800 tons, he held that the defendants ought to have loaded that amount, which would be forty tons more than she actually carried. The judge was wrong in holding that *Morris* v. *Levison* (*ubi sup.*) applied. There the words of the charter-party were "to load a full and complete cargo of iron ore, not exceeding what she could reasonably stow, &c., say about 1100 tons." The cargo actually loaded was 1080 tons, and the ship could carry 1210 tons, and the court (Brett, Archibald, and Lindley, JJ.) held that the charterer was not bound to load the ship up to her actual capacity, but that 3 per cent. was a fair amount of excess over 1100 tons to allow in estimating what was a "full and complete cargo of about 1100 tons," and that consequently the cargo actually provided fell short of the charterer's obligation by fifty-three tons. There the contract was to load "a full and complete cargo"; whereas here the words are merely to load a "cargo," and the judgments in that case proceeded upon the meaning of the words "full

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

and complete" cargo, which completely distinguishes that case from the present. The words in the present case were inserted to meet the decision in that case, and as the words here are to "load a cargo, say, about 2800 tons," the charterers' obligation is fulfilled if they load—as they have loaded—a cargo which comes within 3 per cent. more or less than the stipulated amount of 2800 tons. [BUCKNILL, J. referred to the case of *Carnegie* v. *Conner* (61 L. T. Rep. 691; 6 Asp. Mar. Law Cas. 447; 24 Q. B. Div. 45).]

Bateson for the plaintiffs.—The court must give effect to all the words of the charter-party, and according to the charter-party the charterers were to load "a cargo," and a cargo is what the ship can carry. There is no distinction between the words "cargo" and "full and complete cargo"; so that there is really no distinction between this case and the case of *Morris* v. *Levison* (*ubi sup.*), and the judge was right in so holding. Under the words "to load a cargo, say, about 2800 tons," it is not enough for the charterers to load "about 2800 tons." They must load a "cargo," and, according to *Morris* v. *Levison* (*ubi sup.*), they must load 3 per cent. more than the 2800 tons. [BUCKNILL, J.—Suppose that the ship could in fact carry 4000 tons, what would these words mean in that case?] According to *Morris* v. *Levison* (*ubi sup.*), the charterers would then have been bound to load 2884 tons, being 3 per cent. more than the 2800 tons. 2800 tons is merely put in as the limit, and therefore 3 per cent. more than that is the cargo.

Laing, Q.C. in reply.

CHANNELL, J.—I am of opinion that this appeal must be allowed. I think we can reduce the amount of the judgment by the amount of the dead freight, so that, on the whole, the case need not go down for a new trial, as to which I was for some time in doubt. The contract here was to ship "a cargo of ore, say about 2800 tons." The question of the meaning of the word "about," that is, as to how much margin is to be allowed on the one side or the other, would be a question for the jury. It was so dealt with by the court in *Morris* v. *Levison* (*ubi sup.*), because that case was reserved to them upon the terms that they might draw inferences of fact, and what Brett, J. there said was, that he had only the understanding of business people to guide him in such matters—namely, that 3 per cent. was treated as the margin in business matters, that is to say, that anything less than 3 per cent. one way or the other, could be treated as "about," but that more than 3 per cent. could not. That would ordinarily be for the jury, but nobody in this case desired that particular issue to be left to the jury. The real point here is, does the contract in this case differ from the contract in *Morris* v. *Levison* (*ubi sup.*). The decision in that case proceeded entirely on the fact that there the contract was to ship "a full and complete cargo," and that it was necessary in some way or another to give effect so far as possible to all the words of the contract, and to put a construction upon the subsequent words "of say about 1100 tons," that would, as far as possible, be consistent with the meaning put upon the words "full and complete cargo." The carrying capacity of the vessel in that case was larger than anything that could be considered to be about the quantity specified. The actual capacity of the ship was 1210 tons, and the question was about shipping "a full and complete cargo of iron ore, say about 1100 tons." The judgment of the Court proceeds entirely on the words "full and complete," and that was pointed out in the subsequent case of *Carnegie* v. *Conner* (*ubi sup.*), to which my brother Bucknill has referred, and in which he was counsel. That case of *Carnegie* v. *Conner* (*ubi sup.*), was the converse of the present case, but there it was pointed out that *Morris* v. *Levison* (*ubi sup.*) proceeded on the fact that you started with a contract to ship "a full and complete cargo." Here the words are "ship a cargo, say about 2800 tons," and what is a cargo for a particular ship would, I think, be a question of fact. A very small quantity of goods in comparison to the carrying capacity of the vessel would not be called a cargo. It must to some extent approach her carrying capacity before it could be called a cargo, and the question, therefore, what number of tons would make a cargo would be a question for the jury; but it must be a practical question before it is necessary to leave it to the jury. Here, if the quantity shipped, which was in fact 2840 tons, could be considered a cargo for this particular vessel, then undoubtedly it was a cargo of "about 2800 tons," and therefore the charterers had fulfilled their obligation by shipping 2840 tons. The only possible question, therefore, to be left to the jury was not whether that was a full and complete cargo, but whether it could be called a cargo for the particular vessel; and, having regard to the fact that it is admitted to be very nearly a full and complete cargo, I do not think there was any real question left to go to the jury whether it was not a cargo for a vessel of that kind. If there had been a very large deficiency between the amount shipped and the carrying capacity of the vessel, that would have raised the question whether what was shipped could be considered a cargo. Here I do not think there was any question that could be left to the jury on that point on which they could possibly find but in one way. I think, therefore, the proper thing to do is to reduce the judgment by the amount of the dead freight and let it stand as a judgment for 7*l.*

BUCKNILL, J.—I quite agree, and I have only a few words to add. I quite understand the importance of this point to those concerned in this matter and in this particular trade. In charter-parties we find very often the cargo treated in different ways. We find it described sometimes simply as "a cargo," sometimes as "a full and complete cargo"; and sometimes, as in *Morris* v. *Levison* (*ubi sup.*), as "a full and complete cargo, say about so many tons." Those are three ways of describing the cargo. In *Morris* v. *Levison* (*ubi sup.*) it was said that where it is described as "a full and complete cargo, say about so many tons," then there may be a question for the jury as to what "about" means. "About is 3 per cent.," said Lord Esher in that case. The words "a full and complete cargo" absolutely cannot raise a difficulty, because that is what the ship can carry; but "a cargo of about so many tons"—as in the present case—is a very clear description of what the parties intend shall be the contract. Here the contract is that there shall be a cargo of "about 2800 tons." Now, has the ship done that? In point of fact, she has done it. I

think, therefore, as soon as it is found that the charterers had performed their part of the contract by putting that quantity on board there is nothing left for the jury to find, and no question for us to determine.

Appeal allowed. Judgment for defendants. Leave to appeal refused.

Solicitors for the plaintiffs, *Holman, Birdwood,* and *Co.*

Solicitors for the defendants, *Ince, Colt,* and *Ince.*

Feb. 19, 20, *and* 26, 1900.

(Before KENNEDY, J.)

PARSONS *v.* NEW ZEALAND SHIPPING COMPANY LIMITED. (*a*)

Bill of lading—Incorrect description of goods in —Short delivery—Right of shipowner signing bill of lading to show error in description of goods—Bills of Lading Act 1855 (18 *&* 19 *Vict.* c. 111), *s.* 3.

Sect. 3 *of the Bills of Lading Act* 1855 *does not make the bill of lading conclusive as to the statement of marks upon the goods shipped where those marks do not affect or denote substance, quality, or commercial value.*

The plaintiff, who was the consignee of a quantity of lambs' carcases from New Zealand and the holder of two bills of lading relating thereto, claimed for short delivery against the defendants, who, as agents of the shipowners, had signed the bills of lading, which described the goods as "marked and numbered as in the margin." In one bill of lading the marginal description was "Sun Brand, 488 *X.,* 226 *carcases," and in the other "Sun Brand,* 622 *X.,* 608 *carcases."*

On the ship's arrival in London some carcases of each description were found to be wanting, but there were other carcases on board which were marked "Sun Brand, 388 *X." and "Sun Brand,* 522 *X." respectively, and which were not claimed by any other importer and were not included in any other bill of lading.*

The defendants tendered to the plaintiff these carcases as part of his consignment, but the plaintiff refused to accept them, and contended that the defendants, having signed the bills of lading, were prevented by sect. 3 *of the Bills of Lading Act* 1855 *from proving an error in the marginal description as to the numerical marking, and that the bills of lading were conclusive evidence of the shipment of the quantities designated in the margins with the marginal markings "*622*" and "*488*." The commercial value of the meat would be unaffected whether it were marked "*488*" instead of "*388*," or "*622*" instead of "*522*."*

Held, that the defendants were not prevented by sect. 3 *of the Bills of Lading Act* 1855 *from showing that the carcases tendered to the plaintiff were by the shipper's error incorrectly described in the margins of the bills of lading, and that they formed part of the plaintiff's consignment.*

ACTION tried by Kennedy, J. in the Commercial Court.

The action was brought by the plaintiff, as consignee in London of a quantity of lambs' carcases shipped from New Zealand, against the defendants, who were the agents of the shipowners and who had signed the bills of lading, and it was brought in respect of an alleged short delivery of carcases by the defendants.

The facts and the arguments are fully set out in the written judgment of the learned judge.

The plaintiff relied upon sect. 3 of the Bills of Lading Act 1855 (18 & 19 Vict. c. 111), which provides:

> Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

Danckwerts, Q.C. and *Loehnis* for the plaintiff.

Carver, Q.C. and *Leck* for the defendants.

Cur. adv. vult.

Feb. 26.—KENNEDY, J. read the following judgment:—This is an action brought by the plaintiff, the consignee in London of a quantity of lambs' carcases from Timaru, New Zealand, against the defendants, who were the agents in New Zealand for the owners of the steamship *Fifeshire,* in which the goods were carried, and who signed the bills of lading. The claim is for damages for short delivery of 154 carcases. Each of the bills of lading, two in number, relating to the claim in this action describes the goods included in it as "marked and numbered as in the margin," the body of the bill of lading in the one case giving a total of 1166 carcases, and the marginal description containing (*inter alia*) "Sun Brand, 488 X., 226 carcases." The body of the bill of lading in the other case gives a total of 1076 carcases, and the marginal description contains (*inter alia*) "Sun Brand, 622 X., 608 carcases." On the ship's arrival in London fifty-three carcases of the former description, so far as regards the figure 488, and 101 carcases of the latter, so far as regards the figure 622, were found to be wanting. But there were on board twenty-one carcases marked "Sun Brand, 388 X.," and 102 carcases marked "Sun Brand, 522 X.," which were not required by any other importer, and to which no bills of lading, given in respect of the cargo laden on the *Fifeshire,* related, except, as the defendants contend, the two bills of lading already mentioned of which the plaintiff was the holder. If these carcases were treated as carcases included in these two bills of lading, although incorrectly described in the marginal description, as being marked "488" instead of "388" in the one case, and "622" instead of "522" in the other, there was still a deficiency in the number ready for delivery of thirty-one carcases. The plaintiff in this action claims damages for the non-delivery of 154 carcases. The defendants admit the claim in regard to the

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

deficiency of thirty-one carcases, and in respect of that they paid into court, after service of the writ of summons, a sum of 29*l.*, which exceeds the net invoice cost at the rate of 3*s.* 8*d.* per stone of 8lb. By the terms of the bill of lading the shipowner's liability in case of loss, or detention, or injury to goods for which they may be responsible is to be calculated on, and in no case to exceed, the net invoice cost. I hold that the defendants are entitled to the benefit of this clause, and therefore in regard to the plaintiff's claim as regards thirty-one carcases, the plaintiff's claim is satisfied by the payment into court. In regard to the larger subject of the claim—123 carcases—the main issue is this. The defendants say: "The twenty-one 'Sun Brand, 388 X.,' and the 102 'Sun Brand, 522 X.,' really formed part of the plaintiff's consignment, and were erroneously described in the margins of the two bills of lading, in the one as '488' instead of '388,' and in the other as '622' instead of '522.' We carried these carcases as part of the goods included in the two bills of lading; we tendered the plaintiff these as part of his consignment; we therefore performed our contract, and his refusal to accept them as part of his goods was unjustifiable." The plaintiff, on the other hand, does not admit the fact that these carcases did form part of his consignment in the sense of being shipped, and intended to be included in the totals set forth in the bills of lading; and further he says, as a matter of law, that the defendants, having by their manager, W. Bennett, signed the bills of lading, are concluded by sect. 3 of the Bills of Lading Act 1855 (18 & 19 Vict. c. 111) and cannot be allowed to prove an error in the marginal statement of the bills of lading as to the numerical marking of 123 of the carcases (twenty-one in the one case and 102 in the other). He contends that these bills of lading, so signed, are not only conclusive evidence against the defendants of the total number of carcases therein respectively stated to be shipped and of the carcases being of the quality "Sun Brand, X.," and of the grade of weight designated in the margin in the case of one bill of lading by the final letter "8" and in the other by the final letter "2," but also conclusive evidence of the shipment of quantities designated in the margins of these bills of lading with the marginal markings "622" and "488."

Upon the evidence and statements before me, I find the facts, so far as they appear to me to be material, to be these: The Sun Brand is a registered brand of the shippers, the Christchurch Meat Company Limited, under whose form of bill of lading, signed by the defendants' manager, the meat in question was shipped. That brand and the "X." denote quality; of the three-figure numbering, whether 488, 388, 622, or 522, the final figure is important because it denotes what may be called the classification of weight as—*e.g.*, 35-40lb., or as the case may be. The duplicature of this figure, 88, 22, and so on is a peculiarity of these shippers to indicate both that the meat comes from their factories, as the killing and freezing places appear to be called, and that the meat is their own property, and has not been frozen and shipped by them as agents for other persons. The first figure, as the 6 in 622, or the 4 in 488, simply records the date of killing and freezing, and so for the purposes of his own accounts it has its use or importance for the shipper, just as the duplication of the 2 or the 8 has; but neither the first figure nor the duplication of the following figure has, as I understand the evidence, any distinctive value as regards the market for the meat. In other words, and to sum up, given the "Sun Brand" and "X." and the first figure, the meat is as a commercial article absolutely unaffected in character or value whether it is marked "522" or "622," "488" or "388." Secondly, I find as a fact that in practice, and according to the course of business in shipment, the only tally at Timaru made on behalf of the ship is a tally of the number of carcases. The work proceeds rapidly day and night, and no attempt is made to check the shipper's marks or numbers upon the individual carcases. The carcases are brought in insulated vans from the freezing store, some distance away, to the mole or breakwater where the ship lies, and thence are shot at once down a shoot through the ship's side into the refrigerating chamber of the ship. Thirdly, I find as a fact in regard to the carriage and discharge that there were no other shipments on board the *Fifeshire* of "Sun Brand, X." with duplicated 2 or duplicated 8 under any bills of lading other than those of which Parsons became the holder; nor were there any claims by any other consignees for the twenty-one "388" or the 102 "522," which the defendants sought to deliver to the plaintiff as part of his consignment. So far as I can discover in the documents, though I do not, on my note, find any oral statement in evidence to that effect, no "Sun Brand" at all were shipped under any bills of lading except to the plaintiff. In the result I have come to the conclusion upon the question of fact that the defendants have discharged the burden of proof which undoubtedly lay upon them, and that the true inference from the evidence is that the twenty-one "Sun Brand, 388 X.," and the 102 "Sun Brand, 522 X.," which the defendants asked the plaintiff to take as part of his consignment, did respectively form part of the quantities set forth in the two bills of lading, and were by the shipper's error incorrectly included in the respective marginal specifications under "488" and "622."

Upon the point of law I have come to the conclusion that the defendants are not prevented by sect. 3 of the Bills of Lading Act 1855 from showing and relying upon these facts in order to establish that twenty-one fewer carcases "Sun Brand, 488 X." and 102 fewer carcases "Sun Brand, 622 X." were shipped than are stated in the margins of the bills of lading, and that these were shipped as part of the total quantities stated in these bills of lading respectively, twenty-one "Sun Brand, 388 X." and 102 "Sun Brand, 522 X." I so hold upon the ground that in my view the section referred to does not operate to make the bill of lading conclusive as to the statement of marks upon the goods shipped where those marks do not affect or denote substance, quality, or commercial value. To interpret this statutory enactment, as Mr. Danckwerts for the plaintiff has invited me to interpret it, so as to prevent the party sued as the party responsible for carriage of goods under a bill of lading and I will assume signing the bill of lading, from showing not that he has carried fewer goods than the bill of lading specifies, or goods different in substance or quality or value

from those which are specified in the bill of lading, but that the bill of lading has been incorrectly filled up in regard to the statement of the mark put upon parcels of goods by the shipper for the purposes of identification or record, would be, as it appears to me, to strain the meaning of the section. It was not unfairly urged, I think, by Mr. Carver, for the defendants, that if the statute operates in such a case as this the shipper who signed a bill of lading would be conclusively bound by a clerical error in description of an immaterial mark in a bill of lading. No authority, as it appears to me, has been cited which really supports such an interpretation as that for which the plaintiff contends. *Bradley* v. *Dunipace* (5 L. T. Rep. 356; 31 L. J. 210, Ex.; 32 L. J. 22, Ex.) is, I think, distinguishable. The weight there, as the judgment of the Exchequer Chamber delivered by Wightman, J. points out, was of some importance in the contract. The plaintiff's counsel suggested in this case an importance of the mark in regard to insurance; but it appears to me that a difficulty in matters outside the contract of the shipment of the nature and value of the goods themselves is not a matter which ought to affect the question of the applicability of the statute to such a case as the present. Taking this view of the case, it is unnecessary for me to consider the three other points which Mr. Carver also relied on. First, that the defendants, on the face of the bills of lading, signed as agents only for the shipowners—as, in fact, they were—and therefore could not be successfully sued; secondly, that in regard to the Bills of Lading Act 1855, s. 3, by the operation of the clause of these bills of lading, "the ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark or number and address," the effect of that section, if otherwise such as the plaintiff contended for, would be destroyed (see *Jessel* v. *Bath*, L. Rep. 2 Ex. 267); and, thirdly, that, as the value and nature of the carcases offered to the plaintiff by the defendants were the same as those of such carcases as should have been delivered to him under the marks stated in the bills of lading, the plaintiff, as he was tendered an equivalent, could claim no damages. I will only say, so far as regards the last point, that it seems to me now, as I said during the argument, untenable. A carrier who fails to deliver cannot avoid the consignee's claim for damages by offering something which is not the thing to which the consignee is entitled, because it would be equivalent in value. The first point is not, I think, open to the defendants, because they have accepted in this action the position of the shipowners as carriers of the goods. There is more, I think, to be said for the second point, but I prefer to rest my judgment upon the ground which I have stated.

Judgment for the defendants.

Solicitor for the plaintiff, *Charles Butcher*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Oct. 31, 1899.

(Before Barnes, J. and Trinity Masters.)

The Cathay. (a)

Collision—Fog—Duty to keep course and speed—Whistle—Regulations for preventing collisions at sea, arts. 16 *and* 21.

The steamship C., *while proceeding at the rate of about three knots an hour in a thick fog, heard the whistle of another steamship about four points on the port bow. The* C. *kept her course and speed, and the whistle of the other vessel was heard to be apparently broadening. Shortly afterwards the other steamship was seen close to and bearing five or six points on the port bow of the* C. *The engines of the* C. *were then at once stopped and reversed, but a collision occurred.*

Held, that the C. *was in part to blame for the collision for having failed, in accordance with art.* 16 *of the Regulations for Preventing Collisions, when the whistle of the other steamship was first heard, to stop her engines and afterwards to navigate with caution until all danger of collision was over, and was not justified in continuing her speed under art.* 21. *Although art.* 21 *of the Regulations for Preventing Collisions at Sea directing a ship to keep her course and speed is a general rule, it is qualified by art.* 16, *and hence, where two steamships in a fog are crossing, each ought to stop her engines if she hears the whistle of the other forward of her beam.*

This action arose out of a collision which occurred at about 8 a.m. on the 4th Sept. 1899 off Cape St. Vincent between the plaintiffs' steamship *Clan Macgregor* and the defendants' steamship *Cathay*. Both vessels were found to blame, but the navigation of the *Cathay* is alone dealt with in this report.

The following was the defendants' case as alleged in the 2nd and 3rd paragraphs of the defence:

Paragraph 2. About 7.30 a.m. on the 4th Sept. 1899 the *Cathay* . . . was in the neighbourhood of Cape St. Vincent, in the course of a voyage from Antwerp to Vladivostock . . . There was a thick fog with no wind, and the *Cathay*, with her engines working dead slow, was making barely three knots an hour through the water on a S. seven degrees E. (true) course. Her steam whistle was being regularly sounded for fog, in accordance with the regulations, and a good look-out was being kept on board of her.

Paragraph 3. In these circumstances the whistle of a steamship, which afterwards proved to be the *Clan Macgregor*, was heard at a great distance and bearing about four points on the port bow. The whistle of the *Cathay* continued to be sounded, in accordance with the regulations, and the whistle of the *Clan Macgregor* was heard several times at a great distance on about the same bearing and then was heard to draw broader and broader on the port side of the *Cathay*. The *Clan Macgregor* was apparently going clear, but she suddenly came into view at a distance of about 200ft. and bearing five-six points on the port bow. The engines of the *Cathay* were at once reversed full-speed astern, and her whistle was sounded three short blasts, but the *Clan Macgregor*, which was proceeding at considerable speed, came on

(a) Reported by Butler Aspinall, Esq., Q.C. and Sutton Timmis, Esq., Barrister-at-Law.

under a starboard helm and with her starboard side struck the stern of the *Cathay* and then, crossing her bows, disappeared in the fog.

The defendants gave evidence in support of the above allegations.

Scrutton (with him *Lawson Walton*, Q.C.), for the plaintiffs, contended that the *Cathay* must be held to blame for noncompliance with art. 16 of the Rules and Regulations for Preventing Collisions at Sea, in failing to stop on hearing the first whistle.

Joseph Walton, Q.C. (with him *Aspinall*, Q.C. and *Stokes*), for the defendants, argued that the *Cathay* was a crossing steamship on the starboard bow of another steamship, and was bound under art. 21 to keep her course and speed; and further, that the position of the other steamship was ascertained, and that there was therefore no duty upon the *Cathay* to stop her engines, and then to navigate with care and caution under art. 16.

Arts. 16 and 21 of the Rules and Regulations for Preventing Collisions at Sea are as follows:

Art. 16. Every vessel shall, in a fog, mist, or falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed.

NOTE.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving way vessel alone, she shall also take such action as will best aid to avert collision (see arts. 27 and 29).

BARNES, J. (after dealing with the case of the *Clan Macgregor*, which vessel he found partly to blame, continued:)—Then turning to the other side of the case, the short story of it is, as told by the captain, that having set his ship on this course of S. seven degrees E. true, he heard the plaintiffs' whistle faintly but distinctly nearly four points on the port side, afar off, and sounded his in reply, and continued to whistle after that time; and he says he heard her whistle blown until the collision. In the beginning he says the whistle kept on the same bearing for some minutes—about ten minutes—and that after that it began to broaden on his port side and broadened more and more. When the whistle began to broaden he thought the vessel would go clear under his stern, and he says he heard it so broaden for nearly twenty minutes, and the last time he heard the whistle from the *Clan Macgregor* it was nearly abeam. When he saw her she was nearly two points before his beam, and, he told me, about half a ship's length off. It is quite clear to my mind that he misjudged the sound of the whistle entirely, because it is obvious that on the courses which the vessels were making the whistle could not broaden in the way he said it did, and the most probable thing, it seems to me, is that the whistle remained on the same bearing all the way through. In that state of things it is suggested that the master of the *Cathay* was right in keeping his course and speed up to the time when he saw the vessel and reversed for her. I cannot accept that view of the case at all. As I have already said it seems to me that although art. 21 is a general rule, it is qualified by art. 16 in cases where the latter article applies; and this is one of those cases, because this vessel undoubtedly heard, forward of her beam, the fog signal of the *Clan Macgregor*. It is said by Mr. Walton that those on board the *Cathay* could and did ascertain the position of the whistle which was heard. I do not agree with that contention, nor do the Elder Brethren. It is clear that the captain did not, and could not, properly ascertain the position of the vessel, and was not in the least justified in assuming she would pass under his stern. To my mind, on hearing that vessel he should have stopped his engines and navigated with caution until the danger was over. If he had done so there would have been no collision. No doubt her speed was kept up until the last moment, and then she crashed into the *Clan Macgregor* and sank her. I think it would be extremely dangerous to hold that in a dense fog when vessels can be seen only at a very short distance, the vessel, which from an ultimate knowledge of the respective courses, is shown to be the one which in clear weather should keep her course and speed is to be held to be justified in keeping her course and speed when there is such a fog that the vessels cannot see each other at all, and cannot be certain of each other's position. I hold, without any doubt, that a ship in the position of the *Cathay* ought to have stopped her engines and taken off her speed in order to comply properly with art. 16. Both vessels must, therefore, be held to blame for this collision.

Solicitors for the plaintiffs, *Hollams, Sons Coward*, and *Hawksley*.

Solicitors for the defendants, *Stokes* and *Stokes*.

Wednesday, Dec. 6, 1899.

(Before BUCKNILL, J. assisted by TRINITY MASTERS.)

THE JOHN HOLLOWAY. (*a*)

Collision—River Thames—Crossing ship—Rules and Bye-laws for the Navigation of the River Thames, arts. 48, 53.

A steamship which is turning in the river Thames, on that side of mid-channel on which she is being navigated, having no way upon her and with her anchor down and holding, is not a steamship crossing, within the meaning of art. 48 *of the Thames Rules, from one side of the river towards the other, although at some time during the process of turning some portion of her hull may be to the north of mid-channel.*

The River Derwent (64 *L. T. Rep.* 509; 7 *Asp. Mar. Law Cas.* 37) *distinguished.*

THIS action arose out of a collision which occurred in the river Thames on the 23rd June 1899 between the plaintiffs' steamship *Dalmatia* and the barge *Hambro'*, which was in tow of the defendants' tug *John Holloway*.

The plaintiff's case was that the *Dalmatia*, a steamship of 1268 tons net register, was, in the course of a voyage to London, in the river Thames off the entrance to the Surrey Commercial Dock.

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

The weather was clear, and the tide was about an hour and a half before high water, running about one and a half knots an hour.

The *Dalmatia* was swinging round with a view to entering the dock, having a tug on her starboard bow. Her starboard anchor was down and holding, and her engines were stopped. She had come up on the south side and was swung nearly athwart the river with her head to the northward. A good look out was being kept on board of her, and her whistle had been blown four short blasts to intimate that she was turning round.

In these circumstances those on board of her particularly noticed the tug *John Holloway*, which had previously been seen at a considerable distance coming up the river towing four barges, of which the *Hambro'* was the first barge in the starboard rank. The *John Holloway* was two or three ships' lengths off on the starboard quarter of the *Dalmatia*. The *John Holloway* came on at considerable speed, and herself passed just clear of the *Dalmatia*, but the *Hambro'* with her starboard side struck her rudder and propellor, doing the damage proceeded for.

The defendants' case was that the tug *John Holloway*, with three loaded barges and one light barge in tow, was proceeding up the Lower Pool of the river Thames. The barge *Hambro'* was in the first rank on the starboard side. The weather was fine and clear, and the tide third quarter flood of the force of about two and a half knots an hour. The *John Holloway* was heading straight up the reach making about three knots over the ground, and a good look out was being kept on board of her. In these circumstances the *Dalmatia*, which had overtaken and passed the *John Holloway*, suddenly sounded four blasts and commenced to round in the river when some distance above the *John Holloway*. The helm of the latter was starboarded to pass to the southward of the roads, and was shortly afterwards ported to clear craft at the tier, and she then, with her tows, headed straight up the river to pass between the stern of the *Dalmatia* and a vessel at anchor. When, however, close to the steamer, and in a position to pass with her tows all clear, that vessel suddenly came astern with her engines, and, though hailed to go ahead, she struck the barge *Hambro'* with her rudder upon the starboard side forward of midships, causing the damage for which the defendants counter-claimed.

The defendants charged the plaintiffs with (*inter alia*) failing to keep out of the way of the *John Holloway* and her tows.

By the Rules and Regulations for the Navigation of the River Thames 1898:

Art. 48. Steam vessels and steam launches crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.

Art. 53. Where by the above bye-laws one of two vessels is to keep out of the way the other shall keep her course and speed.

Aspinall, Q.C. and Dr. *Stubbs* for the plaintiffs.

Laing, Q.C. and *Batten* for the defendants.

The following case was cited:

The River Derwent, 64 L. T. Rep. 509; 7 Asp. Mar. Law Cas. 37.

BUCKNILL, J.—This case raises a point which has not been raised exactly before. The point is whether a vessel turning in the Thames on the same side on which she is being navigated, so far as that is possible having regard to her length, is a ship crossing from one side of the river towards the other, within the meaning of art. 48 of the Thames Rules. That rule and art. 53 must be read together. [His Lordship read the two articles.] The evidence has been very conflicting. The story told by the witnesses for the plaintiffs is that the *Dalmatia* had been navigating up the Thames on the south side of the river, and when a little below the entrance to the Surrey Commercial Dock her helm was put to port in order to turn her round and take her into the Surrey Commercial Dock on the south side of the river. That when she had answered about ten points under the port helm, which means that she would then be about two points more than right athwart the river, she was dead in the water, her anchor having been let go, partly to check her way on account of a barge which was at anchor close ahead of her, and partly perhaps to help her to swing. That the anchor, as I find was the fact, had hold of the ground, and was not what is called dredging. When in this position, and with, as is said by the plaintiffs' witnesses, a water space between the stern of the *Dalmatia* and the Russian barque astern of her, too narrow for the defendants' tug and her tow to pass through, the tug is said to have attempted the impossible, and to have caused this collision between the barge *Hambro'* and the rudder of the *Dalmatia*. The case set up by the defendants is, stated shortly: that the *Dalmatia*, having blown a four-blast signal, had got about athwart the river, and that just as the tug and her tow were passing between her stern and the Russian barque the *Dalmatia* came astern and so caused the collision, there being plenty of room for the tug and tow to pass safely if the *Dalmatia* had not come astern. It is admitted that nothing was done by the *Dalmatia* to keep out of the way of the tug and tow, but the charge made against the tug is that she might have avoided the collision by reasonable care and caution; but it is not proved to my satisfaction that any steps could have been taken on board the tug except easing her way, and so allowing the *Dalmatia* to swing more up and down, and thus increasing the waterway between herself and the Russian barque. On the question of fact whether the *Dalmatia* did move astern at the critical and dangerous time, I am satisfied, after hearing the witnesses on both sides, that she did not, and I find as a fact that she was making no movement through the water at the time of the collision, but that her stern was swinging slowly round, so that, had not the collision happened when it did, she would have safely turned round head on tide, when her anchor would have been lifted, and she would have proceeded into dock.

On the question whether the *Dalmatia* was a crossing vessel or not within the meaning of the 48th bye-law, the case of *The River Derwent* (*ubi sup.*) was cited by counsel for plaintiffs and defendants alike. The facts of that case are not the same as those in this. The *Allendale* was in the act of crossing the Thames from the south to the north side in order to moor on the north side, and whilst she was still performing that manœuvre the collision happened, and she was held to be a crossing ship. The Lord Chancellor points out in his judgment, "that it was undoubtedly a fact

that the *Allendale* did cross from one side of the river to the other." He also said that when a vessel has left the south shore and is going toward the north shore she is in the act of crossing. In this case the *Dalmatia* did not leave the south side of the river although by reason of her great length, when she was athwart, some part of the hull was on the north side of mid-stream. She never crossed the river in fact, and it was never intended that she should do so. The manœuvre was simply the manœuvre of turning round in the river on the south side of mid-channel so far as possible. It is true that she was not proceding up the river, nor down it, but that she was being turned round in it, and this affords the only difficulty that I feel on the construction of this bye-law. The question is, whether it applies to all such steam vessels as are not proceeding up and down river, but are either crossing from one side to the other, or are turning round as this vessel was. If such a construction is to be given to it, it applies to the smallest as well as to the largest vessels. I cannot construe the rule to mean more than it seems to me to state, and I think I should be doing so if I held that it applies to every vessel which is being turned round in the river, although I do not say that a vessel so turning might not at some time in the process of turning be crossing towards the other side. It would depend upon the facts of each case, but, in my opinion, it would be very hard upon steamships if such vessels when athwart the tide, in the act of turning round for the purpose of getting into dock, were held in all cases when in such positions to be bound to keep out of the way of vessels navigating up and down the river. Such vessels, in obeying the rule, would necessarily have sometimes to place themselves in positions of extreme difficulty and danger. On the facts of the case I find that the *Dalmatia* was not in motion through the water, but was slowly swinging to her anchor in the act of turning round, and was not a vessel crossing the river within the meaning of the rule. [His Lordship then dealt with the other points of the case, and concluded by finding the *John Holloway* alone to blame].

Solicitors for the plaintiffs, *Stokes* and *Stokes*.

Solicitors for the defendants, *W. Hurd* and *Sons*.

Dec. 15, 16, *and* 18, 1899.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE PHILADELPHIAN. (*a*)

Collision—"Vessel of 150*ft. or upwards in length"—Anchor light—Meaning of "in the forward part of the vessel"—Regulations for Preventing Collisions at Sea* 1897, *art.* 11.

A vessel 313*ft. in length which carries her forward anchor light in the fore-rigging* 60ft. *or* 70*ft. abaft her stem is not carrying that light "in the forward part of the vessel," and is therefore not complying with art.* 11 *of the Regulations for Preventing Collisions at Sea* 1897.

THIS action arose out of a collision between the plaintiffs' steamship *Ella Sayer* and the defendants' steamship *Philadelphian* which occurred in the St. Lawrence river on the 10th Aug. 1899.

The collision occurred about 11 p.m. The *Ella Sayer* was at anchor heading up stream. The *Philadelphian* was proceeding down the river from above the *Ella Sayer*. The defendants charged the plaintiffs with failing to carry and exhibit the anchor lights prescribed by art. 11 of the Regulations for Preventing Collisions at Sea or with carrying and exhibiting the forward anchor light in a position not authorised by the Regulations. The learned judge found as a fact that the forward light of the *Ella Sayer* was being carried on the forward shroud of the starboard fore-rigging at a distance of 60ft. or 70ft. abaft the stem, and that that light as well as the after anchor light were burning brightly. By art. 11 of the Regulations for Preventing Collisions at Sea 1897:

A vessel under 150ft. in length, when at anchor, shall carry forward where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile.

A vessel 150ft. or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20ft. and not exceeding 40ft. above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15ft. lower than the forward light, another such light.

Laing, Q.C., *Miller*, and *Roche*, for the plaintiffs, argued that the forward light of the *Ella Sayer* was being carried in the forward part of the vessel, and referred to art. 2 of the Regulations.

Aspinall, Q.C. and *Glyn*, for the defendants, *contrà*, cited

The Gannet, P. (1899) 230.

The case was heard on the 15th and 16th Dec. when judgment was reserved.

Dec. 18.—BUCKNILL, J. delivered judgment, when, after stating the facts and holding the *Philadelphian* to blame on various grounds, he proceeded as follows:—The *Ella Sayer* is not to blame unless there has been a breach by her of art. 11. Now, as I have said, the forward light was in the starboard fore-rigging, abaft the stem, and the after light was on the flagstaff. Now, what is art. 11? [His Lordship read the article.] So that the Legislature has decided that a vessel under a certain length need carry only one light, but that a vessel of 150ft. or upwards shall carry two lights. The forward light is to be "in the forward part of the vessel." What does that mean? It may mean one of three things. It may mean a light fixed forward of the middle length of the ship, because directly you get forward of the middle length of the ship you are in the forward part of the vessel. It may mean that you are to put it as far forward as possible—right forward, though the article does not say that; or it may mean that it may be put in any spot between just forward of mid-length and the stem. I think, speaking on advice as to what may be reasonably called the forward part of the ship, that it may be put on one of the forward stays. If it is hung at the proper height on the forestay it would necessarily be something abaft the stem. It might be put on the foretopmast stay, one end of which is attached to the jibboom, and the other

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

end to the foretopmast. But is must be abaft the stem. Now, in a case in the Court of Appeal, the case of *The R. L. Alston* (reported only in the *Shipping Gazette*), I came across a passage which appeared to give considerable light here. The language of the Master of the Rolls was to the effect that where you find a rule or an article which is capable of two constructions, as I find this art. 11 is, you ought to put upon the language that which you believe in the particular case is the reasonable construction. It is quite clear this article is capable of more than one construction. "In the forward part" may mean two or three different places, and I have to construe it in this case, and, if it is necessary, to decide the point. I hold, then, that to put a light in a vessel 313ft. in length 60ft. or 70ft. abaft the stem is not to place it "in the forward part of the vessel," and, if it was important in this case, I should find that it was not in compliance with the article. The object of the rule probably was that, when you get a vessel exceeding 150ft. in length at anchor, those navigating the river should have good information as to her length; that when she was swinging in the river the vessels approaching her from astern or ahead should have an opportunity of knowing the length of the ship. How could that be given if the forward light were 60ft. or 70ft. from the stem? But whilst I am putting this construction upon the rule in this particular case, it will not affect the judgment of the court with regard to the responsibility of the *Ella Sayer*, because, although I find that the light was not placed in accordance with art. 11, I find also that that could not by any possibility have contributed to the collision. I say that for the reason that the defendants' witnesses never saw the light at all They swear that there was no light, and therefore they never saw it at all; and, as it is not suggested that the light was hung unskilfully or improperly in the shrouds, it was therefore throwing an unbroken light all round the horizon, and it is clear to my mind that such breach of the article could not possibly have contributed to the collision. In this case, therefore, my judgment is that the *Philadelphian* is alone to blame. I may add that those who sit by my side have suggested to me that it is a very puzzling rule for seamen to understand, and that the language—and I agree with them—is so ambiguous and so misleading to any ordinary person that, I think, speaking for myself, it might very properly be changed; for how is a master to know where to put a light if he is told to put it in the forward part of the ship? *Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *T. Cooper* and *Co.*, agents for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Tuesday, Feb. 6, 1900.

(Before the PRESIDENT and BARNES, J.)

THE RODNEY. (*a*)

ON APPEAL FROM THE COUNTY COURT OF NORTHUMBERLAND, HOLDEN AT NEWCASTLE-ON-TYNE.

Carriage of goods—Bill of lading—Exemption of shipowner from liability — Fault or error in the navigation or management of the ship—"Management"—Act of Congress, 13th Feb. 1893 (the Harter Act).

Goods were shipped under a bill of lading, which by incorporating the Harter Act exempted the shipowner from liability for "damage or loss resulting from fault or errors in navigation, or in the management of the ship" Owing to one of the crew negligently making a hole in a drainage pipe leading from the forecastle through the No. 1 hold to the bilge, in order to clear the forecastle of water which had been taken on board during heavy weather, and with which the forecastle was flooded, water found its way to the cargo in the No. 1 hold, whereby that cargo was damaged.

Held (reversing the decision of the County Court judge) that the act which caused the damage was done in the management of the ship, and that therefore the shipowner was exempt from liability.

The Glenochil (73 *L. T. Rep.* 416; 8 *Asp. Mar. Law Cas.* 218; (1896) *P.* 10) *followed.*

THIS was an appeal from a decision of the County Court judge at Newcastle, given on the 12th Dec. 1899.

The action turned upon the construction of a bill of lading, in which was incorporated the Act of Congress of the United States of America, 1893, commonly known as the Harter Act.

The circumstances under which the question arose were as follows: The plaintiffs, the American Export Coal Company, were the owners of the steamship *Rodney*. The defendant Thomas Richardson, a corn and flour factor, of Newcastle, shipped on board the *Rodney*, in good order and condition, under bills of lading dated the 14th and 17th Jan. 1899, certain quanties of wheat and maize. The *Rodney* was then at Baltimore.

On the 17th Jan. the *Rodney* left Baltimore for Newcastle, where she arrived on the 10th Feb. During her voyage she experienced very heavy weather, and her decks were frequently flooded. Upon arrival at Newcastle certain damage was found to have been sustained by the defendant's cargo, partly by water having found its way into the holds and partly from other causes. The defendant paid the plaintiffs the freight due for the carriage of the wheat and maize, less a sum of 40*l.* 18*s.* 9*d.*, to recover which the plaintiffs brought this action.

Four heads of damage were in fact alleged, but this report deals with the damage by wetting to the cargo in No. 1 hold. The other matters did not give rise to any point of interest.

The following facts were established in evidence. The *Rodney* was a well decked ship, with the entrance to the forecastle flush with the main deck. The vessel was fitted with a 2in. lead pipe leading from the forecastle through the No. 1 hold, to carry the drainage from the fore-

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

castle into the bilge. A syphon trap was placed immediately under the sink of the 2in. pipe, and the sink itself, in order to prevent solid matter getting into the pipe, was protected by a grating. During the voyage this pipe became choked, with the result that the water with which the forecastle was flooded during the bad weather could not get away, and the boatswain therefore in order to free the forecastle of water endeavoured to clear the pipe with a poker and hammer. While attempting to effect this purpose the boatswain drove a hole through the syphon trap, thus allowing the water from the forecastle to run down into the No. 1 hold, and it was in this manner that the cargo in hold No. 1 got damaged. The amount claimed in this respect was 18*l.* 2*s.* 1*d.*

The material paragraph of the bills of lading under which the cargo was shipped was as follows:

> Not accountable for the unseaworthiness of the vessel at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness). It is also mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February 1893 relating to navigation.

By sect. 3 of the aforesaid Act of Congress (the Harter Act):

> If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel.

The County Court judge gave judgment for the defendants on their counter-claim, holding that the act of the boatswain which caused the damage was not an act done in the "management" of the vessel.

The plaintiffs appealed.

Kilburn for the appellants.—The County Court judge was wrong. The act of the boatswain was an act done in the management of the vessel. *The Glenochil* (*ubi sup.*) decides the question in favour of the appellants. It was there held that "management" is a wider term than "navigation," and covers any act which is necessarily done in the handling of a ship, though in the particular case the handling is not properly done. He also referred to

The Ferro, 68 L. T. Rep. 418; 7 Asp. Mar. Law Cas. 308; (1893) P. 38;

Dobell v. *Steamship Rossmore Company*, 73 L. T. Rep. 74; 8 Asp. Mar. Law Cas. 33; (1895) 2 Q. B. 408;

Carmichael v. *Liverpool Sailing Ship, &c., Association*, 56 L. T. Rep. 83; 6 Asp. Mar. Law Cas. 184; 12 Q. B. Div. 242;

Good v. *London Mutual Association*, L. Rep. 6 C. P. 563

The Sylvia, 16th Feb. Reporter, 230.

[He was stopped by the Court.]

Scrutton for the respondents.—The County Court judge was right. The word management is capable of more than one meaning, and when stipulations of this kind in a bill of lading are vague or ambiguous, the rule is to construe them against the shipowner as being the party to put them forward:

Norman v. *Binnington*, 63 L. T. Rep. 108; 6 Asp. Mar. Law Cas. 528; 25 Q. B. Div. 475.

Here the conduct of the boatswain had nothing to do with the management of the ship as a ship. He was merely doing something to a part of the ship with an appliance belonging to the ship.

The PRESIDENT.—I think that this case is covered by the decision in the case of *The Glenochil* (*ubi sup.*). It goes a little way beyond that case, but the principles there laid down appear to me to apply. It goes a little beyond because undoubtedly in *The Glenochil* the act done was one which it was necessary to do for the direct purpose of the management of the ship. In that case the act consisted in water being run into the ballast tank for the purpose of stiffening the ship, and in so doing the engineer let water into the cargo. That was, as we thought in *The Glenochil*, an act which was part, at any rate, of the management of the ship. This case is a little different, but, to my mind, a very little. The vessel in this case experienced bad weather and the forecastle got flooded, and thereupon the boatswain, in order to clear the forecastle of water—principally no doubt because it formed his own quarters—proceeded to endeavour, as he thought, to clear a pipe, which if it had been clear would have carried off the water. But he did this negligently, for he made a hole in the pipe instead of clearing it of any obstacle. Was that an act done in the management of the ship? I think it was. The object was to clear the forecastle of water; that is to say, to render the forecastle habitable for the crew, in order to render the ship proper for the purpose for which it was designed. It appears to me to fall within the view taken in the case of *The Glenochil*. To put the matter in a very small compass, I think the court below has somewhat unduly limited the meaning of the word "management." The learned judge says: "The cases, I think, show that the words must be confined to the performance (though improper) or non-performance of such acts as are done or ought to be done for the safety of the vessel and for her maintenance in a seaworthy condition." I think that is too narrow a view. The acts need not be done merely for the safety of the vessel, nor for her maintenance in a seaworthy condition. If the meaning of the word be extended, as I think it should, to keeping the vessel in her proper condition, the act in this case, to my mind, falls within the definition, and the principle of *The Glenochil* covers this case.

BARNES, J.—I have practically nothing to add to what the President has said. It seems to me that the court below has unnecessarily confined the meaning of "management of the ship" in the way the president has pointed out. Practically there is very little difference, if any, between the case of *The Glenochil* and this case, except that in the case of *The Glenochil* there are to be found some expressions referring to the act as being done for the safety of the ship. Those expressions were not intended to limit the meaning of the words "management of the ship." It seems to me that they extend to the proper handling of the ship as affecting the safety of the cargo, and I agree with the president that the appeal should be allowed.

Solicitors for the plaintiffs, *Holman, Birdwood, and Co.*

Solicitors for the defendant, *King, Wigg, and Co.*, agents for *H. J. Richardson*, Newcastle.

HOUSE OF LORDS.

Feb. 12 *and* 13, 1900.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, MORRIS, SHAND, JAMES OF HEREFORD, and BRAMPTON.)

OWNERS OF THE MEDIANA *v.* OWNERS OF THE COMET; THE MEDIANA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Injury to lightship—Hire of substitute—Damages.

Whenever by a wrongful act another person is deprived of his property, a claim for damages may be sustained, and such damages are not merely nominal, though no actual pecuniary loss may be proved.

The Mersey Docks and Harbour Board are charged by statute with the duty of lighting the approaches to the Mersey, and maintain four lightships in constant use, and two in reserve to take the places of the others when they need repair or in other emergencies. One of the lightships, the C., *was damaged by collision with the* M., *a steamship belonging to the appellants. The collision was owing to the negligence of those in charge of the* M. *The* O., *one of the reserve lightships, took the place of the* C. *while her damages were repaired. The owners of the* M. *paid the cost of the repairs and all other out of pocket expenses, but the board made a claim for the loss of the use of the lightship* C. *while she was under repair, or for the hire of the substitute. It was admitted that the* O. *would not have been employed if she had not been acting as substitute for the* C.

Held (affirming the judgment of the court below), that they were entitled to recover substantial damages for the loss of the use of the C.

The Greta Holme (77 *L. T. Rep.* 231; 8 *Asp. Mar. Law Cas.* 317; (1897) *A. C.* 596) *followed.*

THIS was an appeal from a judgment of the Court of Appeal (Smith and Collins, L.JJ.), who had reversed a judgment of Phillimore, J. sitting in the Admiralty Division.

The case is reported in 80 L. T. Rep. 173; 8 Asp. Mar. Law Cas. 493; (1899) P. 127.

The action was brought by the respondents to recover damages in respect of a collision which occurred on the 23rd April 1898 between the appellants' steamship *Mediana* and the respondents' lightship *Comet*, which was then employed upon the Crosby station, off the river Mersey.

The respondents, the Mersey Docks and Harbour Board, the owners of the *Comet* and the *Orion* hereinafter mentioned, were a public body charged by Act of Parliament with the duty of lighting the approaches to the river Mersey, and kept six lightships, four of which were always in use on four stations, a fifth was kept to replace the lightships at such times as they were being overhauled, and the sixth was kept in the river Mersey in readiness to take the place of any lightship which might be damaged by collision or other accident. During the preceding twenty-five years there had been twenty-three cases of damage by collision with lightships, in eleven of which it was necessary to replace the lightship by the one kept in readiness in the river Mersey, and during the same period there had been four cases in which it was necessary to withdraw one of the lightships in consequence of damage not occasioned by collision. The expense of maintaining the sixth lightship, including interest on capital invested in her, was stated by the marine surveyor to the respondents to amount to about 1000*l.* a year. The *Orion*, the sixth lightship, took the place of the *Comet* after she had been damaged by collision, and it was admitted that during the seventy-four days on which she took the place of the *Comet* she was not required for any other purpose.

The appellants admitted their liability, subject to a reference to the district registrar assisted by merchants.

On the 3rd Dec. 1898 the appellants agreed with the respondents as to all the items of their claim except No. 8, loss of the use of the lightship *Comet*, or hire of the services of the lightship *Orion* on the station from the 23rd April 1898 to the 6th July 1898, seventy-four days at 4*l.* 4*s.*, 310*l.* 16*s.* The appellants agreed that the amount claimed in respect of this item was correct, if such claim was recoverable.

The admitted items of claim covered all the actual out of pocket expenses to which the respondents were put by reason of the substitution of the *Orion* for the *Comet*, and the only question in dispute was whether the respondents were entitled to be paid for the loss of the use of the *Comet* during the seventy-four days during which she was under repair, or were entitled to hire of the *Orion* which took her place. It was contended on behalf of the appellants that inasmuch as the work of the *Comet* was performed by the *Orion*, another of the respondents' lightships, which would not have been otherwise employed, the respondents sustained no loss or damage in respect of their not being able to use the *Comet*, and that they were not entitled to any hire for the use of the *Orion* as they expended no extra money and sustained no loss or damage through not having the use of her owing to the collision, and that it was immaterial whether she was merely laid up at anchor in the river Mersey, as it was stated she generally was, or placed on an anchorage as a lightship, and, further, that if the claim was admitted, the respondents would actually, through the happening of the collision, obtain a profit which they would not otherwise have received, and that they could not legally do so.

It was contended on behalf of the respondents that they were entitled to compensation for the loss of the use of the *Comet* whether or not they could in fact show any actual loss or expense, and, further, that, inasmuch as they had spent moneys in anticipation in providing a spare lightship to replace others damaged by collision, they were entitled to remuneration for the use of the *Orion* when she was replacing the *Comet*.

The reference was heard before the district registrar on the 8th Dec. 1898, and by his report, dated the 12th Dec. 1898, he allowed the item No. 8.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The appellants carried in notice of objection to the registrar's report, and Phillimore, J. allowed the objection, but his decision was reversed by the Court of Appeal as above mentioned.

J. Walton, Q.C. and *Horridge* appeared for the appellants, and contended that the case of *The Greta Holme* (77 L. T. Rep. 231; 8 Asp. Mar. Law Cas. 317; (1897) A. C. 596), upon which the court below relied, was distinguishable. The respondents were put to no additional expense by having to use the *Orion*, and therefore they are not entitled to any compensation. They cannot be allowed to make a profit out of it. The case of *The City of Peking* (63 L. T. Rep. 722; 6 Asp. Mar. Law Cas. 572; 15 App. Cas. 438), before the Judicial Committee of the Privy Council, is exactly in point. They also cited

The Clarence, 3 Wm. Rob. 283;
The Munster (1899) P. 129, n;
The Emerald, 80 L. T. Rep. 178, n; 8 Asp. Mar. Law Cas. 498, n.; (1899) P. 130, n.

Carver, Q.C., *B. Aspinall*, Q.C., and *Maurice Hill*, who appeared for the respondents, were only called upon to distinguish the case of *The City of Peking* (*ubi sup.*).

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: This case, I think, is really governed by the principles laid down by this House in *The Greta Holme* (*ubi sup.*). in which it was pointed out that the respondents were deprived by the negligence of the appellants of the use of their dredger, and were entitled to the damages awarded. Lord Watson pointed out in that case that the result of the withdrawal of the dredger from its ordinary work was the accumulation of a considerable amount of silt which in itself was an injury sounding in damages. That decision has a much wider application than has been assigned to it by the appellants' counsel, and Lord Herschell in terms stated the proposition, and I may say that I myself intended to lay it down, that where by a man's wrongful act something belonging to another was injured or taken away, a claim for damages may be sustained, and that the damages in such a case are not merely nominal. Damages are not necessarily nominal because they are small in amount. The term "nominal damages" is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect to which a man is entitled to judgment. But the term "nominal damages" does not mean small damages. The whole region of inquiry into damages is one of extreme difficulty, and you cannot lay down any fixed principle to a jury as to the amount of compensation which ought to be given. Take the most familiar and ordinary case. How is anyone to measure pain and suffering caused by an accident in terms of moneys counted? By a manly mind pain and suffering, when passed, are soon forgotten, but the law recognises that as a topic upon which damages may be given. In this particular case the broad proposition is that the respondents were deprived of their vessel. I purposely do not use the words the use of their vessel. For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived. Suppose, for example, someone went into my house and took away a chair and retained it for some months, could anyone say that I as owner am entitled to no reparation on the ground that I have other chairs or that I was not in the habit of sitting upon that particular chair? The jury's task is often a difficult one in cases of that character, and an arbitrator or jury often has to take an artificial hypothesis; such as in the case to which I have referred what it would cost to hire such a chair. The broad principle applicable to this appeal is quite independent of the particular use which the respondents would make of the *Comet*. It is wholly different from a case of special damage, where you have to ascertain the specific loss of profit or other advantage which would otherwise have accrued. Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have an opportunity of inquiring into the details before the case comes into court In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter. That broad principle comprehends this and many other cases, and the jury may assess damages which are not nominal damages though the amount may be trifling. It appears to me, therefore, that what the learned Lords in *The Greta Holme* intended to point out—and Lord Herschell gives expression to it in plain terms—was that the unlawful keeping back what belongs to another person is a ground for real and not nominal damages. I put aside the question of trespass, involving high-handed procedure or insolent behaviour, and other cases which have been held to entitle to aggravated and punitive damages. The principle of assessing damages must be the same in all forms of the unlawful detention of another man's property. That seems to me so plain that I have been puzzled to learn that in the Admiralty Court the loss of the use of this vessel has been treated as something for which no money damage can be allowed. I am glad that such a principle has not been affirmed in your Lordships' House, as it seems to me inconsistent and unreasonable.

The only difficulty I have had is in connection with the decision in the Privy Council in *The City of Peking* (*ubi sup.*). But I have, I think, discovered a clue to the real grounds of the judgment in that case. It is to be observed, in the first place, that there is a difficulty in understanding the decision of the Judicial Committee without the report of those persons who had to assess the damage. Their report, so far as quoted, is not a model of clearness. The principle of the decision in *The City of Peking* appears to be that you could not be paid for the detention of the damaged vessel when allowance was already made for the use of the substituted one, because you would be paid twice over. If that is the real principle of the decision it is not inconsistent with but is on the same lines as the judgment of the Court of Appeal in the present case. Whether the question was raised as to the absolute use of the vessel I am not able to say. Therefore, to my mind, that case affords no difficulty in arriving at the conclusion that the judgment ought to be affirmed, and I move your Lordships accordingly.

Lord MACNAGHTEN.—My Lords: I concur. I took part in the hearing of *The City of Peking*, but I cannot pretend to remember very accurately whether this question was or was not directly raised. My impression, however, distinctly is that the present question was not involved in that case. In that case the parties admitted that the substituted service was provided at the expense of the wrongdoers, and that there had been no loss of profit whatever. They claimed an extravagant sum for demurrage on the authority of *The Black Prince* (Lush, 568), but their Lordships had no hesitation in rejecting that claim, because that would have been paying them twice over. I observe that *The City of Peking* was not cited in the Court of Appeal.

Lord MORRIS.—My Lords: I am of the same opinion. I think that this case entirely comes within the principle in *The Greta Holme*, which overruled the principles of previous cases as regards the mode of assessing damages.

Lord SHAND.—My Lords: I entirely concur with the motion of the Lord Chancellor. It was established that the *Orion* was kept expressly for the purpose of meeting such a contingency as happened. It appears that no fewer than eleven cases have occurred during the last twenty-five years in which a substitute has been called for to replace lightships damaged by collision on the Mersey. If the Mersey Commissioners had hired a ship for the purpose of doing the duty for which this sixth vessel was kept, there could be no answer to the claim for the cost of hire. It seems to me, therefore, if there be no answer in that case neither can there be any to this.

Lord JAMES OF HEREFORD.—My Lords: I entirely concur. I think that there is a distinction between the case at the bar and the one determined by the Privy Council arising from the fact that in this case there has been expense incurred in providing the very remedy supplied in order to get rid of the effect of the act of the wrongdoer, while in *The City of Peking* there was no expense incurred in order to remedy the injury.

Lord BRAMPTON.—My Lords: I am of the same opinion. I desire to say one word with regard to the *Orion*, which was the substituted vessel built and maintained at great expense so that the respondents might have the means ready to obviate the inconvenience or danger which might arise from such a misfortune as befell the *Comet*. As between themselves and the wrongdoer, they were under no obligation whatever to use the *Orion*. They might have hired a vessel, in which case the liability for the hire would have been clear. Why should the appellants claim a right to have the services of the *Orion* gratuitously? They might as well claim the services of the skilled workmen employed by the respondents who happened at the moment to be idle. That cannot be the law. In my opinion the services of the *Orion* in this case ought to be paid for in the shape of damages.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *T. Cooper* and *Co.*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitors for the respondents, *Rowcliffes, Rawle*, and *Co.*, for *A. T. Squarey*, Liverpool.

April 1 *and* 3, 1900.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, MORRIS, DAVEY, BRAMPTON, and ROBERTSON, with Nautical Assessors.)

OWNERS OF THE GANNET v. OWNERS OF THE ALGOA; THE GANNET. (a)

Collision—Second anchor light—"At or near the stern"—Regulations for Preventing Collisions at Sea 1897, *art.* 11.

It is not a compliance with art. 11 *of the Regulations for Preventing Collisions at Sea* 1897, *which provides that a ship of* 150*ft. or upwards in length shall, when at anchor, carry a second anchor light "at or near the stern of the vessel," to exhibit a light at a distance of* 120*ft. from the stern. Where the lights of a vessel are not exhibited in the position required by the collision regulations it is necessary for her to establish beyond all doubt that the light was in such a position that it ought to have been seen by the other vessel before the court will find the other vessel in fault for bad look-out.*

THIS was an appeal from a judgment of the Court of Appeal (Smith, Williams, and Romer, L.JJ.), reported in (1899) P. 230, who had varied a decision of Bucknill, J. sitting in Admiralty.

On the 19th Nov. 1898, at about 4 a.m., the screw steamship *Algoa* of 7575 tons gross register was at anchor in the river Elbe off Brunshausen. The wind was south-easterly and fresh, and the weather was gloomy. The tide was the first of the flood. The *Algoa*, which was 455ft. long, was swinging to her anchor very slowly, owing to the sluggish tide and the direction of the wind. She was heading across the channel to the northward, with her starboard side up the river, and her stern about 200 yards from the south shore. She had at the time a globe anchor light hanging in the forestay forward, 38ft. from the deck, and a second light aft, hanging on the inside of the foreshroud of the port main rigging, 20ft. from the deck and 120ft. from the stern.

Under these circumstances the *Gannet*, a steamship of 1246 tons gross register, coming down the river on a voyage from Hamburg to London, ran into her and struck her on the starboard side, about 20ft. forward of the mainmast, doing considerable damage.

The owners of the *Algoa* brought an action against the owners of the *Gannet* for the damage caused by the collision.

Those in charge of the *Gannet* stated that they saw the forward light of the *Algoa* at the distance of about a mile slightly on the starboad bow, and assumed that the *Algoa* was riding head to tide, and only observed the second light and the actual position of the *Algoa*, across the river, when it was too late to avoid the collision though all possible efforts were made to do so.

They contended that the *Algoa* had infringed art. 11 of the Regulations for Preventing Collisions at Sea 1897, which is as follows:

A vessel of 150ft. or upwards in length when at anchor shall carry in the forward part of the vessel, at a height not less than 20ft. and not exceeding 40ft. above the hull, one white light . . . and at or near the stern of the vessel, and at such a height that it shall not

(a) Reported by C. E MALDEN, Esq., Barrister-at-Law.

be less than 15ft. lower than the forward light, another such light. . . .

They argued that a light 120ft. from the stern was not "at or near the stern" in compliance with the regulation.

For the *Algoa* it was contended that the position of the light could not have contributed to the collision, as the ship was struck between the lights; and, further, that the second light ought to have been seen sooner, and the *Gannet* was guilty of contributory negligence in not keeping a good look-out.

The case was tried before Bucknill, J. sitting in Admiralty, with nautical assessors, in April 1899, and the learned judge found the *Algoa* alone to blame, and gave judgment for the defendants, the owners of the *Gannet*.

The plaintiffs appealed, and in May 1899 the Court of Appeal, with nautical assessors, found both vessels to blame.

The owners of the *Gannet* appealed to the House of Lords, and the owners of the *Algoa* entered a cross-appeal,

J. Walton, Q.C., *Laing*, Q.C., and *Batten* appeared for the original appellants, the owners of the *Gannet*.

Cohen, Q.C., *Aspinall*, Q.C., and *Bateson*, for the owners of the *Algoa*, admitted that they could not argue the cross-appeal, and that the only question was whether the *Gannet* was in fault.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: [After going through the facts as set out shortly above, his Lordship continued as follows:] I think that the parties have shown good sense in not contesting what was incapable of being contested, and therefore not arguing the cross-appeal, which, of course, will be dismissed. The question between the two vessels is, I think, narrowed to a comparatively small one, whether or not the light which by the regulations ought to be exhibited by the *Algoa*, which was at anchor, was in such a position that it could be seen by vessels approaching from above. That question is a pure question of fact, and in view of the difference of opinion which prevailed in the courts below, and indeed in your Lordships' House, as to the advice given by the nautical assessors, I think it right to say that it does not appear to me to be a matter of nautical skill at all, nor, indeed, has it anything to do with any particular technical skill. It is a question of the balance of testimony with reference to certain known principles under which all questions of fact are weighed and considered in courts of law. Although I myself should place considerable reliance on the judgment of the nautical assessors with reference to any mere technical manœuvre for the purpose of avoiding some pending accident by some nautical arrangement, I confess that in dealing with a mere question of fact to be determined by the weight and balance of evidence I do not surrender my own judgment to that of the gentlemen who are good enough to assist the courts with their nautical skill. I am fortified in that view by the fact that the learned judge who tried the case appears to have surrendered his own view to that of the nautical assessors. The judges in the Court of Appeal appear to have done the same thing, although the nautical assessors in the two courts were entirely in conflict with reference to that question. I thought it right to propound this question to the nautical assessors who assisted your Lordships. "What is the view of the assessors as to the possibility or probability of the second light on the *Algoa* being seen by those on board the *Gannet*," to which the reply was, "We think that the light ought to have been seen." That seemed to be somewhat ambiguous, so I repeated the question and received the same answer. Paying all respect to the gentlemen who assisted your Lordships, I think that the tendency of their opinions rather suggested that the light was in such a position that but for the negligence of the look-out it would and ought to have been seen by those on board the *Gannet*. I have great respect for that opinion, but I cannot surrender my judgment to it. I am the less disposed to do it from what I see in the judgment of Romer, L.J., that he took the same view as I do, but he attributed his view to the nautical assessors. In the conflict of the assessors, it is clearly the duty of a judge to form his own opinion. As the question is narrowed to that which I propounded to the nautical assessors, it appeared to me that the balance of testimony was greatly in favour of the *Gannet*. I therefore move that the judgment of the Court of Appeal be reversed, and the original judgment of Bucknill, J. restored. You have not to rely on the unaided testimony of those on board the *Gannet*. According to the statement of the chief mate of the *Lisette*, which was following the *Gannet* in the Elbe, he never saw the second light until he was obliged to starboard his helm suddenly, and in doing so ran aground. The *Algoa* was lying athwart the channel. In such circumstances vessels at anchor on a dark night should have thought it essential to take good care that the lights, which were the only guidance, should be in their proper position. It cannot be denied that the *Algoa* was in default in that respect. The light was either 100ft. or 120ft. forward of the stern, and therefore was not in compliance with the rule. That has been fairly and properly admitted by those in charge of the interests of the *Algoa*. There is not the smallest evidence of any absence of care on the part of those on board the *Gannet*. There is a concurrence of testimony on both the *Gannet* and the *Lisette* that the crew did not see the second light. Counsel boldly, when they say they saw the first light but did not see the second, ask your Lordships to disbelieve that they saw the first light at all. That is the logical mode of dealing with the difficulty, but are you prepared to accept that? It seems to me a very bold statement to ask us to disbelieve these people. It is a canon which anyone familiar with courts of law will admit that because evidence differs it is not necessary to imagine that witnesses are perjuring themselves. Those on board the *Algoa* could not know if the light could be seen on the *Gannet*. Those on board the *Gannet* and the *Lisette*, which is more important, say that they saw the one light and not the other. When you put together bits of testimony of that sort, and couple it with the fact that undoubtedly the light was in an unusual position, it appears to me that there is an overwhelming body of testimony in favour of the view of the *Gannet*. Although that is the view which I entertain, that is an under-statement of the

case, because it lays upon those who are at fault to make out beyond all doubt that the light was in such a position that it must have been seen. Looking at all the facts in combination, it appears to me beyond all doubt that they have not satisfied the burden upon them, and therefore they must fail. The question of a judge having seen the witnesses and having had an opportunity of judging whether they spoke the truth or not is generally a very important one. I am not certain that either side can rely upon that position, because I am bound to admit that the judge who tried the case indicates a tendency not to act upon the testimony of the witnesses, but he did so act, and gave judgment for the *Gannet*. That he should have yielded in that respect to the views of the nautical assessors is not absolutely satisfactory to me, as it shows that he had not a very strong conviction either way, Therefore I am not overwhelmed by the fact that the judge saw and heard the witnesses. In the result I think that the reasonable conclusion is that the vessel athwart the stream having her lights in an unusual and admittedly improper position was the vessel to blame. But it is enough to say that it was the duty of the *Algoa* to make out the proposition, which I think that they have failed to make out. I therefore move that the judgment be reversed, and the respondents pay to the appellants the costs both here and below.

Lords MACNAGHTEN, MORRIS, DAVEY, BRAMPTON, and ROBERTSON concurred.

Judgment of the Court of Appeal reversed. Judgment of Bucknill, J. restored. Respondents to pay to the appellants the costs in this House and in the courts below.

Solicitor for the appellants, *William Batham.*

Solicitors for the respondents, *Pritchard* and *Sons*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Dec. 14, 15, 16, 20, 1899, *and Feb.* 17, 1900.

(Present: The Right Hons. Lords HOBHOUSE, DAVEY, and ROBERTSON, and Sir RICHARD COUCH.)

FORMAN AND CO. PROPRIETARY LIMITED v. SHIP LIDDESDALE. (a)

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Shipwright—Contract for repairs—Lump sum—Variation—Authority of master and agent—Acquiescence—Necessaries.

The plaintiffs contracted with the defendant's master at a foreign port to effect certain repairs to the steamship L., *for a lump sum. These repairs were strictly limited to those necessitated by the vessel having stranded. It was also agreed that the plaintiffs should state schedule prices for any work required to be done in addition to the contract repairs. The plaintiffs never executed the contract repairs, but they claimed the lump sum, alleging that they had done the equivalent thereof, or something better, and that they had the authority of the master for the variation. They also claimed for extra work at schedule prices. The master's authority to contract was to the plaintiffs' knowledge limited to repairs of the stranding damage.*

Held, that as the contract for the lump sum, being an entire one, had not been executed, and as the master had no authority to vary it, the plaintiffs could recover nothing under the contract.

Held, further, that the fact that the shipowner had taken the ship as repaired did not amount to an acquiescence in the variation.

Appleby *v.* Myers (16 *L. T. Rep.* 669; *L. Rep.* 2 *C. P.* 651) *followed.*

THIS was an appeal from part of a decree of the Vice-Admiralty Court of Victoria, dated the 5th May 1898, whereby it was pronounced that the sum of 1700*l.* 18*s.* 5*d.* only was due to the appellants for necessary materials, work, and repairs other than those supplied and executed under a contract, dated the 10th Dec. 1896, the terms of which, so far as is material, are set out in their Lordships' judgment; and that nothing was due in respect of such materials, work, and repairs as were supplied and executed under and in pursuance of such contract.

The appellants having executed, under the circumstances stated in the judgment, certain repairs to the steamship *Liddesdale*, began this action on the 8th Feb. 1897 by writ of summons, claiming 15,567*l.* 8*s.* 9*d.* for necessaries supplied and repairs done to the *Liddesdale*, or a sum exceeding by 9571*l.* 18*s.* 9*d.* the lump sum of 5995*l.* 10*s.* mentioned in the contract of the 10th Dec. 1896. By paragraph 4 of the petition the appellants alleged:

The said materials were so supplied and the said work and repairs executed partly under and in pursuance of a written contract, consisting of a tender in writing by the plaintiffs, dated the 8th Dec. 1896, to do certain portion of the works and supply certain portion of the said materials, in accordance with certain writen specifications and conditions referred to in such tender (which tender was accepted in writing by the master upon the 10th Dec. 1896), partly in accordance with certain schedule rates referred to in the documents hereinbefore mentioned, and partly in pursuance of orders given by the master during the progress of the contract works to do certain other works not mentioned in the contract.

The amounts claimed under each head of the appellants' claim were as follows:

	£	s.	d.
I. Contract for repairs	5,995	10	0
II. Work not included in contract, but claimed under schedule rates	6,847	12	6
III. Other repairs	2,724	6	3
Total claim	£15,567	8	9

The answer of the respondent (the owner of the ship) was as follows: (1) As regards the lump sum contract, that the appellants had not performed their contract. (2) As regards the schedule rate repairs and (3) the other repairs, that they were not necessaries, and that they were not ordered by anyone having authority on behalf of the owner.

The respondent further pleaded that, so far as the plaintiffs' claim related to extras, there were no written orders or prices agreed as required by the conditions of the written contract which the parties had entered into.

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

By their reply the appellants alleged that all deviations, alterations, and extras were acquiesced in and ratified and approved by the respondent, which averment was denied by the respondent in his rejoinder.

The Chief Justice on the evidence accepted the respondent's contentions, and, being further of opinion that there had been no holding out by the respondent of any person as having authority to order the deviations from the specifications above mentioned nor any ratification or acquiescence in the deviations by the respondent, he held that the appellants were not entitled to recover the contract price or any part of it. He also disallowed certain items, one on the ground that the work done was a deviation from the specification which had not been authorised in writing pursuant to clause 8 of the contract. He disallowed other works claimed for on the ground that they were not necessaries within the implied authority of the master to order, and that clauses 8, 23, and 24 of the specification, so far as they purported to enable the respondent's agent to incur expenditure beyond 6000*l.* or for repairs not caused by the stranding, were unauthorised although a regular order in writing was given for them. Claims for extras outside the scope of the specification were also disallowed.

Carver, Q.C. and *Mansfield*, for the appellants, contended that the contract of the 10th Dec. 1896 was binding on the respondent as having been made by a duly authorised agent. The master of the ship had express authority to enter into that contract and bind thereby the owner of the ship; if not actual, he had apparent authority, and, further, the respondent acquiesced in and ratified the contract. With regard to the master's general authority to order necessaries, and as to what are necessaries, see

Webster v. *Secamp*, 4 B. & A. 352;
The Riga, 26 L. T. Rep. 202; 1 Asp. Mar. Law Cas. 246; L. Rep. 3 A. & E. 516.

Mondel v. *Steel* (8 M. & W. 858) is an authority that when a contract is for a lump sum, proof of a breach of contract was only ground for deducting from the agreed price the difference between the value of the ship as she was at the time of delivery from what she would have been if the contract had been duly performed. See also

Tharsis Sulphur Company v. *McElroy*, 3 App. Cas. 1040.

The departures from the specifications by the appellants were sanctioned by the master and surveyors who inspected the work on the respondent's behalf as it went on, and no objection to the manner in which the work was being done was taken by them. By the terms of the contract the sanction of the surveyors to alterations in detail was not necessarily to be given in writing. Even if the appellants were not entitled to the contract price, they were entitled to payment for the value of the work done of which the respondent had accepted the benefit, having taken over the ship and sold her with her value enhanced by her having been repaired by the appellants. As to the authority which it should be implied in the agent from the conduct of the parties and the nature of the business, see

De Bussche v. *Alt*. 38 L. T. Rep. 370; 3 Asp. Mar. Law Cas. 584; 8 Ch. Div. 286, 310.

And as to the powers of the master of a ship, see

The Karnak, 18 L. T. Rep. 661; L. Rep. 2 A. & E. 289, 300;
The Albert Crosby, L. Rep. 3 A. & E. 37.

Counsel also referred to

Appleby v. *Myers*, 16 L. T. Rep. 669; L. Rep. 2 C. P. 651;
Munro v. *Butt*, 8 E. & B. 738;
Sumpter v. *Hedges*, 78 L. T. Rep. 378; (1898) 1 Q. B. 673;
Bartlett v. *Stanchfield* (1889) 148 Mass. Rep. 394;
Burn v. *Miller*, 4 Taunt. 745; 14 R. R. 655.

Joseph Walton, Q.C. and *English Harrison*, Q.C. (with them *Leck*), for the respondent, contended that the evidence showed that the appellants did not perform the written contract so as to become entitled to the price stipulated. As to the lump sum, it was shown that in many important respects the appellants had failed to carry out the work which was necessary to entitle them to payment. For instance, they failed to renew twenty steel shell plates, and merely straightened the old bent plates and put them back, and in other details the appellant had failed to put in work in accordance with the specification. The evidence also proved that no one had authority to order or allow these alterations or deviations from the contract, and no order in writing as stipulated by the specification was ever obtained in respect of them. It was also proved that the repairs to the girder plates were so done as to substantially alter the original design of the ship contrary to the provisions of the contract, and that there had been no acquiescence, acceptance, or approval by the respondent of any of the alterations or deviations from the terms of the contract. The other repairs under the schedule rates were not necessaries, nor were they repairs due to stranding damage, which alone was compulsory or desired by the respondent, and neither the master nor any other person had authority to order such repairs to be done. Having regard to the terms of the appeal, no question arises now as to any repairs done except as to those done under the written contract, and as to these the court below was right in holding that nothing was due, for neither the materials nor the work was supplied in pursuance of the contract. They cited

Monro v. *Butt* (*ubi sup.*);
Thomas v. *Lewis*, 39 L. T. Rep. 669; 4 Ex. Div. 18
Sumpter v. *Hedges* (*ubi sup.*);
Sinclair v. *Bowles*, 9 B. & C. 92;
Arthur v. *Barton*, 6 M. & W. 138;
Gunn v. *Roberts*, 30 L. T. Rep. 424; 2 Asp. Mar. Law Cas. 250; L. Rep. 9 C. P. 331.

Carver, Q.C. replied. *Cur. adv. vult.*

Feb. 17.—Judgment was delivered by

Lord HOBHOUSE. — This suit is in form a proceeding in the Vice-Admiralty Court to make the ship *Liddesdale* answerable for the cost of repairs executed upon her. In substance it does not differ from other litigations between one who has done work on a chattel, and the owner of the chattel who denies his liability to pay for it. The plaintiffs, now appellants, are a joint stock company, who carry on the business of building and repairing ships at Melbourne. The *Liddesdale*, the nominal defendant and respondent, is a

British steamer built of steel. The real defendant, her owner, is Mr. Robert Mackill, surviving partner of a firm of merchants carrying on business in Glasgow. Her master was Captain Alexander Clark. In the month of Oct. 1896 the ship ran aground off the coast of West Australia, but she was got off, and continued her voyage to several West Australian ports. Having then discharged her cargo, she made for Sydney to get a fresh one, but on the way put into the harbour of Melbourne, which she reached on the 25th Nov. When there she was examined by the Marine Board of Victoria, who detained her and required that the damage done to the structure of the vessel by her stranding should be repaired before she could be allowed to depart. That led to a correspondence between Captain Clark and the defendant, out of which arises the material question in the suit—viz., what authority was vested in the ship's master. The messages which passed are set out consecutively and in the most convenient form in the judgment of the learned judge below. They have been read frequently during the argument, and need not be quoted at length now. The defendant was very anxious that nothing should be done to the ship beyond what would enable her to come safely home with a cargo, such as replacement of broken plates and so forth, and he forbade Clark to make contracts before being authorised to do so. Clark, on the other hand, informed him that Lloyd's agent and the Marine Board held that more permanent repairs were necessary for safety. Upon this the defendant sent a message, dated the 6th Dec.: "Arrange as best you can permanent; must do nothing whatever beyond repairing stranding damage." In the meantime Clark had got specifications of the work necessary to repair the stranding damage, and had advertised for tenders. The plaintiffs' tender was the lowest. An interview took place on the 8th Dec. between Mr. Forster, the managing director of the plaintiffs, and Captain Clark and Mr. Brodie, who represented the firm of Sanderson and Co. That firm acted as the defendant's agents in the matter of the *Liddesdale*, and in their office all the negotiations took place. There is no discrepancy in the accounts of this interview. Some discussion took place as to a schedule of prices for possible additional work; and when that had been settled Clark and Brodie informed Forster that they could not accept the plaintiffs' tender without authority from home, but that they would recommend it. Brodie and Clark cabled at once to the defendant: "Lowest reliable tender 6000*l.* Twenty days. Repairs commence acceptance tender." On the 10th the defendant replied: "Contract with Lloyd's agent's approval. Twenty days, payment must be accepted by contractor, in banker's guaranteed drafts, ninety days' sight, on Clydesdale Bank, London." The parties met again at Sanderson's office after receipt of the message of the 10th. All agree that Mr. Warne, the secretary of the plaintiffs' company, objected to the mode of payment stipulated for by the defendant, saying that the payment ought to be in cash, but that his objection was overcome and the contract then signed. Clark adds that when Warne's objection was made he answered it by saying: "That is all the authority I have." By the terms of the contract the plaintiffs undertake to effect repairs as per specifications for the sum of 5995*l.* 10*s.* in twenty working days The repairs specified are strictly confined to the damage by stranding. By clause 14 it is said that "this contract to repair and renew shall mean that the vessel shall be restored in every respect to her original condition prior to the accident." There are two clauses relating to repairs not specified, which have been the subject of a great deal of discussion both in the court below and at this bar. They run as follows:—Clause 8: "The contractor shall not make any alteration or deviation from the specification agreed upon, nor shall he be entitled to make any charge or claim for extras or for anything whatever beyond the lump sum agreed upon, unless he obtain the written sanction of the captain or his agents at the time of making such additions or alterations, which shall be at a price agreed upon." Clause 23: "The contractor to state schedule prices as follows for any work that may be required to be done in addition to what is attributable to damage—that is to say, for any repairs due to deterioration in water ballast under boilers." The claim made by the plaintiffs is divisible into three portions. First, they claim the lump sum mentioned in the contract. Secondly, they claim for the extra work at the schedule rates stated by them under clause 23 of the contract. And, thirdly, they claim for extra work not specified in the contract at all, but done in pursuance of orders given by Clark during the progress of the work, and said to be authorised either by his inherent authority or by virtue of clause 23 in the contract. The whole sum claimed is 15,567*l.* and a fraction. As regards the first portion of the claim, the defendants say that the lump sum was never earned because the stipulated work was not done; and, indeed, the plaintiffs do not assert that it was. What they allege on this point is that the equivalent of the stipulated work, or something better, was done, and that they had authority for the variation. As regards the second portion, the defendant insists that Clark did not order the work, and that, if he had done so, he had no authority to do it. As regards the third portion, there has been a separate dispute on each item with respect to its necessity for the liberation or for the safety of the ship, and with respect to Clark's orders for it, whether given in fact and whether binding on the defendants in law. The learned judge below disallowed the whole of the two first portions of the claim. Of the third portion, after detailed examination, he allowed items amounting to about 1700*l.* and disallowed the rest. The defendant put in counter-claims for penalties on account of demurrage and for damages, but all were disallowed. The third portion of the plaintiffs' claim, which was the subject of a great deal of argument during the opening of this appeal, may be disposed of at once. The defendant meets it by the preliminary objection that it is not the subject of appeal; and in this their Lordships agree with him. The decree is as follows: "The judge having heard counsel for the plaintiffs and the defendant respectively pronounced the sum of one thousand seven hundred pounds eighteen shillings and fivepence (1700*l.* 18*s.* 5*d.*) to be due to the plaintiffs in respect of that part of its claim which claimed for necessary materials, work, and repairs other than those supplied and executed under or in pursuance of the written

contract and conditions and specifications mentioned in paragraph 4 of the petition together with the costs of the action up to the nineteenth day of May 1897 and pronounced that nothing was due in respect of such materials, work, and repairs supplied and executed under and in pursuance of such written contract and conditions and specifications and he condemned the defendant and its bail in the said sum and in such costs as aforesaid." This decree bears date the 5th May 1898. On the 30th May the plaintiffs gave the notice which is the foundation of this appeal: "Take notice that Forman and Co. Proprietary Limited plaintiff appeals from so much of the decree of the judge of said court made the fifth day of May 1898 as pronounced that nothing was due in respect of materials, work, and repairs supplied and executed under and in pursuance of the written contract and conditions and specifications mentioned in paragraph 4 of the petition and as deprived the plaintiff of costs. Dated the thirtieth day of May 1898." It is quite clear that the appellants were then satisfied with the decree except as regards the contract with its conditions and specifications, and the claims arising thereunder; that they did not intend to appeal as to that which lay outside the contract, and that the defendant has been right in avoiding discussion of this part of the controversy, both in his lodged case and at the Bar. As regards the work done, no doubt exists but that it was good work and that it added value (how much it is impossible to say) to the ship, which after release from arrest was sold for upwards of 18,000*l.* Indeed, the defendant tendered the sum of 4786*l.* 10*s.* on the 19th May 1897, and on the plaintiffs' refusal paid that sum into court. As the litigation proceeded, however, and the defendant learned more of the details of the case, he was led to dispute more of the plaintiffs' claims, with the result above mentioned. This will be the convenient place to state their Lordships' view of the authority possessed by Captain Clark, because both on the first portion of the claim, and on the second portion, the question of the validity of an order is continually mixed up with the question of fact whether or no it was given, and because for every failure to comply with the contract and for every excess of work beyond the specified repairs the plaintiffs seek to shelter themselves under the authority of Clark either directly given, or given through Mr. Watson, who was Lloyd's agent. It is true that instructions conveyed by cable in abbreviated language or by artificial and cryptic symbols are open to doubts and disputes. In this case the learned judge has pointed out that the message of the 10th Dec. 1896 is susceptible of various meanings. But connecting it with the whole series the meaning is reasonably clear. It means that Clark is to contract on the footing mentioned in his last message of the 8th, provided that the tender is approved by Lloyd's agents; and with the addition, that the payment is to be made by draft. And it is made clear by the defendant's message of the 5th that the tender, though it may provide for repairs of a permanent character, is not to provide for the repair of any damage except the damage by stranding. Clark then was limited, in respect of price to 6000*l.*, in respect of the nature of repairs to stranding damage, in respect of time to twenty days, and in respect of judgment on details to things approved by Lloyd's agent. Within these limits it seems to their Lordships that Clark was free to contract, and that where he was free to contract he might vary the contract as might be found expedient in the progress of the work. But he could not transcend the limits imposed upon him by his principal. As regards the most important of these limits it is clear that the defendant had an eye not only to expense which he says is excessive in Melbourne, but to the liability of the underwriters, and attached great importance both to the approval of Lloyd's agent, and to the complete separation of stranding damage, for which the underwriters would be liable, from other damage for which they would not be liable. The plaintiffs contend that they are not bound by all that passed between the defendant and his agents in Melbourne, that they knew nothing of such matters except the message of the 10th Dec., which apparently gave Clark a free hand to make any contract whatever subject only to the approval of Lloyd's agent, and to the conditions respecting time and the mode of payment. The answer is that Clark had refused to make a contract except such as his principal might authorise; that the plaintiffs knew that Clark and his principal were in correspondence by cable; they knew that the message of the 10th was in answer to Clark's advice of their tender sent on the 8th; if they did not really know the extent of Clark's authority it was their business to learn it; and thus whatever restrictions existed between Clark and his principal were equally binding as between his principal and the plaintiffs. Now, that the plaintiffs have not done the work specified by the contract is undisputed. The learned judge mentions four matters in which they have failed. Two of them are apparently trivial, and such as would not by themselves have any greater effect than to give the defendants a cross-claim if damaged by the variation. The other two are much more important. Under clause 15 the plaintiffs were bound to renew twenty of the injured steel shell plates, and to straighten thirty-seven others, or, if they would not bear straightening, to renew them at a stated price. This work of renewal the plaintiffs never did, and never could have done, at least within the twenty days, and never intended to do. Forster says: "Such plates could not be obtained in this country; the only means of getting them would be from England. . . . It certainly looked a bit awkward for us if we had to carry out our contract as to renewing plates as they were not to be got here. If the surveyor stuck out and refused us time to straighten out old plates and put them on instead of renewing, it would have been very awkward for us. . . . We calculated we would not have to carry out our contract fully. I see in estimate, we charge twenty plates to be renewed; we thought we could get out of that, and so kept price pretty low." The plaintiffs had not any kind of authority for this variation. The two persons from whom they claim to have received authority for some other unspecified work were—first, Captain Clark; and, secondly, Mr. Watson, Lloyd's agent. Forster says: "In January I went with Watson, explained how the plates were coming in. Clark was staying at Malvern. I said: 'I think all the plates will work

in and straighten well.' He said: 'That is first rate.' . . . After contract signed I had no conversation with Watson, as to replacing the straightened plates, instead of new ones. I later on told Clark I was putting them on. This was all that occurred between me and any of them as to this." Under clause 16 a number of girders or plate frames, more or less damaged and buckled, were to be straightened where practicable, and to be renewed where the buckles could not be satisfactorily taken out. The evidence is somewhat confused in parts, but it clearly shows the following things: that all these girders could have been straightened; that some were not touched by the plaintiffs at all, being, as Forster says, still straight; that some were straightened, but in the process it was found that the material was deteriorated; that Watson thought it expedient though not necessary to substitute new material; that iron was substituted for steel; and that the deterioration was not due to stranding damage. From the evidence of Lang, one of the plaintiffs' foremen, it would seem that Clark either ordered this renewal to be done or agreed that it should be done. It is also made clear that the substitution of iron for steel not only added to the weight and to the expense, but altered the structure of the vessel; to her advantage as the plaintiffs contend, but, as the defendant says, causing a rigidity in her framework which is a source of danger to her. That is a matter on which opinions vary, but there is no dispute that the alteration is not consistent with the plaintiffs' obligation to restore the vessel to her original condition prior to the accident. The plaintiffs excuse their failure to do this by alleging the order of Clark But, assuming in their favour that such an order was given, the question of Clark's authority comes in.

It is argued for the plaintiffs that clause 8 of the contract contemplates his giving such an order as this, and that, though he gave no written order as that clause requires, he could vary the contract in that respect as in others, and by his conduct did so vary it. It appears to their Lordships that the object of clause 8 was to prevent the contractors from making claims on account of extra work unless they had a written order for it. It was quite reasonable to contemplate that in the course of repairing further stranding damage might be disclosed, or that variations of detail might be expedient. Under clause 8 the plaintiffs could do no work of this kind, or at least could not charge for it, unless they got Clark's written order. The clause was evidently intended as a check on the contractors, and to prevent disputes about what the parties must have contemplated would be small matters. But it was not calculated or intended to enlarge Clark's authority, nor even, if so expressed, could it have that effect as against his principals. It is now used to justify claims against the defendant for a class of repairs which he had expressly prohibited. Authorised repair of stranding damage has passed into forbidden repair of deterioration, which has the effect apparently (for the two classes of claim are so mixed up that it is difficult to keep them apart) of doubling the stipulated charge. In fact, so far as this line of argument is applied to the lump sum, it tends to show how completely the contract was broken, and how impossible it is for the plaintiffs to maintain that they have given the article for which the defendant bargained and promised to pay the lump sum. In the case of *Appleby* v. *Myers* (*ubi sup.*) Lord Blackburn mentions two conditions under which a contractor for a lump sum who has not performed the stipulated work can recover something under his contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done. Their Lordships are clearly in agreement with the learned judge below that there is no evidence to support either of these conditions, and it is not necessary to travel into further detail upon this point. Beyond the stipulated price, the plaintiffs claim the sum of 6754*l.* for new girder plates, angle irons, and tank top repairs. There is great difficulty in understanding how far the claim for this work is identical with the claim for work done to earn the stipulated price under the contract as varied in the way for which the plaintiffs contend. The learned judge below appears to have found the same difficulty, for he says that, having considered the girder plates and angles as authorised alterations of the specified contract, he has to consider them again as extras. On his view of the case and on that taken by their Lordships, it is not necessary to work out this problem, nor is it necessary to examine minutely into the questions what authority can be imputed by law to Clark, or what particular items are covered by his orders, or what was the necessity for each item. All this has been done by the learned judge with great care, and with results adverse to the plaintiffs. In the judgment of their Lordships Clark had no implied authority beyond the limits which they have before stated—namely, to adjust details falling within the limits of that contract which he had express authority to make. He was not only not authorised, he was expressly forbidden, to effect repairs of any damage except that caused by stranding. In point of fact he did send a message on the 4th Jan. as follows: "Under engines, boilers, tank top damage excessive, condemned; estimate total expenses will be 11,000*l.* propeller blades, engines, boilers." The answer came next day: "Original contract must not be exceeded. If tank top damaged cut off filling pipe closing tank, Lloyd's will allow it. Are you following out instructions telegram 5th Dec.? Repair nothing beyond stranding damage." That is all in accordance with the defendant's previous instructions. Clark seems not to have given any order as to the tank tops. If and so far as he gave orders for repairs wanted on account of deterioration alone he acted contrary to instructions, and his orders cannot be of any avail to the plaintiffs, who knew that he was acting under express instructions, and must be held bound by them. On this part of the case the plaintiffs rely also on clause 23 of the contract. They say that it gave them a right to believe that if Clark and Watson approved of work done in addition to what is attributable to damage (which must mean damage by stranding), it would be properly chargeable against the ship at schedule rates Their Lordships do not so read the clause. It binds the contractor to certain prices for additional work if required, but the requisition must still be made by due authority, and that was, as regards deterioration, the authority of the defendant only. If the clause means what the plaintiffs

contend for, then Clark had no right to insert such a clause. He could not give himself indirectly an authority to order repairs for which he had been forbidden to contract directly. Then the plaintiffs rely on the fact that the defendant took the ship and sold it; this being, as they contend, an acquiescence by the defendant, and a ratification of all that the plaintiffs had done. The mere fact that the defendant took the ship, which was his own property, and made the best he could of it, cannot give the plaintiffs any additional right. It is not like the case of an acceptance of goods which were not previously the property of the acceptor. But the plaintiffs connect the possession and sale of the ship with communications which, as they say, showed that the defendant had knowledge of the true state of the case. The messages passing on the 4th and 5th Jan. have just been cited for another purpose. On the 6th Clark cabled as follows: "Contract provides renewals schedule prices. Girders, plates, under boilers more badly damaged than first anticipated; much deteriorated. Could not have remained in their present condition. Surveyors order renewal. Will make what repairs are absolutely necessary only through stranding." On the 28th the defendant wrote, being then under the impression that the cost of repairs was 11,000*l.*, which he treats as falling upon the underwriters. That, however, would not be the case with the cost of repairing deterioration. Up to that time nothing had been said to warn the defendant that he would be charged for repair of deterioration, and Mr. Mackill says that he had no suspicion of it. After he had written his letter of the 28th Jan. he received a message bearing same date from Clark, which informed him that the expense would be 16,000*l.*, and some particulars were added which showed that it was for other than stranding damage. Upon that the defendant took legal advice, and resolved to dispute the claim. Ever since that time the parties have been hostile.

There is nothing in these communications to show acquiescence and ratification. When the defendant wrote under the impression that 11,000*l.* would be charged he believed that it was all for stranding damage. He never in any way accepted the charge of 16,000*l.* It was only in the course of the action that he learned that the plaintiffs had failed to perform their contract. The plaintiffs have not been led by the defendant's conduct to do anything prejudicial to themselves, and their Lordships cannot see in what respect the defendant has precluded himself from disputing his legal liability. There is one item of the plaintiffs' claim which the learned judge, though he has disallowed it, has treated as standing on a peculiar footing. It is a small item for a single plate valued at 80*l.* It is one of the repairs provided for by clause 15, and it was done efficiently, but not according to contract It seems to their Lordships that the plaintiffs cannot on the most favourable view of the evidence claim more than that the plate should be taken as having been repaired according to contract. But then the price is covered by the lump sum. There is no doubt that many repairs were executed according to contract, but the cost cannot be recovered because the contract is an entire one, and in its entirety has never been performed. There is no reason why this particular plate should be differently treated. The result is that their Lordships concur with the learned judge below in his conclusions, and for the most part on the same grounds as are taken by him. It seems hard that the plaintiffs should not be paid for work which they have done, but such is the effect of contracting to work for a lump sum and failing to do the work. It would be hard upon the defendant if he was made to pay for work which he did his best to prevent. And it must be said that the plaintiffs have done a great deal to bring the hardship upon themselves by careless irregular proceedings in relying on verbal orders, or on the mere presence and knowledge of Watson and Clark, as if they were equivalent to orders coming from the owner, whom the plaintiffs knew to be directing the business. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants, *Wadeson* and *Malleson.*

Solicitors for the respondent, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Jan. 26, 1900

(Before SMITH, RIGBY, and COLLINS, L.JJ.)

THE SNARK. (a)

Admiralty — Damage — Collision with sunken wreck — Wreck improperly marked — Public nuisance—Independent contractor—Transfer of possession and control—Liability of owners.

The defendants' barge S. *was lying sunk and submerged in the fairway of the river Thames without any negligence on the part of the defendants. The defendants employed an underwaterman, one F., a fit and proper person for the purpose, to raise and remove the wreck. No arrangement as to marking and lighting her was made between them. The physical possession and control were taken over by F. Owing to the negligence of F. in not properly marking and lighting the* S., *the plaintiff's steamship, the* V., *came into collision with her. On the plaintiff suing the defendants for the damage so caused to the* V., *it was held by Barnes J. that the defendants were liable.*

The defendants appealed.

Held (affirming the judgment of Barnes, J.), that the defendants were liable, since they had not shown that they had abandoned the possession and control of the S. *so as to rid themselves of liability for damage caused by her, and also because the work of raising the barge was an operation likely to cause injury to members of the public lawfully using the highway of the river Thames, unless proper precautions were taken. The defendants could not rid themselves of the duty of taking such precautions by employing an independent contractor.*

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

THIS was an appeal from a decision of Barnes, J. (reported 80 L. T. Rep. 25; 8 Asp. Mar. Law Cas. 483; (1899) P. 74) holding the defendants liable.

The action, which was *in personam*, arose out of a collision between the German steamship *Vesta*, belonging to the plaintiff, and the submerged wreck of the dumb barge *Snark*, which belonged to the defendants. The collision occurred in Limehouse Reach of the river Thames where the *Snark* was lying sunk. The *Snark* had previously been sunk in another collision without any negligence on the part of the defendants. The question whether the *Vesta* or those responsible for the proper lighting and marking of the *Snark* were to blame for the collision between those two vessels had been previously tried before Barnes, J. and Trinity Masters where it had been found that the collision was due to the *Snark* being improperly lighted and marked.

The defendants had employed an under-waterman named Forrest to raise and remove the *Snark*, and Forrest had taken over the physical control and possession of her. No arrangement was made between the defendants and Forrest as to the lighting and marking of the *Snark*, but the defendants contended that their liability in respect of her was at an end when they had given up the possession and control to Forrest, an independent contractor.

The question was argued on the 13th Dec. 1898, and on the 26th Jan. 1899 Barnes, J. gave judgment for the plaintiffs.

Defendants appealed.

Laing, Q.C and *Batten* for the appellants.—The learned judge has held that this case is governed by the principle of the cases of *Hardaker* v. *Idle District Council* (74 L. T. Rep. 69; (1896) 1 Q. B. 335) and *Penny* v. *Wimbledon Urban District Council* (80 L. T. Rep. 615; (1899) 1 Q. B. 72). Those cases turn on the principle that there was a duty on the defendants of such nature that they could not rid themselves of it. In this case the defendants rid themselves of their duty by employing an independent contractor, and transferring the possession and control of the barge to him:

White v. *Crisp*, 10 Exch. 312.

[COLLINS, L.J.—If that be so how does it assist the appellants? The *corpus delicti* is still in their possession, for Forrest's possession is their possession; and, further, the lights were misleading.] But it is submitted that the appellants had transferred the physical possession and control. If the appellants had abandoned they would not have been liable:

Brown v. *Mallett*, 5 C. B. 599;
Reg. v. *Watts*, 2 Asp. 675.

And the Thames Conservancy would have had to take charge of the wreck: (Thames Conservancy Act 1894, 57 & 58 Vict. c. clxxxvii., s. 77). Again, if the appellants had given notice of the position of the barge to the Thames Conservancy they would not have been liable:

The Douglas, 46 L. T. Rep. 488; 6 Asp. Mar. Law Cas. 15; 7 P. Div. 15;
The Utopia, 70 L. T. Rep. 47; 7 Asp. Mar. Law Cas. 408; (1893) A. C. 492.

[SMITH, L.J.—You must show that you could and did transfer the possession and control of the barge.] There was no danger to the public in raising the barge unless the work was done unskilfully. It is a well-known practice to let out barges with a man by the day or week; if such a barge during the period of its letting were left unlighted in the Thames the owner would not be liable; why, therefore, should the appellants here be liable. [COLLINS, L.J.—The distinction is between employment and letting.] The distinction drawn by Barnes, J. between the cases of a floating and sunken barge is fallacious, for the liability must be the same in both cases. If, in this case, the other facts being the same, the barge had been afloat, it could not be contended that the appellants would be liable, for they were not in physical control. And further, the accident was caused, not by the barge, but by the light being improperly placed in relation to the barge, and the appellants never employed Forrest to light the barge at all. There was no duty on the appellants to light it, and no indictment would have laid for not removing it:

Reg. v. *Watts* (*ubi sup.*).

Counsel also referred to

Holliday v. *The National Telephone Company*, 79 L. T. Rep. 593; (1899) 1 Q. B. 221;
Pickard v. *Smith*, 10 C. B. N. S. 470;
Milligan v. *Wedge*, 12 A. & E. 737;
Hughes v. *Percival*, 49 L. T. Rep. 189; 8 App. Cas. 443;
Beven on Negligence, vol. 1, p. 493.

Carver, Q.C. and *Stubbs*, for the respondents, were not called on.

SMITH, L.J.—This is an action brought by the plaintiff, who is the owner of the steamship *Vesta*, to recover damages against the owners of a barge called the *Snark*, which was sunk in the river Thames on the 1st Aug. 1897. What happened was this: The owners of the *Snark* wanted to get their barge up again; they never intended to abandon possession or control of their barge in any shape or way. They got into communication with a man who, I believe, is undoubtedly efficient—a man called an under-waterman, that is, a man who goes down under water to get up sunken vessels, and they entered into a contract with him to get up this barge The evidence, as stated by Barnes, J. in his judgment, which is under appeal, is this: The officials of the Thames Conservancy were told by Forrest of the sunken barge, and for a short time before the man Forrest brought the *Rhoda* (that is, I understand, a barge lent by the owners of the *Snark*), a boat belonging to the Thames Conservancy, with a flag on it, was made fast to the *Snark*. For this service the defendants paid the Thames Conservancy, and that matter was ended long before this accident happened. Then Forrest brought the *Rhoda* and took charge of the sunken barge, and Forrest and his men alone remained. Forrest was paid for the job which he was executing for the defendants the sum of 25*l*. It has been found in the Admiralty Court by Barnes, J. that Forrest was guilty of negligence in this, and that he did not light the sunken barge in a proper manner. The lights had drifted away from where they ought to have been. They did not notify to the steamers coming up or going down the Thames where the sunken barge in fact was, and the result was that the plaintiff's steamer, the *Vesta*, coming up the Thames, was of opinion, from the

position in which the lights were, that it was all right to go where she went, and ran into the sunken barge and sustained damage. Thereupon an action was brought in the Admiralty Court, in these said circumstances, and the first question which had to be decided by the learned judge of that court was whether or not this barge had been properly lighted by Forrest, the man I have mentioned. He found that it was not, and he found that by reason of its not being properly lighted the plaintiff's steamship got the damage complained of. Another question arose —namely, were the defendants liable for this? Now, it is said and argued stoutly and vigourously, on behalf of the defendants, that they are not liable. One ground taken before the learned judge in the Admiralty Court was that the defendants were not liable because they delegated the job—and, in doing that, the process of lighting this sunken barge till she was got up —to the man Forrest, who comes within the term, well known in this court, of "independent contractor," and therefore they were not liable for the negligence of Forrest.

The Thames is undoubtedly a highway. This man was put to work, and was engaged, in my judgment, in doing work which was likely to cause injury to persons lawfully passing and repassing along that highway, unless precautions were taken. Thereupon it is said. although that is so, still he was not the servant of the defendants, but he was this "independent contractor." Now, we have had of late years, since I have been in this court, a great deal to do with this question of independent contractor. At one time, in conjunction with Sir Nathaniel Lindley, the present Master of the Rolls, my brother Rigby and myself wrote a judgment upon this question of independent contractors and the liability of the independent contractor, and we stated what in our judgment was the law relating thereto. That was the case of *Hardaker* v. *Idle District Council* (*ubi sup.*). It has been referred to by Barnes, J. in this case, and I am not going to refer to it any more at this moment. I see nothing to repent of in what any one of us said in that case. There have been other cases since then which I am not going to refer to, because my brother Bruce, in a judgment in *Penny* v. *Wimbledon Urban District Council and another* (*ubi sup.*), dealt with the whole question. That case came before this court on appeal in the next year, and I then said, and I say it again, that I absolutely agree with the manner in which my brother Bruce put the law applicable to this question of independent contractor, when the defendant is sued for a wrong act. I will just read the passage from Bruce, J.'s judgment, because I cannot put the matter more tersely or more clearly. It is: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard* v. *Smith* (*ubi sup.*) is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do." I subscribe to every word of that. That being, in my judgment, the law applicable to this question of Forrest being an independent contractor, that point falls practically within the decision in that case of *Penny* v. *Wimbledon Urban District Council*, and the reasons of that decision. Therefore, this point does not avail the defendants in the present case. It is said that is all very well in matters arising on land, but it does not apply to matters arising on water, or matters arising, as in this case, with regard to a sunken barge in the river Thames. I will say for myself that I think the learned counsel for the appellants have made out this distinction, that in the case of a barge navigating as here, up the river Thames, which goes to the bottom, it is in the power of the bargeowner, if he is so minded, to throw up the barge—abandon it or transfer it, and have nothing more to do with it. But then it would seem to me also within the terms of the Thames Conservancy Act, which is a private Act, and the result would be that the public authority would have to come in and take up the barge, so as to prevent its being an obstruction to the navigation of the river Thames. It also seems to me to be within the case cited in the judgment of the Privy Council, delivered by Sir Francis Jeune (*The Utopia, ubi sup.*). It is there laid down: "That although it is in the power of the owner of the barge"—as I say—"to throw up and abandon his sunken barge, and have nothing more to do with it, until he has done that he is under the ordinary liability of every other man" Sir F. Jeune says: "The result of these authorities may be thus expressed: The owner of a ship, sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as and so far as possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owner an obligation in regard to the protection of other vessels from receiving injury from her." That then is the law. Very well; be it so. Now, where do you find a tittle of evidence, and what is more, proof, that the owners of this barge abandoned or properly transferred possession, management, and control of the wreck within the meaning of that judgment? Of course, they did not. What they did was to put on Forrest to get this barge up, not for the purpose of abandoning control of her, but for the exactly opposite purpose of getting her above water again. This case seems to me to fall within the decision of the Privy Council. I have dealt with the independent contractor point, and for these reasons I am of opinion that the excellent judgment of my brother Barnes should be affirmed.

RIGBY and COLLINS, L.JJ. concurred.

Solicitors for the appellants, *J. A.* and *H. E. Farnfield.*

Solicitors for the respondent, *Stokes* and *Stokes.*

Thursday, Feb. 15, 1900.

(Before SMITH, COLLINS, and ROMER, L.JJ.)

DOBELL AND CO. *v.* GREEN AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Ship to load cargo of coal "as ordered by charterers" — Charterers to ship "except in event of strike of pitmen"—Order to load from colliery on strike—Detention of ship —Liability of charterers.

By a charter-party it was provided that the ship should proceed to Cardiff and there load "a cargo of steam coal as ordered by charterers," which the charterers bound themselves to ship "except in the event of strike of shippers' pitmen," the vessel to be loaded as customary, "but subject in all respects to the colliery guarantee in [ ] colliery working days as may be arranged."

The charterers bought a cargo of steam coal from a colliery; subsequently a strike took place which extended to 85 per cent. of the collieries in South Wales including the said colliery. While the strike still continued the charterers obtained from the said colliery, and sent to the shipowners the usual guarantee by which the colliery proprietors undertook to load the ship in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes. The shipowners objected to this guarantee because the colliery was on strike, and required the ship to be loaded from a colliery which was working. The ship then went to Cardiff and, owing to the continuance of the strike, was delayed for three months.

The shipowners claimed damages for the delay from the charterers.

Held (affirming the judgment of Bigham, J.), that the charterers were entitled to select the colliery which they did in fact select, although it was on strike, and that they were not liable for the delay of the ship.

THIS was an appeal by the plaintiffs from the judgment of Bigham, J. at the trial of the action as a commercial cause, without a jury.

The action was brought by the plaintiffs, who were the owners of the *Curzon*, to recover from the defendants damages for alleged breach of a charter-party.

By a charter-party made on the 14th Jan. 1898 the defendants chartered the plaintiffs' vessel, the *Curzon*, to carry a cargo of South Wales coal from Cardiff to Iquique. The vessel was at the time homeward bound to Liverpool, and was not expected to arrive there before April or May.

The charter-party provided that, after discharging her inward cargo at Liverpool, the vessel should sail to Cardiff and should "proceed to such loading berth as the freighters may name, and there load a cargo of steam coal as ordered by charterers, which they bind themselves to ship (except in the event of strike of shippers' pitmen)"; the vessel to be loaded as customary, but subject in all respects to "the colliery guarantee in [ ] working days as may be arranged; any claim for demurrage in loading to be settled with colliery direct."

On the 3rd Feb. 1898 the defendants bought two cargoes of Hood's Merthyr colliery coal, one of which they intended for the *Curzon* and the other for some other vessel.

On the 6th April 1898 the South Wales coal strike began, and Hood's Merthyr colliery was stopped by the strike.

On the 26th April 1898, while the strike was still going on, the defendants procured from Hood's Merthyr colliery the usual colliery guarantee, whereby the colliery proprietors undertook to load the *Curzon* in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes.

The defendants sent this guarantee to the agents of the plaintiffs in the ordinary course. The plaintiffs' agents returned the guarantee with a letter, saying: "We decline to accept it, having regard to the fact that Messrs. Hood's Merthyr colliery is on strike. As there are numerous other collieries which are not on strike and from which coal can be obtained, the owners require to be loaded by a colliery which is now working."

The defendants replied that the coal had been bought from Hood's Merthyr collieries some time before the strike began, and that the plaintiffs could have had the colliery guarantee at the time if they had so desired.

On the 14th May 1898 the plaintiffs sent the *Curzon* from Liverpool to Cardiff, where she arrived on the 16th May. She was ready to load on the 17th May, from which day, but for the strike, the twenty days mentioned in the colliery guarantee would have begun to run.

At this time there was good reason to expect that the strike would speedily come to an end, and that it would end in time to enable the loading to be completed within the twenty days.

The strike did not, however, end until the 1st Sept. 1898, and the loading of the *Curzon* was not completed until the 27th Sept. There was not any delay in loading after the end of the strike, of which the plaintiffs complained.

During the whole time of the continuance of the strike about 15 per cent. of the South Wales collieries were at work, and South Wales coal was obtainable, although at a very high price.

The plaintiffs claimed damages, based upon the loss of the use of their ship for three months.

The action was tried before Bigham, J. as a commercial cause, without a jury, and the learned judge gave judgment in favour of the defendants (80 L. T. Rep. 19; 8 Asp. Mar. Law Cas. 473).

The plaintiffs appealed.

Joseph Walton, Q.C. and *Horridge* for the appellants.—The charterers were liable to pay damages for the delay of the vessel owing to their breach of the charter-party. The provision in the charter-party, that the ship should load a cargo of coal "as ordered by charterers," gave the charterers the option of selecting the colliery from which the ship should be loaded, but the charterers were bound to exercise that option in a reasonable way. The selection of the colliery must be a reasonable selection at the time when it is made, that is, when the selection is notified to the shipowner. It was not a reasonable selection to choose a colliery which was on strike. In *Tharsis Sulphur and Copper Company* v. *Morel Brothers and Company* (65 L. T. Rep. 659;

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647) Bowen, L.J. said, with reference to the option of charterers to select a port, berth, or dock: "The option is to select a port or berth or dock, that is, one which is reasonably fit for the purpose of delivery. It will not do, for instance, to choose a dock the entrance to which is blocked." There must be some limitation upon the option of the charterers; by the charter-party any claim for demurrage must be settled with the colliery direct, and it could not be reasonable or proper for the charterers to select an insolvent colliery. The charterers could not be entitled to select a colliery which was closed owing to flooding or a great accident. The charterers must be bound to select a colliery which is working at the time when the selection is notified to the shipowners. A cargo could, in this case, have been obtained from some other colliery and, in the reasonable exercise of their option, the charterers ought to have selected a colliery which was not on strike. They cited also

Bulman and Dickson v. *Fenwick and Co.*, 69 L. T. Rep. 651; 7 Asp. Mar. Law Cas. 388; (1894) 1 Q. B. 179;

Shamrock Steamship Company v. *Storey*, 81 L. T. Rep. 413; 8 Asp. Mar. Law Cas. 590;

Saxon Steamship Company v. *Union Steamship Company*, 81 L. T. Rep. 246; 8 Asp. Mar. Law Cas. 449, 574.

Carver, Q.C. and *T. E. Scrutton* for the respondents. The judgment of Bigham, J. was right. The charterers *bonâ fide* exercised their option in the way in which they were entitled to exercise it. The contention of the appellants could only be right if the colliery, by reason of the strike, ceased to be a colliery within the meaning of the charter-party, and that cannot be so. The existence of a strike could not in any way affect the exercise of their option by the charterers; the duration of a strike is quite uncertain, and it might come to an end at any time. In this case the strike might have come to an end before the ship reached Cardiff. If the contention of the appellants were right, the charterers could not select a colliery at which there was a strike, even if that strike lasted for the shortest possible time. That would be a most unreasonable construction of the charter-party. Here the charterers made their contract with the colliery before there was any strike, and it would not be reasonable to hold that they could not select that colliery because a strike happened to take place before the colliery was named to the shipowners.

Horridge replied.

SMITH, L.J.—I think that this appeal ought to be dismissed, and I entirely agree with the judgment of Bigham, J. This action is brought upon a charter-party by the shipowners against the charterers to recover damages for the detention of the ship. By the charter-party it was provided that the ship should load a cargo of steam coal "as ordered by charterers," which the charterers bound themselves to ship "except in the event of strike of shippers' pitmen." That is to say, it was provided that, in the case of the happening of a strike, any loss thereby occasioned to the shipowners was to fall upon them. On the 3rd Feb. 1898 the charterers contracted for the supply of a cargo of steam coal from Hood's Merthyr colliery. On the 6th April 1898 a colliery strike began, which extended to about 85 per cent. of the South Wales collieries, including Hood's Merthyr colliery. Subsequently in April, and before the ship arrived at Cardiff, the charterers gave notice to the shipowners that they intended to load the ship with steam coal from Hood's Merthyr colliery. The strike was still continuing at that time, but Bigham, J. has found as a fact that there was then "good reason to expect that the strike would speedily end; in fact, that it would end in time to enable the loading to be completed within the stipulated time." Why, then, was the order to load a cargo of steam coal from Hood's Merthyr colliery, notified in April to the shipowners, not a good order under the terms of the charter-party? It was contended by the appellants that the charterers were not entitled to give this order, because there was at that time a strike at Hood's Merthyr colliery, which was common to 85 per cent. of the South Wales collieries, but that the charterers were bound to give an order to load a cargo from one of the few collieries at which there was no strike. Where can there be found, in the terms of the charter-party, anything to the effect that an order must be given by the charterers to load coal from a colliery not on strike? As I have already pointed out, it is expressly provided by the charter-party that any loss which may arise from a strike shall fall upon the shipowners. I cannot find anything in the charter-party which imports any such limitation of the right of the charterers to select the colliery from which the coal is to be shipped as that for which the shipowners are contending. It was argued that this case was governed by a passage in the judgment of Bowen, L.J. in *Tharsis Sulphur and Copper Company* v. *Morel Brothers and Co.* (65 L. T. Rep. 659; (1891) 2 Q. B. 647), where he says, with reference to the option of a charterer to choose a berth at which the ship is to discharge: "The option is to choose a port or berth, or dock—that is, one which is reasonably fit for the purpose of delivery." Upon that it is contended that we ought to hold that the order for the ship to load coal from Hood's Merthyr colliery was not a reasonable exercise of the charterers' option in this case. I can see nothing in this case to lead me to the conclusion that the order which the charterers gave was not a reasonable exercise of the option given to them by the charter-party. I am of opinion, therefore, that the judgment of Bigham, J. was right and that this appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. I think that the judgment of Bigham, J. was perfectly right. It seems to me that by the terms of the charter-party, as between these two parties of business men, the risk of any difficulty which might arise from a strike was deliberately placed upon the shipowners, and that, that being so, the very case contemplated by the exception in the charter-party as to strikes has arisen. By the terms of the charter-party the shipowners were under an obligation to load their ship with a cargo of steam coal from a colliery which the charterers had the right to select, and the charterers took upon themselves the obligation to ship such a cargo "except in the event of strike of shippers' pitmen." What right, then, have the shipowners to complain because it was notified to them, under the charter-party, that the ship must

load from a particular colliery at which there is a strike at the time of the notification? It appears to me that the existence of the strike at that time is *nihil ad rem*. The shipowners must send their ship to the place at which they have undertaken to load, and at which the charterers have undertaken to ship a cargo; it is not until the ship has arrived at that place, and the question arises as to the obligation of the charterers to ship the cargo, that the existence of a strike becomes material. The charterers are entitled to say that the shipowners must do that which they have contracted to do, and must place their ship in position at the place which they, the charterers, have indicated, and that then, and not until then, the question will arise whether they, the charterers, are relieved from the obligation which they have undertaken by reason of the existence of a strike. In my opinion it would be unreasonable, having regard to the uncertain duration of strikes, to impose upon the charterers an obligation to name a colliery where there is not at the time any strike, for, although there might be a strike existing at the colliery which is named, that strike might be at an end at the time when the obligation of the charterers to ship the cargo attached. I think that, upon the true construction of the charter-party, there is no such fetter imposed upon the option given to the charterers as is suggested by the appellants. I agree, therefore, that this appeal fails and must be dismissed.

ROMER, L.J.—I am of the same opinion. I agree that the charterers were, for the purposes of this charter-party, bound to select what I will call a reasonable colliery, and I will assume, although I do not decide the question, that the time for ascertaining whether the colliery which is selected is such a colliery is the time at which the selection is notified to the shipowners. Assuming that, however, I come to the conclusion, having regard to the terms of this charter-party, and especially to those with reference to strikes, that the colliery in question was not an unreasonable colliery for the charterers to select at the time when they notified the selection to the shipowners merely because there was at that time a strike in existence which, so far as could be judged, might have come to an end at any moment. The selection of that colliery, then, not being an unreasonable selection, the shipowners were by the terms of the charter-party bound to accept the colliery guarantee of that colliery. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Walker, Son,* and *Field,* for *Weightman, Pedder,* and *Weightman.* Liverpool.

Solicitors for the respondents, *Parker, Garrett,* and *Holman.*

Thursday, Feb. 22, 1900.

(Before SMITH, COLLINS, and ROMER, L.JJ.)

BRENDA STEAMSHIP COMPANY LIMITED v. GREEN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Discharge of cargo — "To be taken from alongside the steamer at charterer's risk and expense, any custom of the port to the contrary notwithstanding"—Duties of owners and charterers.

A charter-party, by which a steamer was to load a cargo of timber and therewith to proceed to the Surrey Commercial Docks, London, and deliver the same, contained a clause that the cargo was "to be brought to and taken from alongside the steamer at charterer's risk and expense, any custom of the port to the contrary notwithstanding."

Held, that by this clause the custom of the port of London as to the discharge of timber cargoes was excluded, and therefore it was the duty of the charterer to be ready to receive the cargo at the ship's rail.

THIS was an appeal from the judgment of Mathew, J. at the trial of the action without a jury.

The action was brought by the owners of the steamship *Brenda* against the charterer to recover the money paid by them under protest for discharging a timber cargo at the Surrey Commercial Docks from the ship's rail into barges and on to quay.

By the charter-party it was provided that the *Brenda* should proceed to ports in the Baltic and there load a timber cargo, and, being so loaded, should therewith proceed to the Surrey Commercial Docks, London, and deliver the same, always afloat.

The charter-party contained the following printed clause:

> The cargo shall be supplied as fast as required by the steamer and be received at port of discharge as fast as steamer can deliver during the ordinary working hours of the port. . . . The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense, any custom of the port to the contrary notwithstanding.

The charterer refused to accept delivery of the timber at the ship's rail, and the shipowners, having paid under protest the expenses of discharging the cargo into barges and on to quay, now sought to recover the sum they had thus expended.

For the purposes of the action the plaintiffs admitted that, in the absence of any provision in the charter-party negativing it, there is a custom in the port of London with regard to timber ships which enlarges the ordinary meaning of "alongside" and "delivery" by requiring the shipowner to do work outside his ship in placing the timber into barges or on to quay, but that such custom does not require him to stow the timber in the barge or to stack it on the quay.

At the trial of the action the following judgment was delivered:—

MATHEW, J.—I have no doubt as to the meaning of the clause in question in this charter-party, having regard to the controversy which has existed between shipowners and charterers on this subject. There have been several decisions as to

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

the meaning of the words "cargo to be taken from alongside at merchant's risk and expense," and the interpretation placed upon those words by Lord Esher, M.R., apart from the point as to the custom, is that in which they are commonly understood, and that interpretation is, of course, binding upon me, and I entirely agree with it. In the case of *Aktieselskab Helios* v. *Ekman and Co.* (76 L. T. Rep. 537; 8 Asp. Mar. Law Cas. 244; (1897) 2 Q. B. 83) Lord Esher, M.R. used these words: "If the written terms of the charter-party stood alone, it has been held, and I think rightly held, that, upon the true construction of a charter-party in those terms, the delivery of the cargo from the ship into barges or on to a quay is a joint operation; that is to say, neither party is bound to do it alone. It is to be a joint act, and therefore if one party is not there to perform his part in it, that prevents the other party from performing his part. Therefore, upon the written terms of the charter-party standing alone, the captain of the ship would not be bound to begin to deliver the cargo into the barges unless the charterers had men there to assist in the joint operation; and if they were not ready and willing to take part in it, the captain being ready and willing to do so, he would be prevented by the default of the charterers from discharging the ship, and demurrage would be payable for the consequent delay." That being the proper interpretation to be placed upon the charter-party, apart from any evidence as to custom, there have been three or four cases in succession, the result of which, after a long struggle in which the evidence as to custom was in many respects doubtful, has been that the charterers succeeded in establishing that there was an obligation on the shipowner to do more than he would be required to do if the charter-party was in the form referred to by Lord Esher. These cases show that the charterers were adhering with great pertinacity to their view of their rights with regard to the discharge of timber cargoes; and, on the other hand, the cases show that the shipowners were determined if possible to restore the old construction of the charter-party, and to get rid of the custom which had been established by the charterers. I am clearly of opinion that the shipowners have succeeded in doing so by the form which they have adopted in this case. It is said that this charter-party is one which is intended to be used all over the world, but I have no doubt that the framers of it had the custom of the port of London in their minds. They were dealing with a timber cargo, and, with the object of getting rid of the effect of the custom, they have adopted phraseology which appears to me not to admit of a shadow of a doubt. The language of this clause is as clear and plain as it possibly can be, and I am unable to accept the interpretation which, it was contended for the defendants, ought to be placed on the clause. The custom is now by the terms of this charter-party finally excluded, and I hope that this will be the last litigation on this subject. I give judgment for the plaintiffs with costs.

From this judgment the defendant appealed.

English Harrison, Q.C. and *Leck* for the defendant.—Delivery of the cargo includes putting it over the ship's side into the barges or on to the quay. "From alongside" in this clause in the charter-party deals only with taking the cargo away; the clause refers to what is to be done to the cargo when it has been put into the barge in accordance with the custom of the port. The clause does not entirely exclude the custom of the port. The expression "any custom of the port to the contrary notwithstanding" refers, not to the whole clause preceding it, but only to the words "at charterer's risk and expense." There is a difference between customs as to "delivery" and as to taking "from alongside":

Aktieselskab Helios v. *Ekman and Co.*, 76 L. T. Rep. 537; 8 Asp. Mar. Law Cas. 244; (1897) 2 Q. B. 83.

[SMITH, L.J. referred to *The Nifa* (69 L. T. Rep. 56; 7 Asp. Mar. Law Cas. 324; (1892) P. 411).]

Scrutton, for the plaintiffs, was not called upon.

SMITH, L.J.—I think that the judgment of Mathew, J. was right. The question is one as to the construction of a charter-party, and the parties have inserted the clause under discussion in order to exclude the custom of the port where the cargo is to be delivered. Apart from any custom a shipowner would have to deliver the timber by putting it over the ship's rail, and it is the duty of the consignee to be there with his men to receive the timber from the rail. As Lord Esher, M.R. said in *Aktieselskab Helios* v. *Ekman and Co.* (*ubi sup*), the delivery of the cargo from the ship into barges or on to a quay is a joint operation by the shipowner and the consignees. Now, the parties to this charter-party have agreed as follows: "The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense, any custom of the port notwithstanding." That is to say, the words of the charter-party are to be read in their ordinary sense, excluding any custom of the port. That exclusion of custom applies to the whole clause, and is not to be limited to apply only to the words "charterer's risk and expense." That being so, the duty of the charterer here was, as I have said, to take the cargo when the shipowners put it over the ship's rail. He did not do so, and must therefore refund to the shipowners the expenses incurred by them in taking the cargo from the ship's rail to the barges and on to the quay. The appeal must be dismissed. In *Aktieselskab Helios* v. *Ekman and Co.* (*ubi sup.*) the question in dispute had reference to the custom of the port. In the present case the custom of the port, whatever it may be, has been excluded from consideration.

COLLINS, L.J.—I am of the same opinion. It must be conceded that, apart from any custom of a port, the words "brought to and taken from alongside" mean brought to and taken from the ship's rail, and that meaning can only be altered by the custom of any particular port. In this charter-party the custom of the port has been excluded from consideration, and therefore the duties of the shipowners and the charterer under these words of the charter-party remain unaffected.

ROMER, L.J.—I agree. I think that the argument that has been addressed to us on behalf of the defendants is too fine. The meaning of the clause in the charter-party that has been under discussion is that, in considering the relative obligations of the shipowners and the charterer as

regards the loading and discharging of the cargo, the custom of the port is not to be taken into consideration.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendant, *Lowless* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday, April 11, 1900.

(Before KENNEDY, J.)

GEDGE AND OTHERS v. ROYAL EXCHANGE ASSURANCE. (a)

Marine insurance—Policy on a ship—Gaming or wagering transaction—"p.p.i." clause—Illegality not pleaded—Refusal to enforce claim—19 *Geo.* 2, *c.* 37, *s.* 1.

A policy of insurance agreeing to pay a total loss in the event of a ship not arriving at a port by a certain date is a policy "on a ship" within 19 *Geo.* 2, *c.* 37.

Where a policy is illegal by statute, the court will not enforce such policy, although the illegality has not been pleaded.

Ex turpi causa non oritur actio.

COMMERCIAL cause tried before Kennedy, J. without a jury.

All the material facts appear in the written judgment.

Rufus Isaacs, Q.C. and *J. A. Hamilton* for the plaintiffs.

J. Walton, Q.C. and *Scrutton* for the defendants.

KENNEDY, J.—This action is brought by the plaintiffs, who are insurance brokers suing really on behalf and for the benefit of a Mr. Rouse and certain other gentlemen associated with him, against the defendants on an alleged policy of marine insurance, dated the 14th Nov. 1898, upon the British steamship *Radnorshire*, belonging to the Shire Line. The policy, as pleaded by the plaintiffs, is a policy for 400*l.* on the said steamship at and from London to Yokohama, to pay a total loss in the event of the vessel's not arriving at Yokohama on or before midnight on the 31st Dec. 1898. It is pleaded by the plaintiffs that the vessel did not arrive at Yokohama on or before midnight the 31st Dec. 1898, and the amount insured is claimed by the plaintiffs. In fact, as appeared when the document was produced by the plaintiffs in evidence, the alleged policy is what is known as a "p.p.i." or honour policy, one of its terms being that, in the event of loss, "it is hereby agreed that this policy shall be deemed as full and sufficient proof of interest." The defendants, in the points of defence, do not plead the invalidity of the alleged policy, under the provisions of 19 Geo. 2, c. 37, s. 1. Their pleaded defences, in addition to a refusal to admit the correctness of the statement of the plaintiffs as to the terms of the alleged policy, are (1) concealment of material facts; (2) that the persons on whose behalf the plaintiffs effected the alleged policy had no insurable interest in the subject-matter insured. The alleged policy was, in truth, so far as regards the purpose of Mr. Rouse and certain other gentlemen for whom it was effected, a mere wager or wagering speculation. It appears that some time before the 14th Nov. 1898 the Government of Japan had made an ordinance whereby goods imported into Japan after the 31st Dec. 1898 should be liable to a higher duty than had previously been levied. This was known to Mr. Rouse, who was employed in the London office of a Japanese insurance company called the Nippon, and he had a conversation with a Mr. Pound (who was an insurance clerk in the plaintiffs' office) upon the subject of insurances being, in consequence of the ordinance, effected in regard to the arrival in Japan of vessels carrying goods to that country. It occurred to Mr. Rouse that there was an opportunity of having what he called "a spec." He asked Mr. Pound if he thought he would be able to do a "spec." for him. Pound said he thought he might be able. They then parted. Mr. Rouse returned to his office and read in Lloyd's *Shipping Gazette* that the *Radnorshire* was the vessel of the line of steamships running between London and Japan under the management of Messrs. Jenkins and Co. which had last sailed for Japan; and that she was reported to have passed the Downs on the 30th Oct. Believing that a vessel of that type might be expected to take roughly about two months on the voyage, he saw from her reported position that, to use his own words, her arrival before the 1st Jan. 1899 was obviously a close thing, and what he wanted for a "spec." He mentioned his project to certain other gentlemen in the Nippon office, and they agreed to share with him in the speculation. In the result, through Mr. Pound, acting as their agent to procure an insurance, Mr. Rouse and his fellow speculators carried out their project by obtaining from the defendants the policy in question, the slip for which was initialled by Mr. Toulmin on behalf of the defendant company. Had Mr. Toulmin known the real nature of the transaction—namely, that it was a mere bet or speculation without any interest on the part of those for whom in reality the insurance was effected — he would have declined the risk altogether. It is at the same time only just to Mr. Rouse and his friends to add that they appear to have desired throughout the transaction to act in a candid and straightforward manner. It was not through any fault of theirs that the purely speculative nature of the transaction was not disclosed to Mr. Toulmin.

It appears to me that, when upon the trial of an action the plaintiff's case, as happens here, discloses that the transaction which is the basis of the plaintiff's claim is illegal, the court cannot properly ignore the illegality and give effect to the claim. Here the insertion of the "p.p.i." clause taints the whole of the plaintiffs' case. The 19 Geo. 2, c. 37, s. 1, expressly forbids the making of an assurance upon a British ship without further proof of interest than the policy, and goes on to declare that every such assurance shall be null and void to all intents and purposes. It has been suggested by the plaintiffs that the present policy is not a policy "on a ship" within the meaning of this section. I am clearly of opinion that it is. An assurance whereby the assured is entitled to be indemnified against loss in respect of the

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

non-arrival of the ship at a certain port by a certain date may, I think, be correctly described as an insurance on the ship. If authority is wanted I think that it appears in the case —very similar indeed in its circumstances — of *Kent* v. *Bird*, decided on the same statute in 1777 (Cowp. 585). There the defendant undertook that a vessel should save her passage to China that season, and, in the action brought upon the document of insurance, judgment was given for the defendant on the ground that the transaction was the making of a gaming or wagering policy on a ship within the meaning of the statute. Attempts to narrow the section when it speaks of an assurance on "goods, merchandises, or effects," similar to the attempt of the defendants in this case in regard to an assurance "on ship," were unsuccessfully made in *Smith* v. *Reynolds* (1 H. & N. 221; 25 L. J. Ex. 337), *De Mattos* v. *North* (18 L. T. Rep. 797; L. Rep. 3 Ex. 185), and *Berridge* v. *Man On Insurance Company* (56 L. T. Rep. 375; 6 Asp. Mar. Law Cas. 104; 18 Q. B. Div. 346). These cases show that assurances on profits, commission, and advances are covered by the section, when it speaks of assurances on "goods, merchandises, or effects." This policy, then, being an illegal instrument —an assurance which, in the language of Grove, J. in *Allkins* v. *Jupe* (36 L. T. Rep. 851; 3 Asp. Mar. Law Cas. 449; 2 C. P. Div. at p. 389), is contrary to the direction of the statute, and so unlawful in all its incidents that the law will not countenance any part of it—I cannot give judgment upon it in favour of the plaintiffs. Then counsel argued that the illegality was not pleaded by the defendants. In my opinion that makes no difference—*Ex turpi causa non oritur actio.* This old and well-known legal maxim is founded on good sense, and expresses a clear and well-recognised legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. (Per Lindley, L.J., *Scott* v. *Brown* (1892) 2 Q. B. at p. 728). "If," said Lord Mansfield in his judgment in *Holman* v. *Johnson* (Cowp. 343) (to which Lindley, L.J. refers as an authority immediately after the passage which I have just quoted), "from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon this ground the court goes, not for the sake of the defendant, but because they will not lend their aid for such a plaintiff." Order XIX., r. 16, upon which Mr. Hamilton for the plaintiffs laid much stress, does not touch (as the judgment of Lindley, L.J. which I have quoted clearly indicates) a case like the present in which the illegality of the transaction appears upon the face of the plaintiffs' case. The purpose of that rule, as it appears to me, is to prevent the injustice which might arise from a litigant, without notice to his opponent, adducing evidence to show that a transaction which apparently is perfectly legal is really illegal—as, for example, that an apparently good deed was really fraudulent under 13 Eliz., c. 5; or the similar injustice which might arise if a litigant, who would otherwise have been prepared with evidence to surmount them, was suddenly called upon at the trial for the first time to meet objections to the pursuit of a legal remedy based upon the Statute of Limitations or the Statute of Frauds, or was called upon to deal with issues of which he had no notice. The rule does not affect a case liket he present.

There is, I think, only one other point in the argument of the plaintiffs' counsel upon this part of the case which I have to notice. It was urged that the defendants themselves were wishful that the policy should not be held void on account of its having been made in terms prohibited by the statute. Certainly the defendants' counsel did so state their attitude. But I hold that my judgment ought not to be affected by this consideration. I was referred to the course taken by Bigham, J. in the recent case of *Buchanan* v. *Faber* (4 Com. Cas. 223). In that case the policy sued on contained the "p.p.i." clause. In a note to the report it is stated that my brother Bigham, after consultation with Mathew, J., intimated that he would, with the consent of the parties, hear the case as if the policy did not contain the "p.p.i." clause. I need not say that I should be very slow not to adopt a course which they had approved, and if I ever felt impelled by my own conviction to take a different view from them I should have very great misgiving as to the correctness of my own view. But what I am invited to do here is something quite different from that which was asked by the parties and permitted by my brother Bigham in that case. That was, in effect, to treat the vitiating clause as deleted. What I am invited to do is to treat the policy as valid with the vitiating clause retained as part of it. If that were done here which the court did in *Buchanan* v. *Faber*—viz., if I dealt with this policy as if it contained no "p.p.i." clause—the plaintiffs, so far from being helped, would obviously be involved in a fatal difficulty. They, admittedly, never had any insurable interest; the absence of such an interest has been pleaded by the defendants; and the only possible reply to this defence lies in the presence in the policy of the "p.p.i." clause. If that is treated as gone, the plaintiffs' case goes with it. Deciding this case, as I do, upon the grounds which I have stated, I feel, nevertheless, in view of the care bestowed upon it by the learned counsel on both sides, that I ought not to let pass unnoticed another aspect of the case which was presented for my consideration. The defendants argue that, even if the policy can be treated as not invalidated by the "p.p.i." clause, they have a good defence to the action, because it was obtained by the concealment of a material fact—a fact, that is to say, "which if communicated would affect the judgment of a rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium or another": (see per Brett, L.J., *Rivaz* v. *Gerussi*, 44 L. T. Rep. 79; 4 Asp. Mar. Law Cas. 377; 6 Q. B. Div. at p. 229). The fact referred to is the purely speculative character

of the transaction. That it was not expressly communicated by Mr. Pound to Mr. Toulmin is indisputable; but the plaintiffs say to the defendants, "You are not entitled to rely on this non-disclosure; you knew perfectly well that we were negotiating for a policy with a 'p.p.i.' clause, and you contracted to give us such a policy. Mr. Pound was justified in assuming that Mr. Toulmin knew all he had to tell, and in the circumstances you must be taken to have waived being informed of the purely speculative nature of the risk": (see *Carter* v. *Boehm*, 3 Burr. 1907). It appears to me that there is much to be said for this view, but upon the whole, if it was open to me to treat the policy as a valid policy and I had to decide the case upon this point, I should feel myself, upon the evidence given before me, obliged on this point also to decide in favour of the defendants' contention. On the materiality of the fact of this being purely a speculative or wagering venture on the part of Mr. Rouse and his friends Mr. Toulmin is clear and emphatic. He would not have entertained the risk if he had known of it. As I understand his evidence, "policy proof of interest" in the ordinary understanding of underwriters means at least the possible existence of a business interest—an interest which may be hard to prove or may not admit of legal proof as an insurable interest, but still some business interest. The facts in the case of *Buchanan* v. *Faber*, to which I have had occasion to refer, afford an illustration, I think, of a class of risk of this latter sort. In fact the clause is sometimes stipulated for in policies which are intended to cover substantial interests such as disbursements and advances. It is not understood, if I follow Mr. Toulmin's evidence correctly, to cover a mere wager. The only case, according to Mr. Toulmin, in which he has accepted a purely speculative or wagering risk—and that he has done only on rare occasions—is in the particular case of "overdue" vessels, and then only at specially agreed rates of premium. The defendants' evidence is substantially confirmed, I think, by the conduct and by the evidence of Mr. Rouse. Mr. Rouse is himself a clerk in an insurance office, and he expressly enjoined Mr. Pound to state in negotiating for the insurance the speculative nature of the transaction. The idea was, he says, that they could not be too careful. He says, no doubt, elsewhere in his cross-examination that he did not see the materiality of a "spec." or real interest, but he goes on to admit that the underwriters would probably quote a higher rate of premium in the case of a "spec." Mr. Pound's excuse for not obeying Mr. Rouse's instructions on this point as given to him by Mr. Rouse was that he had not got the chance of making the disclosure. It was quite an insufficient excuse, as I understood what took place between Mr. Pound and Mr. Toulmin; but I believe that Mr. Pound did not at all mean to do anything improper or unfair. I think he possibly drew an unwarranted inference from Mr. Toulmin's words and manner that Mr. Toulmin either knew or was willing to waive inquiry about the circumstances of the insurance. Upon the whole, as I have already said, upon the evidence before me, if I had to decide on this issue I should feel obliged to decide it in favour of the defendants. It is not, however, necessary for me to do so, and I give judgment for the defendants on the grounds which I have previously stated. Under the circumstances of the case, including those to which I need not refer, except for this purpose—namely, that, as appears by Mr. Toulmin's letter of the 14th Nov. 1898, the defendants repudiated the policy for reasons which the facts do not warrant, and which implied an unjust imputation upon the plaintiffs' representative—I give judgment for the defendants without costs. *Judgment accordingly.*

Solicitors for the plaintiffs, *Thos. Cooper* and *Co.*

Solicitors for the defendants, *Hollams, Sons, Coward*, and *Hawksley*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, March 1, 1900.

(Before BARNES, J. and TRINITY MASTERS.)

THE SANSPAREIL. (a)

Collision—Tug and tow and a ship of war—Duty of single vessels to avoid crossing course of large fleet—Improper light on tug—Exemption of Her Majesty's ships from Regulations for Preventing Collisions at Sea—Order in Council of June 1899, *applying collision regulations to Her Majesty's ships—Regulations for Preventing Collisions at Sea* 1897, *arts.* 3, 19, 21, 27, 29 *—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 419, 741.

The statutory sanction imposed by sect. 419 *of the Merchant Shipping Act* 1894 *for a breach of the Collision Regulations has no application to a merchant trader which is crossing the course of one of Her Majesty's ships from starboard to port, because the obligations imposed by arts.* 21 *and* 27 *are only applicable to ships, both of which are bound to obey the regulations.*

Under ordinary circumstances a tug and tow are entitled to cross ahead of a fleet of warships which has the tug and tow on the starboard hand, and the tug and tow ought to keep their course and speed, and are not bound to wait till the fleet has gone by. (b)

Where a tug towing another vessel exhibited her two towing lights and side lights, and also carried a white steering light abaft the mainmast visible aft and forward of the beam, the exhibition of such last-mentioned light was held in the circumstances not to be a breach of the regulations which could possibly have contributed to a collision with another steamship which was crossing the course of the tug and tow and had them on her starboard hand.

THIS was an action *in personam* which arose out of a collision between the plaintiff's sailing vessel the *East Lothian* and H.M.S. *Sanspareil*, of which the defendant was the navigating lieutenant, and in charge at the time of the collision.

The plaintiff's case was that about 10.30 p.m. on the 7th Aug. 1899 the full-rigged iron ship *East Lothian* of 1389 tons register, manned by a

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

(b) The Court of Appeal has since reversed this view of the duty of a tug and tow (*post*, p. 78).—ED.

crew of nineteen hands all told and carrying two passengers, was in the entrance to the English Channel. The Wolf Rock bore about N. by W. distant about thirteen miles.

The *East Lothian*, which was on a passage from Nantes to Cardiff in ballast in tow of the screw tug *Sir W. T. Lewis*, was on a course N. 9 deg. E. magnetic, and, with three lower topsails, main upper topsail, two jibs, and fore-topmast staysail set to assist the tug, was making about six knots an hour.

The weather was fine, dark, and clear, with a moderate breeze from the S.E., and the tide was low water slack.

The *East Lothian* carried the regulation side lights and a stern light, and the *Sir W. T. Lewis* carried two vertical white lights in front of the foremast, the regulation side lights, and a white light abaft the mainmast for the *East Lothian* to steer by. This light showed forward of the beam.

The lights were burning brightly, and a good look-out was being kept on board both vessels.

In these circumstances those on board the *East Lothian* saw, amongst a number of lights bearing between four and five points on the port bow and several miles distant, a masthead light which proved to be the masthead light of H.M.S. *Sanspareil*, which was the leading ship of one of the columns of the B Division of the Channel Fleet returning from the naval manœuvres. As she came nearer her green light as well as the green light of other vessels of the fleet was seen. The *Sir W. T. Lewis* and the *East Lothian* kept their course and speed, and as the *Sanspareil*, which was in charge of the defendant as officer of the watch, approached the *East Lothian* she opened her red light, but instead of keeping clear of the *East Lothian*, as she could and ought to have done, the *Sanspareil* came on at great speed showing both her side lights, and with her stem and ram struck the port side of the *East Lothian* near the break of the poop, causing her such damage that she sank in a very few minutes and with her crew's effects was totally lost.

The plaintiff charged the defendant with not keeping a good look out, with failing to keep out of the way of the *East Lothian*, and with failing to take proper or sufficient measures in due time to do so, with failing to slacken the speed of the *Sanspareil* or to stop and reverse her engines in due time or at all before the collision, and with breaking arts. 19, 22, 23, 27, and 29 of the Regulations for Preventing Collisions at Sea.

The defendant's case was that the *Sanspareil* was on the day in question proceeding up Channel on a course S. 72 deg. E. at a speed of ten knots, the Lizard lights bearing W. by S. ½ S. distant about sixteen miles. There was a light southerly breeze, and the weather was very dark, but fine and clear. The *Sanspareil* was one of a large fleet of thirty ships of war proceeding up Channel in columns of divisions in line. The *Sanspareil* was leading the second division, with a line of cruisers on her starboard hand. On her port hand was a line of battleships headed by the flagship, and a further line of cruisers on the port side of the flagship. The *Sanspareil* had all the lights prescribed by the Queen's Regulations burning, and a good look-out was being kept on board of her.

In these circumstances the defendant saw at the distance of about two miles and about four points on the starboard bow a masthead light, a port side light, and also further aft another bright white light, which afterwards proved to be the masthead, port, and steering lights of the tug *Sir W. T. Lewis*.

The defendant believed the after white light to be an auxiliary white light of a steamship exhibited in accordance with art. 2 (*e*) of the Regulations for Preventing Collisions at Sea.

The defendant, bearing in mind the danger occasioned to ships of a fleet if the leading ship of a division of a large fleet unnecessarily alters her course, watched the lights before mentioned, but, finding their compass bearing did not alter, ported the helm of the *Sanspareil* so as to bring the lights before mentioned on her port bow, and then steadied her helm; and immediately afterwards, in order to keep clear of the line of cruisers on the starboard side of the *Sanspareil*, and in order to throw out the line of which the *Sanspareil* was the leading ship as little as possible, put the helm of the *Sanspareil* hard-a-starboard. Immediately the helm was hard-a-starboard the defendant saw on the starboard bow of the *Sanspareil* the red light of a vessel, which proved to be that of the *East Lothian*, which, it eventually appeared, was being towed by the *Sir W. T. Lewis* with a very long scope of hawser. Finding the red light drew ahead of the *Sanspareil* and a collision appearing inevitable, the defendant put the engines of the *Sanspareil* full speed astern, but immediately afterwards the stem of the *Sanspareil* struck the port side of the *East Lothian*.

The defendant charged the *East Lothian* and her tug with improperly neglecting to carry the regulation lights or with carrying them in an improper manner, with being towed with too long a scope of hawser, with improperly attempting while being towed to proceed across and through a large fleet of ships of war steaming in company, and with failing to observe arts. 3, 27, and 29 of the Regulations for Preventing Collisions at Sea.

The masters of the *Sir W. T. Lewis* and the *East Lothian* gave evidence to the effect that when the lights of the fleet were first observed they were taken to be the lights of a fishing fleet, but that later they were made out to be the lights of a fleet of war vessels when some four to five miles off, at which distance they bore about five points on the port bow of the *Sir W. T. Lewis*.

The defendant deposed that he never made out the two towing lights on the foremast of the *Sir W. T. Lewis*, and that they were never reported to him. He alleged he saw one bright light first, and then another bright light aft of the one first seen, and that he took the after white light to be the auxiliary light authorised by art. 2 (*e*) of the Regulations for Preventing Collisions at Sea.

By the Regulations for Preventing Collisions at Sea 1897:

Art. 2.—(*e*) A steam vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (*a*) (a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass). These two lights shall be so placed in line with the keel that one shall be at least 15ft. higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

Art. 3. A steam vessel when towing another vessel shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than 6ft. apart, and, when towing more than one vessel, shall carry an additional bright light 6ft. above or below such lights, if the length of the tow, measuring from the stern of the towing vessel to the stern of the last vessel being towed, exceeds 600ft. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in art. 2 (*a*) (*ubi sup.*), except the additional light, which may be carried at a height of not less than 14ft. above the hull.

Such steam vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

Art. 19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other vessel.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed.

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

Art. 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner, or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

By sect. 419 (4) of the Merchant Shipping Act 1894:

Where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

By sect. 741:

This Act shall not, except where specially provided, apply to ships belonging to Her Majesty.

The *Attorney-General* (Sir R. E. Webster, Q.C.) and *Acland* for the defendant.—The plaintiffs were guilty of contributory negligence at common law in attempting to pass through a great fleet of warships; it must have been obvious to those in charge of the navigation of the tug and her tow that for a tug with a large vessel in tow and with a large scope of hawser to attempt such a thing must bring about great risk of collision. The tug and tow should have kept away or have stopped until the fleet had passed; either of which manœuvres they could have easily adopted. [BARNES, J.—But if your point is that the plaintiff was guilty of common law negligence only, that will not assist you, since it is admitted the defendant could have avoided the tug and tow.] Secondly, it is submitted that the plaintiff was guilty of failure to discharge his statutory obligations under the regulations, arts. 27 and 29. The circumstances were such as to be special circumstances within the meaning of art. 27, and it was consequently the duty of the plaintiff to depart from art. 21. The plaintiff, in holding his course and speed, neglected precautions required by the special circumstances of the case: (art. 29). If so, he must be deemed to be in fault. Thirdly, the plaintiff committed a breach of art. 3 of the regulations in carrying the after white light so that it was visible forward of the beam. A vessel is prohibited from carrying a white light aft which is visible before the beam; the defendant was misled by this light because he was led to suppose that the vessel showing it was a vessel not engaged in towing. They cited

The Hope, 2 W. Rob. 8;
The La Plata, Swabey, 220;
The Annot Lyle, 55 L. T. Rep. 576; 6 Asp. Mar. Law Cas. 50; 11 P. Div. 114.

Joseph Walton, Q.C. and *Scrutton* for the plaintiff.—Firstly, as to the after white light on the *Sir W. T. Lewis*. It is submitted that such a light could not possibly have misled the defendant into supposing that the tug was not a vessel towing another vessel; because any steamship, towing or not, may carry a second white light aft of the masthead light prescribed by art. 2 (*a*). Therefore there was nothing in the fact that this tug was showing an after white light to make the defendant think she was or was not a vessel engaged in towing. The intention for which this second light was carried is immaterial if its exhibition does not infringe the regulations. Secondly, was there a duty on this tug and the *East Lothian* to keep out of the way of the fleet? The duty, if it exists, is outside the Regulations for Preventing Collisions at Sea; there is nothing in those articles to impose any such duty. Under what circumstances does this alleged duty arise? What must be the size of the fleet? A similar obligation was unsuccessfully contended for in *The Warrior* (27 L. T. Rep. 101; 1 Asp. Mar. Law Cas. 400; L. Rep. 3 A. & E. 553) and many other cases. Such a duty is outside and inconsistent with the regulations. But if the plaintiff was wrong to keep on across the course of the fleet, it is submitted that he cannot be held to blame. Such negligence would not be a breach of a statutory rule, and therefore the case of *The Monte Rosa* (68 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 326; (1893) P. 23) is in point, since the defendant could have avoided the consequences of the plaintiff's negligence by the exercise of reasonable skill. See also

The Margaret, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 204; 9 App. Cas. 873;
Marsden on Collisions, 3rd edit., p. 21.

It is not a breach of a statutory duty on the part of the plaintiff in not keeping clear of this fleet. The articles relied upon are arts. 27 and 29. Art. 29 gives a seaman some discretion in cases of emergency. Art. 27 does not apply, because at the time it is said the plaintiff should have acted there was no "danger of navigation or collision." [BARNES, J.—Suppose I find "due regard" was not had?] It is immaterial, because the due regard is to be in "obeying and construing" the regulations, and to avoid "immediate danger." There was no immediate danger here at first, and it is admitted that as soon as there was danger arts. 19 and 21 applied. Art. 21 does not apply to a case of collision between a Queen's ship and a merchant trader.

The *Attorney-General* in reply.—The last part of art. 3 is conclusive against the plaintiff; that provision amounts to an absolute prohibition to a vessel towing from carrying any light abaft the beam which is visible before the beam. Art. 27 does apply. There was immediate danger—namely, the risk in which the vessels would be involved if the plaintiff did not depart from the regulation which ordered him to keep his course and speed. *The Monte Rosa* (*ubi sup.*) is not in point; there the party suing was held to be unable to rely on the defendant's breach of duty; here the defendant is setting up the plea of contributory negligence.

Cur. adv. vult.

March 1.—BARNES, J.—This action arises out of a collision which took place on the 7th Aug. 1899 between the plaintiff's vessel the *East Lothian* and H.M. battleship *Sanspareil*, some miles to the south of the Wolf Rock, whereby the *East Lothian* was sunk. The *East Lothian* was proceeding in tow of the tug *Sir W. T. Lewis* on a voyage from Nantes to Cardiff in ballast. The tug and tow were on a course of N. 9 deg. E., and were proceeding at a speed of about six knots an hour. The wind was about S.E., and the vessel had some sail set. The tug was exhibiting the usual lights for a tug having a vessel in tow—that is to say, two bright lights in a vertical line, one over the other, at a distance of 6ft. apart, the regulation side lights, and a white light abaft the mainmast for the sailing vessel to steer by. The last light, according to the regulations, ought not to have been visible forward of the beam, but in fact did show to some extent forward of the beam. The *East Lothian* had the regulation side lights and a stern light. The *Sanspareil* was one of a large fleet of thirty ships of war proceeding up Channel. She and the other vessels were proceeding on the same course, S 72 deg. E., at a speed of about ten knots an hour, in the following formation: The ships were in four lines. The distance between each line was about eight cables, and the distance from the stern of one vessel to the bow of the vessel behind her was about two cables. The outer lines were formed by cruisers, and the inner by battleships. The *Sanspareil* was the leading ship of the more southerly line of battleships. She had all the lights prescribed by the Queen's regulations burning. Those on board the *East Lothian* and the *Sir W. T. Lewis* made out the lights of the fleet at a distance of about six miles, and broad on the port beam. At first the lights were taken to be those of a cluster of fishing boats, but as the tug and tow drew nearer the lights were observed to be the electric lights of the fleet. The tug and tow kept their course and speed, and crossed ahead of the southernmost line of cruisers. As they drew nearer to the *Sanspareil* the helm of that vessel was ported to pass under the stern of the tug, but the defendant, who was navigating the *Sanspareil*, being under the impression that the tug was a steamer proceeding alone, ordered the helm of the *Sanspareil* to be starboarded as soon as the *Sanspareil* was in a position to pass clear of the tug, and this was done. Shortly afterwards the defendant observed the red light of the *East Lothian*, and the engines of the *Sanspareil* were put full speed astern, but she ran into the *East Lothian* and sank her. This action was afterwards brought by the owner of the *East Lothian* against the defendant, Lieutenant Potter, to recover for the damages sustained by the former. At the hearing of the case the Attorney-General, who appeared for the defendant, raised no technical defences, but treated the case as one tried in the ordinary way between the owners of two vessels. He conceded that the helm of the *Sanspareil* had been improperly starboarded in the circumstances. This in fact means that the *Sanspareil* could have passed under the stern of the *East Lothian*. The Attorney-General, however, contended that the plaintiff's vessel must also be held to blame on two grounds. The first was that the tug infringed the regulations by exhibiting a light to guide the vessel astern which showed forward of the beam instead of only abaft the beam. The second was that the tug and tow infringed the regulations by standing on across the path of the fleet. With regard to the first point, the rule as to the exhibition of lights to a vessel in tow is contained in the second clause of art. 3 of the Regulations for Preventing Collisions at Sea, made in the year 1897, by virtue of the Merchant Shipping Act of 1894. This clause is as follows: "Such steam vessel"—it is a tug—"may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam." There is no doubt that there was an infringement of this rule by the tug, and that this would affect the tow as much as the tug. The Merchant Shipping Act 1894, s. 419 (4), provides: [His Lordship read the sub-section.] But it has been held that if the infringement of a rule could by no possibility have contributed to a collision, the infringement will not be a ground for holding the vessel infringing the rule to blame. See *The Fanny M. Carvill* (32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565; 13 App. Cas. 455 (*n*); and *The Duke of Buccleuch* (65 L. T. Rep. 422; 7 Asp. Mar. Law Cas 68; (1891) App. Cas. 310). It was urged by the plaintiff's counsel that the infringement in this case could not by any possibility have contributed to the collision in question. This was disputed by the Attorney-General. The facts bearing upon this point disclosed by the evidence appear to be these. The two towing lights forward, the white light aft, and the red side lights on the tug, and the red side light on the *East Lothian* could be seen from the *Sanspareil* from her position forward of the beam of the tug. The defendant stated that he only noticed one white light forward, one white light aft, and the red light on the tug, and that he took the white light aft to be the second light which a steamer of a certain size may carry under art. 2 (*e*); and that, therefore, the tug was considered to be a steamer proceeding alone. I cannot understand these statements, because if one light forward was noticed the other one forward ought to have been noticed too, and the small white light aft was an inferior light to the light which is referred to in art. 2 (*e*). The latter should show at least five miles. I understand that he did not see the red light of the *East Lothian* nor hear any report of the lights before the order to starboard was given. There was no evidence as to what reports, if any, were made, and, owing to the course which the case has taken, it is not necessary for the court to determine on what person on board the *Sanspareil* the blame rests. Upon these facts the question for con-

sideration is peculiarly one for the Elder Brethren of the Trinity House, who have heard this case as assessors with me, to form an opinion upon. They advise me that in their opinion the fact that the white light aft on the tug was visible before the beam of the tug could by no possibility have contributed to the collision; whether the white light aft on the tug was visible from before her beam or not, the other lights on the tug and tow should have shown unmistakably that they were on a tug and her tow. Even if the red light of the tow were not noticed at first the two towing lights forward on the tug were plainly visible, and would indicate that she had a vessel in tow, whether the white light aft could or could not be seen. Moreover, there is nothing unusual in a tug showing to another vessel, in certain positions, her two white lights forward, her side light, and her white light aft, for the first three are to show as far as two points abaft the beam, and the last may show from aft to abeam, and thus over two points of the circle on each side the lights overlap. Further, the small white light aft is, as I have already noticed, a different light from the light mentioned in art. 2 (*e*), and the defendant says that he concluded it was a steamer proceeding alone by only noticing one white light forward and one aft, besides the red light, and I have already commented on this. It is to be further observed that if he only noticed one light forward and no light had been visible aft, the reason which he gave for concluding that the tug was a steamer proceeding alone shows that in that case he would have concluded that the tug was a steamer proceeding alone and acted as he did, so that the fact that the white light aft was to some extent visible before the beam of the tug really made no difference whatever in the case.

The second point raises a question of very considerable importance. It was contended by the Attorney-General that the tug and tow ought not to have continued their course and speed across the course of the fleet, but should either have waited till the fleet had passed across their bows or starboarded their helms and gone under the stern of the fleet, and that in continuing their course and speed they were guilty in the circumstances of an infringement of the said regulations. The particular rules referred to were arts. 19, 21, 27, and 29. They are as follows: [His Lordship read the articles.] The substance of the argument was that although if the *Sanspareil* had been navigating alone, having the tug and tow crossing her course from starboard to port, she should keep out of the way of the tug and tow, and they should keep their course and speed unless and until they might be compelled to take action as contemplated by the note to art. 21, yet that while the *Sanspareil* was one of a fleet crossing the course of the tug and tow in the formation I have described, art. 27 applied and art. 21 ought to have been departed from by the tug and tow, because, owing to the difficulties which the vessels composing the fleet would have in the circumstances in navigating for a tug and tow coming in amongst them and crossing their course, and in avoiding collision with one another in doing so, due regard was not had by those in charge of the tug and tow to the dangers of navigation and collision, and the special circumstances which, it was contended, rendered a departure from the rules necessary in order to avoid immediate danger. It was also contended that art. 29 applied for practically the same reason, but as this rule does not impose obligations and merely provides that nothing in the rules shall exonerate any vessel or the owners or master or crew thereof from the consequences of any neglect to observe certain proper precautions, this contention was not really pressed. The objections to the argument also were that the articles in question do not apply so as to render the plaintiff's vessel subject to the statutory consequences imposed by sect. 419 (4) of the Merchant Shipping Act 1894, and that the tug and tow were not guilty of contributory negligence, and that there was no infringement of art. 27 by the tug and tow in the circumstances; that is to say, that they were right in keeping their course and speed, and that there was nothing in the circumstances which rendered it improper or negligent for them to do so. First, with regard to the law applicable to the case. The Regulations for Preventing Collisions at Sea, of which the articles above referred to form part, were made by Order in Council in 1897, by virtue of sect. 418 of the Merchant Shipping Act of 1894, which provides that regulations so made shall have effect as if enacted in that Act, and also applies them, together with the provisions of the Act relating thereto, or otherwise relating to collisions, to all foreign ships within British jurisdiction, and they and the said provisions of the Act may, by sect. 424, be applied by Order in Council to the ships of any country when beyond the limits of British jurisdiction, if the Government of such country is willing that they should be so applied. But sect. 741 of the Act enacts that the Act shall not, except where specially provided, apply to ships belonging to Her Majesty, and there is no special provision in the Act providing that the regulations made under it for preventing collisions at sea are to apply to such ships. There are, however, precisely similar regulations made in June 1899 for Her Majesty's ships by Order in Council, and these are in the Queen's Regulations and Admiralty Instructions. These are not made by virtue of the Act of 1894, but they are word for word the same as those made under the Act, and there are, as I understand, only in addition certain special regulations for Her Majesty's ships, with regard to certain special lights and signals to be used by them only. Art. 13 contemplates such regulations being made. The result is that as the Regulations (except the special regulations just referred to) for Preventing Collisions at Sea are similar for Her Majesty's ships and for other vessels for all practical purposes, the navigation of all vessels upon the high seas and in all waters connected therewith navigable by sea-going vessels must be conducted as if the same regulations applied to them. This is the only reasonable way of treating the matter. In my opinion, however, the fact that the regulations made with respect to Her Majesty's ships are not made under and by virtue of the Merchant Shipping Act 1894, may in cases of collision between such a ship and a vessel to which the regulations of 1897 apply, affect in some respects the statutory liability imposed on the latter vessel by sect. 419 (4) of the Act. This observation does not apply to most of the regulations which have

to be obeyed. For instance, an infringement by the tug in this case of the rule in regard to lights would, as I have already pointed out, be visited by the statutory penalty unless it could by no possibility have contributed to the collision. Such a breach is not affected by the observance or non-observance by the other vessel of the regulations applicable to her. But I find a difficulty in applying a statutory penalty in cases of collision between a merchant vessel and one of Her Majesty's ships, where the infringement by the former which is complained of is an infringement of the 27th combined with the 21st rule. This arises from the language of the rules, and may be pointed out by dealing with the present case. In navigating for each other in the circumstances of this case, and acting on similar regulations, the *Sanspareil*, if she were a single ship, would have to keep out of the way (art. 19), and the *East Lothian* and her tug to keep their course and speed (art. 21), subject to the effect to be given to the note to art. 21 and to art. 27, and it follows from what I have remarked above that it would be neglect of good seamanship and navigation to do otherwise, and if such neglect caused or contributed to the collision, the vessel infringing the regulation would clearly be held to blame. If, however, a breach of art. 27 combined with art. 21 by the *East Lothian* and her tug did not in fact contribute to the collision, though by possibility it might have done so, then to fix the *East Lothian* with blame it is necessary to rely on the statutory penalty imposed by sect. 419 (4) of the Act of 1894, and to consider strictly whether any of the collision regulations referred to in that section have been infringed by her or her tug. In my opinion, the collision regulations referred to in that section are only those made by virtue of the Act which, according to sect. 418, are to have effect as if enacted in the Act, and, as already noticed, the Act does not apply to Her Majesty's ships. The *Sanspareil*, in fulfilling a duty to keep out of the way, would, strictly speaking, be acting under art. 19 of the Queen's Regulations, and not under the corresponding article of the regulations made under the Act of 1894, and, strictly speaking, the duty of the *East Lothian* and her tug to keep their course and speed according to art. 21 of the latter regulations was only where "by one of these rules" the other vessel has to keep out of the way. "One of these rules" must, as a matter of construction, mean one of the regulations made under the Act of 1894, and art. 27 thereof only strictly applies to the obeying and construing of the same rules. It appears to me necessarily to follow that the statutory provisions of sect 419 (4) could not apply in the present case even if the *East Lothian* and her tug did not act in accordance with art. 27.

There was a further point taken by the plaintiff with regard to the meaning of art. 27 of the regulations of 1897. It is this, that that article does not impose an obligation which can be infringed, but is to be considered solely as in exoneration of the strict duties imposed by the other articles. I am not able to agree with this view entirely. It seems to me that there is an express obligation in obeying and construing the rules to use due regard to the circumstances mentioned in the article, and at the same time it is difficult to conceive a case in which there could be a finding of want of such due regard unless it in fact contributed to a collision. So that I fail to see how there can be an infringement of art. 27 unless there has been default under it which contributes to a collision. For these reasons I am of opinion that, in order to establish liability on the part of the plaintiff for the collision in this case, it is necessary to show that there has been default on the part of the *East Lothian* or her tug under arts. 21 and 27, which in fact contributed to the collision. Even if the tug and tow were wrong in the circumstances in proceeding on at full speed on the course they were on at first, it is clear that the *Sanspareil* could by the exercise of reasonable care have avoided the collision without any difficulty, and, according to well-known principles which are stated in a convenient form in Mr. Marsden's book on the Law of Collisions at Sea, p. 25, the plaintiff can recover in this case. I might leave the case there, but I think it desirable to express the view which the court has arrived at with regard to the important question as to whether the tug and tow were right or wrong as a matter of navigation, having regard to the terms of art. 27, in proceeding on as they did in the circumstances. The argument of the Attorney-General upon this point was supported by a reference to the following notice to shipowners and masters which has been issued by the Board of Trade for some time, though the masters of the tug and tow stated that they were not aware of it. It is as follows: "Notice to shipowners and masters of single ships approaching squadrons.—The Board of Trade desire to call the attention of shipowners and masters to the danger to all concerned which is caused by single vessels approaching a squadron of warships so closely as to cause danger of collision by attempting to pass ahead of or to break the line of such squadron. The Board of Trade find it necessary to warn mariners that it would be in the interests of safety for single ships to keep out of the way and avoid passing through the squadron." The Attorney-General did not rely upon this notice as having any binding effect like the regulations have, but as supporting his contention that for a single ship to stand on in amongst a squadron was for her to run into such danger that she should be held guilty of an infringement of art. 27 by so doing. There may possibly be a case in which if a vessel were to keep her course and speed through a squadron of war vessels which ought *primâ facie* to keep out of her way, it would be impossible or impracticable for them to manœuvre so as to keep out of her way without some or one of them colliding with her, or with some other vessel or vessels of the squadron; and in such cases the single vessel may be required to take action to avoid the danger either by acting according to the note to art. 21, or in accordance with the provisions of art. 27. But there is at present no regulation dealing in express terms with the case of a single ship approaching a squadron of war vessels. The general regulation for all crossing steam vessels is that the vessel which has the other on her starboard hand must keep out of the way of the other, and the other must keep her course and speed, unless the circumstances referred to in the note to art. 21 or in art. 27 require her to act differently. It is therefore necessary to consider the particular circum-

stances of the case. I have therefore taken the opinion of the Elder Brethren upon this point, having regard to the facts of the case which I have set forth at the commencement of this judgment. Their opinion is that the position and movements of the fleet did not constitute such a danger to navigation or collision, or such circumstances as to render it necessary for the tug and tow to wait till the fleet had passed, or to starboard and go under the stern of the fleet; in other words, they do not consider that the tug and tow acted improperly in this case in proceeding as they did, and that the *Sanspareil* and the other vessels of the fleet could without difficulty or danger, though possibly not without some inconvenience, have avoided them. All the vessels except the *Sanspareil* in fact did so, and the *Sanspareil* would have done so without any difficulty if her helm had not been starboarded until she was in a position to pass under the stern of the *East Lothian*. For these reasons I am of opinion that the plaintiff is entitled to judgment.

Solicitors for the plaintiff, *T. Cooper* and *Co.*

Solicitor for the defendant, *The Treasury Solicitor.*

Monday, March 12, 1900.

(Before Sir F. JEUNE, President.)

SARAH HUDSON (widow) AND HENRY HUMPHREY *v.* OWNERS OF THE BARGE SWIFTSURE; THE SWIFTSURE. (*a*)

Objection to registrar's report — Account book entries of receipts and disbursements — Admissibility in evidence.

In taking accounts between a mortgagor and a deceased mortgagee of a barge, an account book kept by the latter in his own handwriting containing entries of payments made to him by the mortgagor as well as disbursements made by him on account of the barge is admissible on behalf of the mortgagee's executors in evidence as containing entries against interest.

Taylor *v.* Witham (3 *Ch. Div.* 605) *followed.*

THIS was a motion by way of objection to the registrar's report, dated the 24th Feb. 1900.

The question arose as follows:

The plaintiffs were the executors of John Hudson, deceased, and brought the action to recover the sum of 200*l.* with interest at the rate of 6 per cent., due under a mortgage granted to the deceased of the barge *Swiftsure*, of which the defendants were the registered owners.

The defendants alleged in their defence that the whole of the sums due under the mortgage had been repaid to the deceased, and had been accepted by him in full satisfaction of any claims he had upon the defendants, whether under the mortgage or otherwise.

The defendants also counter-claimed an account of the sums paid by them to the deceased, and a reconveyance of the barge to them by the plaintiffs.

By the third paragraph of their reply the plaintiffs pleaded that at the time the *Swiftsure* was mortgaged to the deceased it was agreed between him and the mortgagors that, in consideration of the deceased paying for all the repairs, disbursements, and outgoings in connection with the said barge, the deceased should receive 5 per cent. of her gross earnings. In pursuance of this agreement the deceased and his executors from time to time expended large sums on and in connection with the said barge, and in respect of his share of the earnings received from time to time certain sums. It was also alleged that any sums paid by the defendants to the deceased were in respect of the earnings of the barge, and not otherwise.

The matter was referred to the registrar of the Admiralty Court for him to report upon. At the hearing before the registrar it was sought on behalf of the plaintiffs to adduce in evidence the account book of the deceased John Hudson. In this book, which was in the handwriting of the deceased, were entries showing that various sums had from time to time been received by the deceased from the defendants on account of the barge. Other entries showed that the deceased had made disbursements on account of repairs to and the upkeep of the barge

The learned registrar declined to admit this book in evidence.

The plaintiffs appealed against his refusal.

Kilburn, for the plaintiffs, contended that the account book was admissible in evidence as containing entries against interest. He cited in support of his contention the cases of *Wilkinson* v. *Sterne* (9 Mod. Rep. 427) and *Taylor* v. *Witham* (3 Ch. Div. 605), and distinguished the present case from that of *Doe* v. *Bevis* (18 L. J. 128, C. P.) upon the ground that in the latter case there were practically two accounts unconnected with each other.

Nelson, contra, submitted that the account book could not be received in evidence, either as a book kept in the ordinary course of business or as containing entries against interest. He relied upon *Doe* v. *Bevis* (*ubi sup.*), and pointed out that that case had not been cited to the learned judge who decided *Taylor* v. *Witham* (*ubi sup.*).

The PRESIDENT.—The question in this case is as to the admissibility of evidence which the learned registrar thought right to reject. It is a claim by the executors of a man named Hudson on account of a mortgage on a barge, and the defence is that various sums have been paid by the defendant, making altogether a greater amount than the mortgage debt, and therefore the mortgage is discharged. I do not think it necessary to go further into the question as to whether the mortgage debt has been paid than to say that it was sought to be proved by the plaintiffs that although these sums, or certain sums, of money had been received by Hudson, these sums were received or applied by him—and properly so applied—in payment, not of the mortgage, but of certain expenses which he was under in connection with the barge. The whole of that turns upon the entries in his books, and the first question is whether the books ought to be admitted. Then, of course, comes the subsequent question as to what, if admitted in evidence, they prove, and one has to look at them for the purpose of seeing exactly what they prove. Are these books evidence? They are kept in the handwriting of Hudson. That seems to have been clearly

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

proved, and I think myself, although I do not desire to base my decision entirely upon the point, that they were kept in the ordinary course of business. There is no suggestion that they are "cooked," or fraudulent, and therefore it seems to me, *primâ facie* at any rate, that they may be said to have been kept in the ordinary course of business, and kept at the time; that is to say, kept from day to day. But the question is whether they are admissible in evidence. Of course, if they cannot be put in as books kept in the course of business, they are only admissible because the entries are against Mr. Hudson's interests. Now, what are the interests? I think it would take time to make out what the books show, but at a glance one can see that they are books which show accounts with regard to the *Swiftsure*, and the receipt of money from time to time. Therefore every one of those items is clearly against interest.

Various cases have been cited to me, and I do not think they are opposed to the general principle that entries in a book which are against interest are admissible. I think the cases go further, because they show that if there are other items in the book closely connected and related to receipts which are against interest, then we may look not only at the entries which are against interest, but at the accounts of which they form an integral and essential part. The decision, reported in the Modern Reports, of Lord Hardwicke appears to me to go all that way. I think Lord Hardwicke must in that case have regarded the book as kept in the ordinary course of business. If so, the report is not so much to show that the book was admissible, but to show for what purpose it was admissible. The decision in *Doe* v. *Bevis* (*ubi sup.*) appears to me only to show that the items which were sought to be proved were not so necessarily connected with the items admissible that the whole were admissible. The items which were rejected were not in any sense against interest or connected with such items. *Taylor* v. *Witham* (*ubi sup.*) appears to me to be very strong to show that the items of this book are all admissible. The Master of the Rolls, who was not sitting in the Court of Appeal but in a court of first instance, held that the whole of the entries in that case were admissible. It is not very easy to follow exactly the line of reasoning, but the decision is quite clear—namely, that the whole of the entries were hanging together; and that as the items against interest were clearly admissible, the entries which were connected with them were admissible also. Looking at this book, it appears to me that it is clearly against interest, because it says in fact this: "I have paid on behalf of the owner of the barge a large number of items, making up a considerable sum of money, for repairs to the barge, and I admit that as against that I have received a considerable number of payments." The whole entry is clearly an entry against interest, because it is an admission that he has been paid certain sums on account of payments which he has made—to that extent it is against interest. Clearly the receipt of money is against interest, because it admits payment of a sum which otherwise would be due to him. It seems to me also that I can see clearly from the book itself that the items are so closely connected together that the whole of the book is admissible. In the circumstances what ought to be done? I do not say what the effect of the book carefully looked into is, but you have a statement, more or less complete, by Bartlett, that he paid various sums of money to Hudson, and that he allocated them to the payment of the mortgage debt. I cannot quite gather that from the evidence of the shorthand writer's notes, and inasmuch as the sums were not paid direct, there may be some doubt whether there was really any allocation by Bartlett. On the whole, I think the best course is for the matter to go back to the registrar, with an intimation that these books should be received in evidence, and the proper deductions drawn from them. What the effect will be appears to be a matter for his consideration.

Appeal allowed.

Solicitors for the plaintiffs, *Indermaur* and *Brown*, agents for *George Robinson*, Strood.

Solicitors for the defendants, *Farlow* and *Jackson*.

March 19 *and* 28, 1900.

(Before BARNES, J.)

THE STELLA (No. 2). (a)

Objection to registrar's report—Wreck—Limitation of liability—Free pass—Loss of life—Loss of property—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 508—*Railway and Canal Traffic Act* 1854 (17 *&* 18 *Vict. c.* 31), *s.* 7—*Railway Clauses Act* 1863 (26 *&* 27 *Vict. c.* 92), *s.* 31—*Regulation of Railways Act* 1868 (31 *&* 32 *Vict. c.* 119), *ss.* 14, 16—*Railway and Canal Traffic Act* 1888 (51 *&* 52 *Vict. c.* 25).

A husband and wife were travelling on the defendants' steamship with a free pass. The steamship was wrecked by the negligence of her master and crew, and the husband was drowned, and both his and his wife's luggage was lost. Upon the free pass was printed a condition exonerating the defendants from "any injury, delay, loss, or damage, however caused." The defendants obtained a decree of limitation of liability, and paid the limit of their liability into court.

The wife and children brought a claim under Lord Campbell's Act for the loss of their husband and father. The registrar dismissed the claims, holding that the condition upon the free pass precluded recovery.

On appeal to the court:

Held (affirming the registrar), that the condition covered negligence, and was applicable both to sea and land transit.

Held, further, that a claim by the wife for the loss of her property, and, as his personal representative, for the loss of her husband's property, was likewise barred by the condition; and that, in the circumstances, no statute prevented the defendant railway company relieving themselves from liability for negligence.

Sect. 14 *of the Regulation of Railways Act* 1868, *which provides that any conditions in through booking contracts exempting a railway company from liability for loss or damage shall not have effect unless they are published in a conspicuous manner in the company's office, has no application to a case where a passenger is travelling with a free pass.*

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

THIS was a motion by way of appeal from a decision of the registrar of the Admiralty Court.

The action arose out of the loss of the steamship *Stella*, the property of the London and South-Western Railway Company, which on the 30th March 1899 ran aground on the Black Rock, near the Casquets, in the Channel Islands, when she and many lives were lost.

Among the passengers on board the *Stella* were a Mr. and Mrs. Le Mare.

Mr. Le Mare was an official in the employ of the London and North-Western Railway Company, and as such had obtained a free pass from the London and South-Western Railway Company for himself and his wife for the journey from London to Jersey.

Mr. Le Mare was drowned, and, though Mrs. Le Mare was saved, both her own and her husband's luggage was lost.

On the 24th July 1899 Bucknill, J. made a decree limiting the liability of the owners of the *Stella* to a sum equal to 15*l.* per ton of her tonnage ascertained according to the provisions of the Merchant Shipping Act 1894. Such sum, amounting to 15,404*l.* 8*s.*, was paid by the defendants into court.

Among the claims put forward against this fund were claims by Mrs. Le Mare and her four children, under Lord Campbell's Act, for the loss they had sustained by the death of their husband and father.

Mrs. Le Mare also claimed for the loss of her luggage, and, as his personal representative, for the loss of her husband's luggage.

On the face of the free pass under which Mr. and Mrs. Le Mare were travelling were the words "for conditions, see back"; and on the back there appeared the following:

This free pass is granted on the following conditions:—Condition 2. That it shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass.

The registrar held that Mrs. Le Mare and her children were debarred from claiming under Lord Campbell's Act by the wording of the above condition.

The claimants appealed from this decision, and by consent the question of Mrs. Le Mare's right to recover in respect of the loss of her own and her husband's luggage was also dealt with at the hearing of the motion.

By the Merchant Shipping Act 1894:

Sect. 503.—(1) The owners of a ship British or foreign shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say): (*a*) Where any loss of life or personal injury is caused to any person being carried in the ship; (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; be liable in damages beyond the following amounts (that is to say): (i.) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and (ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

By the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), s. 7 (so far as is material):

Every such company as aforesaid shall be liable for the loss of or for injury done to . . . any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said . . . articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable.

By the Railway Clauses Act 1863 (26 & 27 Vict. c. 12), s. 31:

The provisions of the Railway and Canal Traffic Act 1854, so far as the same are applicable, shall extend to steam vessels, and to the traffic carried on thereby.

By the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119), s. 14:

Where a company by through booking contracts to carry any . . . luggage or goods from place to place partly by railway and partly by sea . . . a condition exempting the company from liability from any loss or damage which may arise during the carriage of such . . . luggage or goods by sea from . . . accidents of . . . navigation of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected and if printed in a legible manner upon the receipt or freight note which the company gives for such . . . luggage or goods, be valid as part of the contract between the consignor of such . . . luggage or goods in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition.

Tindal Atkinson for the appellants.—As regards the claim under Lord Campbell's Act, the conditions of the free pass were not binding on Mr. Le Mare with respect to the sea portion of the journey. The exemption does not cover negligence. As regards the claim for the lost luggage, the conditions of the free pass cannot be allowed to exonerate the company from liability in respect of goods carried by them, having regard to the provisions of sect. 7 of the Railway and Canal Traffic Act 1854, as extended by sect. 16 of the Regulation of Railways Act 1868, and to the provisions of sect. 31 of the Railway Clauses Act 1863. Sect. 14 of the Regulation of Railways Act 1868 also applies to this contract, which was one of through booking. Under the last-mentioned section it is necessary, in order to exempt the company from liability, that the conditions of the contract should be published in a conspicuous manner in the office where the through booking was effected, and be printed in a legible manner on the receipt or freight note given by the company for the goods. These requirements were not complied with. He referred to the following cases:

Henderson v. *Stevenson*, 32 L. T. Rep. 709; 2 H. L. Scotch, 470;

Watkins v. *Rymill*, 48 L. T. Rep. 426; 10 Q. B. Div. 178;

Zuns v. *South-Eastern Railway Company*, 20 L. T. Rep. 873; 4 Q. B. Div. 539;

Harris v. *Great Western Railway Company*, 34 L. T. Rep. 647; 1 Q. B. Div. 515;
Cutler v. *North London Railway Company*, 56 L. T. Rep. 639; 14 Q. B. Div. 64;
Great Western Railway Company v. *Bunch*, 58 L. T. Rep. 128; 13 App. Cas. 31;
Marshall v. *York and Newcastle Railway Company*, 11 C. B. 655;
Great Northern Railway Company v. *Shepherd*, 8 Ex. 30.

Acland for the London and South-Western Railway Company *contra*.—The conditions of the free pass are binding as to the claim under Lord Campbell's Act. Here there was no contract of carriage. This pass was merely a licence to Mr. Le Mare to be upon the company's premises and conveyances on certain conditions. The conditions are equally binding with regard to the claims for lost luggage. The extension of the Carriers Act to steamboats by sect. 16 of the Regulation of Railways Act is repealed by the Railway and Canal Traffic Act of 1888. He referred to

Bergheim v. *Great Eastern Railway Company*, 38 L. T. Rep. 160; 3 C. P. Div. 221.

Tindal Atkinson, in reply, cited

Gallin v. *London and North-Western Railway Company*, 32 L. T. Rep. 550; L. Rep. 10 Q. B. 212.

Cur. adv. vult.

March 28.—BARNES, J.—This was a motion that the decision of the registrar, deciding that Mrs. Le Mare and her children had not any claim against a certain fund in court in this case, should be reversed, and that the claimants should be allowed to come forward and prove their claim in this limitation suit. The husband of the lady and the father of the children was a passenger by the vessel, the *Stella*, which was lost some time ago under circumstances which appear in this case, and he was unfortunately drowned in the accident, together with other persons. A number of claims have been made in this limitation suit, and amongst them are claims put forward by the widow and children, under Lord Campbell's Act, relating to the loss of this gentleman. The registrar disallowed the claim on behalf of the widow and children, on the ground that the deceased gentleman was travelling under conditions which really amount to this, that he was travelling at his own risk. Two grounds are put forward in support of the claim, so far as it was made by the widow and children. The first was that the plaintiffs, the persons limiting their liability, were responsible for negligence—the loss having occurred, as I understand, through negligence—because the ticket or pass with which he was travelling was not binding, so far as the conditions exempting the plaintiffs from negligence were concerned, upon the traveller at all; and, secondly, that even if they were binding, that they were not binding or applicable so far as related to the sea transit. I think it was conceded that the widow and children could only claim for loss, under Lord Campbell's Act, where the passenger himself, if alive, could claim for injury done to himself. I think there is no dispute about that. But the two points taken have to be considered. With regard to the first one, it appears that the gentleman in question was travelling with a free pass. The document which was given to him is headed "free pass," and the terms on which it was granted appear on the back of it. It was granted from London to Jersey, and at the foot of it there is, in print, "for conditions, see back." On the back the conditions are set out. It says: [His Lordship read the condition.] Now, Mr. Le Mare was chief officer and secretary of the Stores Department of the London and North-Western Railway Company, and according to the affidavit of the claimant he had obtained a free pass, similar accommodation being given by the London and North-Western Railway Company to the *employés* of other railway companies. That is how he and his wife came to have free passes on the journey which they had undertaken.

The argument on this first point for the applicants was that the conditions really did not form part of any agreement entered into between the company and the traveller. On the other hand it was said that this was a mere licence to the passenger to travel on the conditions which are set out on the back of the pass. I do not think it really makes very much difference in the case, whether it is termed a licence, pass, or a contract to carry upon the terms mentioned, because, in my view, if the terms which are on the back are terms which the passenger agreed to, then those terms, if applicable, do exclude such a loss as that which happened in this case. Now, it seems to me that it really is a free pass granted on certain conditions, whether it is termed a mere licence or a contract to carry upon those conditions, and although a number of cases were cited, connected with this class of subject, all those cases were very fully considered in the judgment which was delivered in the case of *Watkins* v. *Rymill* (*ubi sup.*), and it seems to me quite clear that this pass bears upon the face of it a stipulation that it is issued upon certain conditions which are to be found on the back of it, and especially as it was given to a gentleman who was fully cognisant of such matters as free passes over different railways, that the terms upon which he was carried were the terms which are found on that free pass and which are set out on the back. My conclusion of fact with regard to the first point is that this gentleman was carried upon the terms which are mentioned on that free pass. The second point is that those terms are only applicable to land transit, and were not applicable to the loss which happened in consequence of the boat on which this gentleman was being lost. The point made was that all the conditions are only conditions which apply to transit on railways. I am not able to take that view, because it seems to me that although it is possible to read some of those conditions in that way, yet the second condition, which is quite general in its terms, is applicable to the whole of the transit from London to Jersey, which was the transit mentioned on the face of the ticket, and also that the whole transit is upon the conditions upon the back so far as they are applicable. Therefore, it appears to me that these terms apply all through, so far as they can apply, and the second condition is clearly one which exonerates the company from liability for the accident in this case. That would be sufficient to dispose of the appeal, which was only against the decision dealing with the claim by the widow and children.

But a further point has been taken by Mr. Atkinson on behalf of the widow, Mrs. Le Mare —namely, that she, as the administratrix of her

husband and also in respect of her own rights, had a claim for loss of luggage belonging to her husband and herself. Although that was not really part of the matter disposed of by the registrar, it was discussed and considered by counsel on both sides and therefore I have to dispose of it. Now it appears to me that, for the reasons which I have already given in relation to the claim under Lord Campbell's Act, the ticket or pass is equally binding so far as it relates to any claim for loss of or injury to the luggage which either of them had put under the charge of the company. That would therefore dispose of the case so far as the luggage is concerned, unless there is some statute preventing the application of these conditions to the contract to carry the luggage. The precise particulars of the luggage I do not think were very fully gone into. It was stated that there was luggage in the ordinary mode of transit, sent off with the passengers, and there was a bag containing jewellery which, when on board, the lady placed in the charge of the stewardess. I do not think there is any difference between the claim so far as it relates to the luggage delivered in the ordinary way at starting and so far as it relates to the bag, because both were, I think, in the custody of the company for carriage; but, as I have said, it seems to me that the ticket or pass is binding with regard to the loss in respect of those articles, unless the operations of the conditions is controlled by the effect of some statute. The point made with regard to that was that either under the Carriers Act 1854 or under the Railways Regulation Act 1868 the contract was controlled and could not affect this liability because of the provisions of either one or other of those Acts. I have felt some difficulty in disposing of this part of the case, because I do not think counsel were quite prepared to discuss these Acts with any great nicety, especially as the point was freshly made by Mr. Atkinson. But Mr. Acland has been good enough to send me the Acts relating to the London and South-Western Railway Company which bear upon this case. Now, first of all it was said that the Carriers Act of 1854 controlled the contract. That point was based upon the 7th section of the Act, the terms of which I need not go into. If that section applied there would be, of course, liability upon the company in this case. But that Act only applies to land carriage. Then it was said that it was extended to steamers belonging to railway companies by subsequent legislation, and there is no doubt that it was extended by the 31st section of the Railway Clauses Act 1863 to steam vessels and the traffic carried thereby. But that Act was what is termed a Clauses Act, and the 30th section shows that it applies to railways whose special Acts are passed after that time, and which incorporated the part of the Act which deals with this subject. I think sect. 31 is applicable to steam vessels referred to in the fourth part of the Act. Now, the London and South-Western Acts were before that date. The first is the Act of 1848, and the next is the Act of 1860, so that both those Acts were passed before the Act of 1863. It follows that they do not and could not incorporate the provisions of the fourth part of the Clauses Act of 1863. Then came the later Act of 1868—the Regulation of Railways Act—and the 16th section of that Act extended the Act of 1854 to all railway steamers; but there came a later Act in 1888, the 59th section of which repealed that part of the 16th section of the Act of 1868 which extended the provisions of the Act of 1854 to all railway steamers. Therefore, it seems to me, upon such consideration of these Acts as I have been able to give, that the Act of 1854, so far as the London and South-Western Railway Company is concerned, does not apply. But that does not quite exhaust the case, because it was further said that the 14th section of the Regulation of Railways Act 1868 was applicable to this contract, and prevented the company from taking advantage of the exonerating clause of the free pass. That is a section which deals with the case of a company agreeing, by through-booking contracts, to carry any animal, luggage, &c., partly by railway and partly by sea, &c., and provides that any conditions exempting the company from liability for loss and damage shall not have effect unless they have been published in a conspicuous manner in the company's office, and printed in a legible manner on their documents. But my view is that that section does not apply to such a case as the present. It really, I think, was intended to apply to through-booking contracts made in the ordinary course of business, and I cannot in its terms find anything preventing the railway company from making such conditions as in the present case. For these reasons it appears to me that the appeal must be dismissed with costs, and the claims put forward excluded from the fund which has to be distributed in this case.

Appeal dismissed.

Solicitors for the appellants, *Willson* and *Norman*.

Solicitors for the respondents, *Clarksons, Greenwell*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 27 *and* 28, 1899.

(Before SMITH, COLLINS, and WILLIAMS, L.JJ.)

Re AN ARBITRATION BETWEEN GOODBODY AND CO. AND BALFOUR, WILLIAMSON, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Bill of lading — Excepted port—Port of Manchester — Meaning — Immaterial addition.

A contract for the sale of a cargo of wheat per Vanduara *provided that the vessel should discharge "at any safe port in the United Kingdom." The vessel was chartered by the sellers to discharge at "any safe port in the United Kingdom (Manchester excepted)," and the bill of lading was in the same terms.*

By the Manchester Ship Canal Act 1885, *and by the Customs regulations, the port of Manchester included the whole of the ship canal, but in the ordinary commercial meaning it included only Manchester and the waters adjacent thereto.*

In the wider meaning Manchester was, but in the more limited meaning was not, a safe port for the Vanduara.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Held (affirming the decision of the Queen's Bench Division), that Manchester, within the meaning of the charter-party and bill of lading, was not a safe port for the Vanduara, *and that therefore the addition of the words "Manchester excepted" in the bill of lading and charter-party was not a material alteration of the contract of sale so as to release the buyers from taking the documents.*

THIS was an appeal by Goodbody and Co from the decision of the Divisional Court (Bruce and Ridley, JJ.) upon a special case stated by arbitrators.

By a contract of sale, dated the 29th Dec. 1896, Balfour, Williamson, and Co. sold to Goodbody and Co. a cargo of wheat per the vessel *Vanduara*, sailed or about to sail.

The contract contained the following clause:

Shipped in good condition per *Vanduara*, first-class iron vessel, classed not lower than A1 English . . . from Oregon and [or] Washington, sailed or about to sail, as per bill or bills of lading, dated or to be dated accordingly, about 13,000 units, or whatever quantity vessel may carry, at the price of 33*s*. 10½*d*. per 500lb. gross, including freight and insurance, to any safe port in United Kingdom of Great Britain and Ireland, or to Havre or to Dunkirk or to Antwerp, calling at Queenstown, Falmouth, or Plymouth for orders as per charter-party, vessel to discharge afloat.

The *Vanduara* had been chartered, under a charter-party dated the 22nd Sept. 1896, by Balfour, Williamson, and Co. for a voyage from Portland, Oregon, to Queenstown, Ireland, or Falmouth, for orders to discharge at a safe port in the United Kingdom (Manchester excepted), or on the continent between Havre and Hamburg, both inclusive.

The bills of lading for the cargo were also for a safe port in the United Kingdom (Manchester excepted), or on the continent between Havre and Hamburg, both inclusive; they were dated the 17th Dec. 1896.

The *Vanduara* when loaded with the said cargo would have been unable to go up the Manchester Ship Canal to the Manchester Docks because it would be necessary to dismantle the ship to get her under Runcorn Bridge.

Runcorn is about twenty-four miles from Manchester, and about twelve miles from the entrance to the canal.

On the 7th Jan. 1897 Balfour, Williamson, and Co. rendered a provisional invoice for the cargo.

On the 1st March the agents of Goodbody and Co. inspected the documents, and on the 6th March saw Balfour, Williamson, and Co., and took exception to the fact that the charter-party and bills of lading excepted Manchester, whereas the contract for sale provided for any safe port in the United Kingdom, and they stated that the buyers declined to take up the documents.

The due date of payment was the 12th March 1897.

Some time between the 6th March and the 11th March, Balfour, Williamson, and Co., by a payment of 30*l*. and a promise to pay an additional 30*l*. if the ship actually went to Manchester, obtained the consent of the shipowners to delete the words "Manchester excepted" from the charter-party and bills of lading. Those words were accordingly deleted by the agents for the shipowners, and the erasures were duly initialled.

On the 11th March the documents so altered were tendered to Goodbody and Co., and objection was taken to the erasures.

The matter was then referred to arbitration.

At the arbitration it was contended that the buyers were justified in refusing to take up the documents both (*a*) before and (*b*) after the erasures. Before the erasures, because the cargo tendered did not fulfil the terms of the contract in that the vessel was excluded from Manchester which it was alleged was a safe port. After the erasures, because no alteration ought to be made in documents after signature which may affect the rights of the parties interested; because the property in the cargo was in the buyers, subject only to the right of rejection if the documents were not in order, and therefore the buyers' consent was necessary before any alteration could be made in the documents; because the captain of the ship was a party to the bills of lading, and his consent also must be necessary; because the erasures formed a material alteration of the charter-party and the bills of lading.

On behalf of the sellers it was contended that, inasmuch as the contract for sale was for a safe port for the *Vanduara*, and as Manchester was not a safe port for her, the words "Manchester excepted" were implied in the contract, and therefore the documents as originally tendered were in conformity with the contract; that the subsequent erasures remedied any defect in the documents before the due date for payment and taking up the documents; that the erasures did not constitute a material alteration.

Subject to the opinion of the court, the arbitrators found on these facts that the shipping documents tendered by the sellers fulfilled the obligation of the sellers under the contract in all respects, and must be accepted by the buyers.

When the special case came before the Divisional Court for argument it was referred back to the arbitrators to find and state all material facts upon the question whether a shipowner, under the charter-party and bill of lading with the words "Manchester excepted" therein, could have been compelled to proceed to Runcorn Lay-bye and there discharge; and, in particular, upon the question whether, and to what extent, the words "Manchester excepted" and "Port of Manchester" in such documents have any recognised meaning among shipowners, shippers, or charterers, as including or not including Runcorn Lay-bye.

The arbitrators thereupon found the following facts:

Runcorn was, prior to the construction of the Manchester Ship Canal, a port on the river Mersey available for vessels not exceeding 500 tons or thereabouts; and, prior to the construction of the canal, there was no port of Manchester.

Since the construction of the canal Runcorn is for commercial purposes treated as a separate port.

Runcorn Lay-bye consists of an embayment which was made by the Manchester Ship Canal Company in the canal between the town of Runcorn and the old river bed, and affords capabilities for vessels up to 5000 tons to discharge cargo there.

Runcorn Lay-bye is part of the present port of Runcorn, which is the last port on the canal below bridges.

Vessels exceeding 500 tons or thereabouts can only reach Runcorn Lay-bye by entering the canal at Eastham Locks.

Various provisions are inserted in charter-parties with reference to the exclusion of Manchester and the canal, some charter-parties having the words "Manchester excepted," but more commonly the words inserted are "Manchester Ship Canal excepted," or "Manchester and all places on the canal excepted," or "Manchester Canal above bridges excepted."

A ship not exceeding 5000 tons, where the words "Manchester excepted" occurred in the charter-party or bill of lading, could, in the opinion of commercial men, be compelled to proceed to Runcorn Lay-bye and there discharge.

The evidence of the Custom House authorities was to the effect that, for the purposes of customs, Runcorn and Runcorn Lay-bye are treated as a part of the port of Manchester; but the evidence of the other witnesses was to the effect that, in a commercial sense, the interpretation placed upon the words "Manchester excepted" introduced into shipping documents is that Manchester alone is excepted, and not Runcorn Lay bye.

In a commercial sense the words "Port of Manchester" introduced into shipping documents include Manchester and the waters adjacent thereto only, and do not include Runcorn Lay-bye.

The Manchester Ship Canal Act 1885 (48 & 49 Vict. c. clxxxviii.) provides:—

Sect. 3. From and after the completion and opening for traffic of the canal by this Act authorised the said canal and so much of the navigable waters of the rivers Mersey and Irwell as lie between Hunt's Bank in the parish and township of Manchester and the limit of the port of Liverpool at Warrington and all channels, canals, cuts, docks, and works of the company within those limits shall be and are hereby constituted the harbour and port of Manchester, and the company shall be harbour authority of that harbour and port, but nothing in this Act shall extend to prejudice or derogate from the rights, interests, privileges, and jurisdiction of the Mersey Commissioners, or to prohibit, alter, or diminish any powers, authority, and jurisdiction of the said commissioners, their officers and servants, provided always that such harbour and port shall not by virtue of this Act be deemed a port for customs purposes, nor shall anything in this Act contained abridge or affect in any way the powers of the Commissioners of the Treasury to appoint a port of Manchester under the Customs Consolidation Act 1876 with such limits as they may think fit, nor abridge or affect any powers whatsoever conferred by the said Act, provided also that nothing in this Act shall be deemed to affect any of the rights or privileges of the port or harbour of Liverpool or of the port or harbour of Runcorn or any of the rights or privileges of the station at the mouth of the Mersey Canal known as Ellesmere Port.

By a Treasury Warrant of the 18th Dec. 1893, made under the Customs Consolidation Act 1876, the port of Manchester was made to include the Manchester Ship Canal from the entrance thereof at Eastham to Hunt's Bank in the city and parish of Manchester; and by the same Treasury Warrant it was declared that Runcorn should be no longer a port.

The Divisional Court (Bruce and Ridley, JJ.) decided in favour of Balfour, Williamson, and Co., and affirmed the award made in their favour: (8 Asp. Mar. Law Cas. 503; 80 L. T. Rep. 188).

Goodbody and Co. appealed.

R. Bray, Q.C. and *Edward Bray* for the appellants.

Joseph Walton, Q.C. and *Danckwerts* for the respondents.

SMITH, L.J.—I think that this appeal must be dismissed. It is contended by the respondents that the words "Manchester excepted" in the charter-party and bill of lading are immaterial, because the appellants were only entitled to have the wheat which they bought delivered at a safe port, and Manchester was not a "safe" port for the vessel in question. The appellants contended on the contrary that the port of Manchester includes Runcorn Lay-bye and that the vessel could have gone there safely although she could not have gone safely to Manchester. It was clearly shown that Manchester itself was not a safe port for this vessel, because it is found by the award of the arbitrators that it would have been necessary to dismantle the ship in order to enable her to pass under Runcorn bridge, which is the first bridge on the way up to Manchester. The arbitrators have found in their further award that Runcorn Lay-bye is not part of the port of Manchester in a commercial sense. It is indeed true that, for the purposes of the customs, Runcorn and Runcorn Lay-bye are treated as forming part of the port of Manchester, but the authorities show that, in considering what constitutes a particular port in a commercial sense, the limits of the port for the purposes of customs may be disregarded: *Price* v. *Livingstone* (47 L. T. Rep. 629; 5 Asp. Mar. Law Cas. 13; 9 Q. B. Div. 679); *Garston Sailing Ship Company* v. *Hickie* (53 L. T. Rep. 795; 5 Asp. Mar. Law Cas. 499; 15 Q. B. Div. 580); *Hunter* v. *Northern Marine Insurance Company* (13 App. Cas. 717). In the case of *Garston Sailing Ship Company* v. *Hickie* (*ubi sup.*) Lord Esher, M.R. said: "The word 'port' in a charter-party does not necessarily mean an Act of Parliament pilotage port, or, which is the better word, pilotage district. Therefore, when you are trying to define the port with regard to which persons who enter into a charter-party are contracting, you endeavour to find words which will shut out those things which you know they do not intend. What do they intend? They intend the port as commonly understood by all persons who are using it as a port—*i.e.*, for sailing to or from it with goods and merchandise. What persons are they? Shippers of goods, charterers of vessels, and shipowners. What do all these persons in their ordinary language mean by a port? What they understand by the word is, port in the ordinary sense, in its business sense, in its popular sense—*i.e.*, the popular sense of such persons. It is also the port in its commercial sense, for, with them, business means commercial business." Upon the facts as found in this case, I am clearly of opinion that it was quite immaterial whether the words "Manchester excepted" were in the charter-party and bill of lading or not. What, then, is the effect of an immaterial alteration in a written contract? Upon that point I will refer to 1 Smith's Leading Cases, p. 783, 10th edit., where, in the notes to *Master* v. *Miller* it is thus stated: "The addition of anything perfectly immaterial does not affect the liability of the

parties." For that proposition, *Catton* v. *Simpson* (8 A. & E. 136) and *Aldous* v. *Cornwell* (L. Rep. 3 Q. B. 573) are referred to as authorities; in the latter case, in an action by the payee against the maker of a promissory note, the addition of the words "on demand" was held to be immaterial. I am of opinion, therefore, that the decision of the Divisional Court was right, and that this appeal fails and must be dismissed.

COLLINS, L.J.—I am of the same opinion. Were it not for the facts which have been found by the arbitrators, there would be much strength in the objection of the buyers to the shipping documents in this case, for, by the terms of the contract the vessel is to discharge the cargo at any "safe" port and there are tendered to the buyers shipping documents, which, upon their face, seem to say that Manchester is a safe port, but is excepted. If Manchester were in fact a safe port, that stipulation would certainly alter very materially the contract which was made between the parties. If, however, Manchester was not a safe port for the ship in question, then the addition of the words "Manchester excepted" did not alter the contract between the buyers and the sellers. It is necessary, therefore, to consider whether Manchester was or was not a safe port, and I think that there is no difficulty about that question as soon as the boundaries of the port of Manchester are ascertained. The real question, therefore, is what the parties intended by the expression "port of Manchester." Now the arbitrators have found that the expression "port of Manchester," as used in these documents, means Manchester and the waters adjacent thereto, but not Runcorn Laybye. It is not disputed that in that meaning Manchester was not a safe port for this vessel. It is clear, therefore, that the words "Manchester excepted" in the shipping documents introduced nothing into the contract between the parties which was not there before, and the addition of those words was quite immaterial. I agree, therefore, that this appeal fails and must be dismissed.

WILLIAMS, L.J.—I am of the same opinion. In the view which I take of the facts of this case it is unnecessary for me to express an opinion as to the effect of the alteration of the shipping documents by erasing the words "Manchester excepted," if that had been a material alteration. I do not know that, even in that case, the buyers would have had a right to refuse the documents, seeing that the charterers and the shipowners both agreed to the alteration; and I do not know that the captain would not also be bound by such an alteration. It is not, however, necessary to decide those points. The real question is the contention of the sellers that it makes no difference whether the words "Manchester excepted" are in the shipping documents or not, because Manchester was not a safe port for this ship, and she was not bound to go there. That brings us to the question, what is the commercial meaning of the "port of Manchester." That question is a question of fact, and does not depend upon the practice of the customs authorities or anything of that kind, but upon considerations which are enumerated in *Garston Sailing Ship Company* v. *Hickie* (*ubi sup.*) by Bowen, L.J. Now, it is quite clear upon the findings of the arbitrators that, in a commercial sense, the port of Manchester does not extend beyond Runcorn Bridge, and it is not disputed that in that sense Manchester was not a safe port for this vessel. The addition of the words "Manchester excepted" in the shipping documents was, therefore, an immaterial alteration—that is, one which did not affect the contractual relations of the parties to the contract of sale. In the case of *Aldous* v. *Cornwell* (*ubi sup.*) it was held that the addition to a promissory note of the words "on demand," even if made by a party to the note, was immaterial, that alteration being one which only expressed the common law with regard to the note. It is desirable to carry the matter a step further and to show that an alteration, which does not import a rule of the common law into the document, but expresses something which is consistent with the terms of the document, is not a material alteration. I think that *Sanderson* v. *Symonds* (1 B. & B. 426) is an authority upon that point; in that case there was a policy of insurance upon a ship "at and from Liverpool to her port or ports, place or places, of discharge and loading in Africa, and during her stay there"; after the execution of the policy, the words "and trade" were inserted after the words "during her stay." The court there held that the alteration was immaterial, and did not avoid the policy; so, in the present case, there is an alteration made in the shipping document which does not at all affect the contractual obligations of the parties. Therefore it seems to me in this case that the buyers got all that which they were entitled to have when these shipping documents were tendered to them either with the words "Manchester excepted," or with those words erased. In either case their rights were the same. I agree therefore that the judgment of the Divisional Court was right, and that the appeal must be dismissed. *Appeal dismissed.*

Solicitor for the appellants, *Tilleards.*

Solicitors for the respondents, *Rowcliffes, Rawle,* and *Co.,* for *Hill, Dickinson, Dickinson.* and *Hill,* Liverpool.

Tuesday, May 15, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ. and NAUTICAL ASSESSORS.)

THE PHILADELPHIAN (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Anchor light—"Forward part of the vessel"—Art. 11 *of the Regulations for Preventing Collisions at Sea.*

A vessel at anchor, 313*ft. in length, which is exhibiting her forward light in the fore shroud of the starboard fore rigging,* 72*ft. abaft the stem, is carrying it "in the forward part of the vessel," in compliance with art.* 11 *of the Collision Regulations.*

THIS was an appeal by the defendants in a collision action from a decision of Bucknill, J., who held the defendants' steamship *Philadelphian* alone to blame for a collision with the plaintiffs' steamship *Ella Sayer* (81 L. T. Rep. 728; 9 Asp. Mar. Law Cas. 38; (1900) P. 43).

The collision occurred about 11 p.m. on the 10th Aug. 1899 in Quebec Harbour.

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

The plaintiffs' case was that the *Ella Sayer*, a steamship of 2549 tons gross register and 313ft. in length, was lying at anchor in about mid-channel in Quebec Harbour, heading up stream. There was a light breeze from the N.E., the weather was fine and clear, and the tide ebb, of the force of about one and a half knots an hour. The *Ella Sayer* was exhibiting two riding lights, one forward on the starboard side on the foremost shroud of the fore rigging, 23ft. 6in. above the forecastle deck, 8ft. from the centre of the mast, and 72ft from the stem; and the other aft in the usual place. While so at anchor the *Philadelphian*, which was coming down river, collided with her.

The plaintiffs charged the *Philadelphian* with failure to keep a good look-out, neglect to keep out of the way, and with proceeding at an excessive rate of speed.

The defendants, in their defence, charged the plaintiffs with not keeping a good anchor watch, and with neglecting to exhibit any or proper anchor lights in accordance with art. 11 of the Regulations for Preventing Collisions at Sea.

Art. 11 is as follows:

A vessel under 150ft. in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light, visible all round the horizon at a distance of at least a mile A vessel of 150ft. or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20ft. and not exceeding 40ft. above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15ft. lower than the forward light, another such light.

Bucknill, J. held that there was a bad look-out on board the *Philadelphian*, and that she was being navigated at an excessive rate of speed. In dealing with the position of the forward light of the *Ella Sayer*, he held that she was exhibiting a light, but it was not in the "forward" part, and that art. 11 of the regulations had not been complied with. He also held that in the circumstances the breach of the regulation could not possibly have contributed to the collision.

Joseph Walton, Q.C. (*Butler Aspinall*, Q.C. and *Glynn* with him) for the appellants.—The learned judge has held that there was an infringement of art. 11 on the part of those on the *Ella Sayer*, but was wrong in saying it could not possibly have caused the collision. The light must be right forward, not merely forward of the middle line of the vessel. It should be at or near the stem, just as the after light is to be at or near the stern. It must be put on the forestay. It is admitted the light could have been placed 20ft. further forward than it was. He referred to

The Rita and *The Vera Cruz* (unreported).

Laing, Q.C., *Dawson Miller*, and *Roche*, for the respondents, were not called upon.

SMITH, L.J.—We must consider this rule according to what it says. The *Ella Sayer* had a proper anchor light in the forward part of the vessel, and a proper anchor light in the after part of the vessel, and the question is whether that proper light in the forward part of the vessel, which was hung on the starboard forestay, was in a proper position. Bucknill, J. has held that it made no difference in this case, as if it had been forward in the right place the defendants would not have seen it, as they were not looking out. But he has put an interpretation upon the meaning of the word "forward" which is only surmise. The word "forward" is in contradistinction to the word "aft," with the addition that it must be where it can best be seen. The rule is as follows: [His Lordship read art. 11, and continued:] This vessel was more than 150ft. in length, and therefore the first part of the rule does not apply. She was 313ft. in length, and the forward light was therefore a quarter of her length from the stem. Now, it was not amidships. It was not in the after part of the ship. Where was it? In the forward part of the ship. It is clear it must have been. Then what does the rule say? 'A vessel 150ft. in length when at anchor shall carry"—Where? Not at or near the stem. No place is mentioned as regards the stem—" . . . in the forward part of the vessel." It is not for us to inquire whether that is a place where ships ordinarily carry anchor lights — whether they ordinarily carry it on the fore stay or not. That is not the point. The question is what is the construction of the rule, "Carry it in the forward part of the vessel at a height not less than 20ft. and not exceeding 40ft. above the hull." That light is to be carried in the forward part of the vessel. So much for the forward light. Now, where does the rule say that the after light is to be carried? It does not say that it is to be carried "in the after part of the ship," as, in the case of the forward light." But the rule says that the after light shall be carried "at or near the stern," and what the learned counsel for the *Philadelphian* argued was that you ought to read the first part of the second paragraph of the rule as "in the forward part of the vessel at or near the stem." How is any court to do that; what justification has any court for reading such words into the rule? It cannot be done. The framers of this rule for some reason have let the forward light be "in the forward part of the ship," and the after light is to be "at or near the stern," and it is not competent to read the two clauses as though they were, "Forward light to be at or near the stem, and the after light at or near the stern." It is said that we ought to read it like that because the meaning is that if the ship is over 150ft. the length of the ship might not otherwise be seen by an approaching vessel. If that is the meaning of it, the framers have not drawn the rule so as to carry out their intention. It seems to me, therefore, that in this case the light, being in the forward part of the starboard rigging, was, within the terms of this rule, in the forward part of the vessel. I wish just to refer to art. 2 of the rules about steam vessels under way. There it is stated that "a steam vessel when under way shall carry on, or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel. . . ." Therefore it is to be seen that the rules are in the same category with regard to where the light is to be in the fore part of the vessel. I think, myself, without going into the second point which Bucknill, J. decided against the *Philadelphian*, that this hits the *Philadelphian*, and that the appellants do not make out that the *Ella Sayer* was guilty of a breach of the articles.

WILLIAMS, L.J.—I agree. Mr. Walton in his argument admitted that he was asking us to construe the words in reference to the forward light as if the words had been "at or near the stem of the vessel." It seems to me that that would be doing great violence to the words, and it is plain that under this rule, so far as the stern light is concerned, these words "at or near the stern," give you substantially a fixed point; but that the words as to the forward light do not limit you to a fixed point, but give you discretion.

ROMER, L.J. concurred.

Solicitors for the appellants, *Thomas Cooper* and *Co.*, agents for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitors for the respondents, *Botterell* and *Roche*.

Wednesday, May 16, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ. and NAUTICAL ASSESSORS.)

THE ARGO. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Lights—Breach of art. 5 *of the Regulations for Preventing Collisions at Sea—Merchant Shipping Act* 1894, *s.* 419, *sub-s.* (4).

Where a steamer collided with a sailing ship which after sunset was showing no lights, the court held that, although there was some look-out on the steamer, nevertheless the absence of the lights could not in the circumstances have possibly caused or contributed to the collision; and that therefore the sailing ship was not to be deemed to be in fault under sect. 419, *sub-sect.* 4, *of the Merchant Shipping Act* 1894.

THIS was an appeal by the defendants in a collision action brought by the owners of the ketch *Batavia* against the owners of the steamship *Argo*.

The plaintiffs' case was that shortly before 4.35 p.m. on the 15th Nov. 1899 the *Batavia*, a ketch of 67 tons, whilst on a voyage from Victoria Dock, Hull, to Montrose with a cargo of oil cake, was being hauled and pushed out of the entrance to the Victoria Dock along the East Pier, in order that she might get into the river. The weather was fine and clear, and the tide about high water. Under these circumstances, when the *Batavia* had just cleared the end of the East Pier, the steamship *Argo* was seen from a quarter to half a mile distant broad on the port bow. The *Argo* continued to approach, and took no steps to keep clear of the *Batavia*, and shortly afterwards came into collision with her.

The plaintiffs charged the defendants with a bad look-out, with neglecting to keep out of the way of the *Batavia*, and with navigating across the lock entrance in disregard of warning signals from the dockhead.

The defendants' case was that the *Argo*, with her lights duly exhibited, was on a voyage from Grimsby to Hull with a general cargo, and was in Hull Roads. The weather was clear but dark, the tide first quarter ebb, of the force of about half a knot. The *Argo* was proceeding up the river to the northward of mid-channel, making five to six knots an hour through the water. In these circumstances the loom of the *Batavia* was seen about 300ft. off, and bearing about half a point on the starboard bow of the *Argo*. The helm was at once ported, the engines reversed full speed astern, and the anchor dropped, but the *Batavia* continued to come on across the bows of the *Argo* and a collision occurred.

The defendants charged the plaintiffs with not keeping a good look-out, with not exhibiting any lights, and with failing to comply with art. 5 of the Regulations for Preventing Collisions at Sea. It was proved that sunset was at 4.10, but that vessels without lights could be seen at a considerable distance.

At the trial before the President (Sir Francis Jeune), the learned judge found as a fact that the *Batavia* ought to have been exhibiting proper side lights, and that she had been guilty of a breach of art. 5. He then continued: "Then comes the question which is all-important in the case Can it be said that the absence of the red light could by any possibility have contributed to the collision? The authorities to which I have been referred do not throw much light upon this matter, because they decide that under the peculiar circumstances of each of those cases there was not any breach of the rules that could have contributed to the collision. In the case of *The Englishman* (37 L T. Rep. 412; 3 Asp. Mar. Law Cas. 506; 3 P. Div. 18) it was shown conclusively that, although the correct lights were not exhibited, inasmuch as the lights that were shown were not seen, it was clear that even if proper lights had been shown they would not have been seen either. Therefore the fact that they were not shown became wholly immaterial. In the same way in the case of *The Breadalbane* (46 L. T. Rep. 204; 4 Asp. Mar. Law Cas. 505; 7 P. Div. 186) it appeared that a vessel which should have shown a stern light failed to do so, but it seems also clear that she was showing a light through a pane of glass in the after part of the deckhouse — one of the binnacle lights— which would practically have the same effect as a stern light, and therefore it was held that she was guilty of a breach of the rule inasmuch as she was not showing such a light as the rule required, but that she was showing a light, and that therefore the *Breadalbane* was not to be exempted from the consequences of her negligence. In this case this is the practical question, whether by failing to show the red light the *Batavia* was not only guilty of a breach of the rules, but contributed, or can be supposed possibly to have contributed, to this collision? Or, in other words, if the red light had been exhibited, would the *Argo* have been in any better position than she was? This is a matter which appears to me to be a practical question, because it turns upon the consideration whether the *Argo* coming up would have seen, or would probably, or possibly, have seen, the red light under the circumstances of the case? Upon this point I have consulted carefully with the Trinity Masters, and they are clearly of opinion that, although the red light was not shown by the *Batavia*, that did not and could not be supposed to have contributed in any degree to the collision. In other words, that the *Argo*, so far as one could judge, would not have seen the red light any more than the *Batavia* herself.

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

Now that conclusion, in which I agree, turns mainly upon this, that beyond all question on the *Argo* at that time—I do not like to put it quite so high as to say there was no look-out—but it is, I think, quite correct to say there was a very bad look-out indeed, and that at a time when a good look-out was, as the Elder Brethren advise me, imperative."

The learned judge then dealt with the facts of the case, and came to the conclusion that the collision was due to the bad look-out kept on the *Argo*, and that, "inasmuch as there was not an efficient look-out on the *Argo*, even if the proper lights had been exhibited on the *Batavia*, she would have failed to see her in such a time that the collision could have been prevented. Under these circumstances I have to hold that although the *Batavia* has broken the rule, she cannot be regarded as having by any possibility contributed to the collision, and therefore the *Argo* must be held alone to blame."

Sect. 419, sub-sect. 4, of the Merchant Shipping Act (57 & 58 Vict. c. 60):

> Where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

Butler Aspinall, Q.C. (with him *Batten*), for the defendants, in support of the appeal.—The learned judge ought to have held the *Batavia* in fault for not showing any lights. He was not entitled to hold that the breach of the article could not by any possibility have contributed to a collision:

> *The Duke of Buccleuch*, 62 L. T. Rep. 94; 6 Asp. Mar. Law Cas. 471; (1891) A. C. 310.

The judge has not held that there was no look-out. If so, it is impossible to say that a look-out, however bad, might not have seen a light on the *Batavia*. To say that, because the look-out never saw the *Batavia*, the absence of lights could not have possibly caused this collision is to give no effect to the Act of Parliament. If a breach of a regulation might cause a collision, the court is not entitled to draw the conclusion from the particular facts of the case that the breach could not have caused the particular collision because it did not cause it. The court is bound by the Act of Parliament to say that the ship is to be deemed in fault. In *The Duke of Buccleuch* (*ubi sup.*) the court investigated the facts to ascertain whether the obscuration could have obscured the light to a look-out on the other ship; but there is no case where, given a breach of the rules as to lights and given a look-out, however bad, the court has held the infringing ship free from blame. To escape the presumption of fault, a ship which infringes the regulations must show that it was physically impossible that the infringement could have caused the collision.

Robson, Q.C. and *Stephens*, for the plaintiffs, *contrà*.—It is a question of fact in each case whether a breach of the collision regulations can possibly have caused the collision. In this case the learned judge has held as a fact upon the evidence that the breach of the article could not possibly have caused the collision. All the circumstances of each case must be considered.

Aspinall, Q.C. in reply.

SMITH, L.J.—This is an appeal from the learned President, in an action brought by a ketch called the *Batavia*, the steamship *Argo* having run into her on the afternoon of the 15th Nov. 1899, at about 4.45 or about half an hour after sunset. Now, the evidence seems to be all one way—namely, that although the lights were up on some of the vessels in the Humber, and lights were put up on the pier-head, the state of the atmosphere was such that objects could be seen at a long distance off, and what took place on one side of the Humber was perfectly visible to those on the other side, though the Humber is a mile and a half wide there. Now, the *Argo* was coming up, hugging the north shore of the Humber. The ketch had been in the Victoria Dock, and was coming out of the dock into the Humber, and just as the *Argo* was approaching the dock entrance the ketch was being warped out. We do not know what the height of the ketch out of the water was, but she had two masts, which showed over the dock pier. She was being warped out without lights, and it is agreed that inasmuch as it was after sunset she ought to have had lights. Not having a light upon her port bow, she is to be taken to be in fault within sect. 419, sub-sect. 4, of the Merchant Shipping Act 1894. The action was tried before the learned President and Trinity Masters, and they came to the conclusion that the *Argo* was alone to blame; and that the *Argo* is to blame there cannot be a doubt, and indeed it is not disputed here that she was to blame. The *Argo* appeals against that finding, and says that the *Batavia* is also to blame because she says, and says truly, that a case has been made out that the *Batavia* committed a breach of the section I have referred to. That does not end this case, because it has been said in the House of Lords, in the case of *The Duke of Buccleuch*, that it may be that although there has been a breach of the rule, that breach of the rule does not necessarily condemn the ship which has committed that breach of the rule; "that the infringement must be one having some possible connection with the collision; or in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision," and the burden of showing this lies on the party guilty of the infringement; proof that the infringement did not, in fact, contribute to the collision being excluded. Therefore, that onus is undoubtedly upon the ketch, she having committed a breach of the rules, to prove that this infringement could not by any possibility have contributed to the collision; and unless she proves that, she fails in getting rid of her responsibility, and the President ought to have condemned both ships. I will just read a passage from the judgment in the House of Lords, in which the case of *The Fannie M. Carvill* is cited. The House of Lords, although they differed as to the facts of the case (*The Duke of Buccleuch*), agreed that this was the true construction of this section of the Merchant Shipping Act. I will read from Lord Hannen's judgment. He says: "Sir James Colville, who delivered the judgment of the court in the case of *The Fannie M. Carvill*, said: 'Their Lordships therefore conceive that whatever be the true construction of the enactment in question, that which would take the case out of its operation by mere proof that the infringement of the regulations did not in

point of fact contribute to the collision is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact upon conflicting evidence. He then proceeds to consider the possible constructions which may be put upon the enactment, and he rejects the one that an infringement of any of the regulations gives rise to an absolute presumption of culpability, and adopts the other, 'that the infringement must be one having some possible connection with the collision; or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision;' and he concludes by saying that this construction 'gives effect to the statute by excluding proof that the infringement which might have contributed to a collision did not in fact do so, and by throwing on the party guilty of the infringement the burthen of showing that it could not possibly have done so.'" There can be no doubt that that is the law applicable, and unless the ketch satisfied the learned judge below that the infringement could not possibly have contributed to the accident, she must be held in fault.

Now, that being the law, the evidence is that this was, I will not say a light night, but it was light altogether. The President says it was dusk. Be it so, but it was such that anybody looking out and using his eyes could see ships at a considerable distance, and see a mile and a half across the Humber. I call that nearly daylight. It is true that lights had been put up, but I understand that lights have to be put up at sunset, which was half an hour before, and on some nights at sunset you can see all round. The evidence is overwhelming on this point, that it was light. Very well! The ketch was coming out of this dock entrance; and it is quite clear that no one on board the *Argo* saw her coming out. That is absolutely clear. The question at once arises, why didn't they? There was nothing in the light to prevent them. The question is, why could they not have seen the ketch if they had been looking at the pierhead where they ought to have been looking? They were shaving this pierhead close, and they were steaming ahead, and I think the evidence is clear that they were not looking at the place at which they ought to have been looking—namely, the dock gates, where the ketch was coming out. What happened was this: The ketch comes out—she is being warped out—and the length of time between when she ought to have been seen if anybody had been looking out and the time of the collision was forty-five seconds, and we are advised by our assessors that considering the propinquity in which the steamer was to the ketch when the ketch was coming out of the dock gates, the accident was nearly inevitable. On that ground it seems to me that the plaintiffs have shown that the non-exhibition of the red light by no possibility could have contributed to the accident; because, if there had been a red light, or no red light, considering the propinquity of the steamer to the ketch, we are advised, and we agree, that the collision was inevitable; and the steamer, going at the pace she was, did all she could to pull up, but yet ran into the ketch. The ketch has succeeded in meeting the onus which is upon her of showing that red light or no red light, owing to the action of the steamer the collision was inevitable. The learned President, in his judgment, says: "In those circumstances I am advised by the Elder Brethren that they have come clearly to the conclusion that the collision was due to the faulty look-out on the *Argo*; that if she had had a proper look-out there was no reason under the circumstances why she should not have seen the *Batavia* in sufficient time; but that inasmuch as she practically had no look-out at all, even if the red light had been exhibited on board the *Batavia*, the *Argo* would have failed to see it in time to avoid the collision." Our assessors advise us in the same way. The President continues: "Under these circumstances, I hold that although the *Batavia* has broken the rule, that breach has not and could not by any possibility have contributed to the collision, and therefore the *Argo* must be held alone to blame." In my judgment there is plenty of evidence to support that finding. But it is said that the learned judge has used some expressions which did not go far enough to exculpate the owners of the ketch. The President said: "This is a matter which appears to me to be a practical question, because it turns on the consideration whether the *Argo*, coming up, would have seen or could possibly or probably have seen, the red light under the circumstances of the case. The question is whether by failing to show a red light the *Batavia* was not only guilty of a breach of the rules, but that that breach of the rules contributed to the collision; or, in other words, if the red light had been exhibited, would the *Argo* have been in a better position than that in which she was? On this point I have carefully consulted the Trinity Masters, and they are clearly of opinion that although the red light was not shown by the *Batavia*, that fact could not reasonably or probably be supposed to have contributed in any degree to the collision; in other words, that the *Argo*, as far as may be judged, would not have seen the red light any more than she saw the *Batavia* herself." Then he goes on to say: "I don't like to put it so high as to say there was no look-out, but a very bad look-out indeed, at a time when a good look-out was imperative." In my judgment, he has found this, that although there were persons who called themselves the look-out, as a matter of fact the evidence satisfied him they were not looking at the place where they ought to have been looking—namely, where the ketch was coming out of the dock. If one of them had been looking, it is perfectly obvious that he would have seen the mast of the ketch over the pier, and the collision would have been avoided. For these reasons I think the judgment should be upheld and the appeal dismissed.

WILLIAMS, L.J.—I agree so far as the rule of law is concerned; the case of *Eastern Steamship Company Limited* v. *Owners of the Vandalia* (65 L. T. Rep. 422; 7 Asp. Mar. Law Cas. 68; (1891) A. C. 310), in the House of Lords, puts it beyond any possibility of question. It is this, that the presumption of culpability arising from the terms of the Merchant Shipping Act, s. 419, may be met by proof that the infringement could not by any possibility have contributed to the collision, but the burden of showing this lies on the party guilty of the infringement; proof that the infringement did not, in fact, contribute to the collision being excluded.

That is perfectly clear and definite, but I can see myself that this rule is very difficult of application, because it is quite plain that when one deals with the question of whether it has been shown that the infringement could not by any possibility have contributed to the collision, that that must mean, and does mean, having regard to the facts of the case. There is the example that Lord Esher gave in this very case when it was in the Court of Appeal, of a collision on a bright, clear, fogless day, and the breach of the regulations in respect of the fog-horn. It is obvious that in that case Lord Esher assumed that the judge having to try the case had satisfied his mind as to the surrounding circumstances—that is to say, that the day was a bright, cloudless day—before he arrived, or could have arrived, at the conclusion that there could be no possible connection between the infringement and the collision. So in each case you must arrive at the facts, and it is very plain that a great deal of evidence going to show what the surrounding facts are will also be material evidence to show that the infringement did not in fact contribute to the collision. The consequence is that it is not an easy matter in these cases to say whether the proper conclusion is that the facts were such that the infringement could not by any possibility have contributed to the collision, or whether the evidence only shows that the infringement did not in fact contribute to the collision. I want to say this—before dealing with the present case further—that it is quite plain that whichever question you are dealing with, you cannot get rid of the necessity of considering which way the balance of evidence turns the scale, in case there is a conflict of evidence; and Lord Esher, in his judgment in *The Duke of Buccleuch*, when that case was in the Court of Appeal, points out in the clearest way that that is so. He says if there is a dispute as to the way in which one ship is approaching another, and the evidence of the way in which she is approaching on the one side will make it clear that it could not have any effect on the collision, and the evidence on the other side will show that it could, then the court must try the question of how the ship was approaching. Under those circumstances, having regard to that observation, it seems to me perfectly clear that in order that the onus on the party infringing the rule may be satisfied it is not necessary that the evidence should be all one way. It was more or less hinted—I do not think it was actually said in terms—by Mr. Aspinall in his argument that the only case in which you could say it was impossible there could be no connection between the infringement and the collision was a case where it was physically impossible that there should have been such a connection, but really he himself departed from that contention in his argument In *The Duke of Buccleuch* case the suggested impossibility no doubt was based upon the physical fact that a sail was intervening, which would have rendered it impossible, having regard to the direction in which the ship was going, for the approaching ship to have seen the light if it had been there. But it cannot be doubted that it would equally come within this rule as to impossibility if in point of fact there had been no look-out at all. It is impossible in such case that the infringement of the rule should be taken to be the cause of the collision. But it is impossible to stop at that point, and to say that if the look-out people, although there, had been proved to be in a condition incapable of observation—from illness or drunkenness, or anything else—they would not also come within the rule. If you cannot stop there, why is one to stop in a case where the facts show that although the men were there with eyes which should have looked out, their eyes were in point of fact all turned in another direction? It seems to me that if you show that although there was an opportunity for these people to look out if they had chosen, in fact there was no look-out kept, that that is sufficient. The learned judge seems to me to have come to that conclusion, and there seems to me to be a great deal of evidence to justify the conclusion at which he arrived; but I do not conceal from myself that when one is relying upon the fact that those placed to look-out did not in fact look-out, one is getting perilously near that which the House of Lords said must be excluded from the category of things which can rebut the statutory presumption; that is to say, proof that the infringement did not in fact contribute to the collision. But that is the conclusion which the learned judge has come to, and it does not seem to me that we ought to depart from the conclusion of the learned judge unless there is much more cogent reason than there is here to induce us to do so. He put to himself the law properly, and he has arrived at the conclusion that in fact the infringement could not by any possibility have contributed to the collision, and I do not think we ought to differ from his conclusion. But in this particular case really one is not driven to rely upon that finding of the learned judge only, and for this reason, that we have been advised by the assessors sitting with us that having regard to the very short space of time between the time when the ketch was first projected into the river and the moment of the actual collision, which was forty-five seconds only, it is impossible that the presence of any light could have made any difference whatsoever as to the happening of the accident. Upon this question of seamanship it is right we should be guided by their opinion.

ROMER, L.J.—I also think that this judgment should not be disturbed. As I understand the judgment, the learned President has come to the conclusion of fact that the breaking of the rule as to the lights by the *Batavia* did not and could not by any possibility have contributed to the collision, and that the look-out on the *Argo*—the so-called look-out—was such that even if the proper lights had been exhibited on the *Batavia* she would have failed to see her in such time that the collision could have been prevented. I have carefully attended to the evidence, and in the result I am not disposed to differ from the conclusion of fact at which the President has arrived. He had the inestimable advantage of seeing the witnesses. I say inestimable, because in such a case as this much must depend upon what weight is to be attached to the evidence given by individual witnesses.

SMITH, L.J.—I ought to say that I mentioned forty-five seconds as indicating the shortness of time. I do not pledge myself to that time—it was very short.

Appeal dismissed.

Solicitors for the plaintiffs, *Holman, Birdwood, and Co.*

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *Hearfield* and *Lambert*, Hull.

May 16 *and* 17, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ. and NAUTICAL ASSESSORS.)

THE SANSPAREIL. (a)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Tug and tow and a ship of war—Duty of single vessels to avoid crossing course of large fleet—Exemption of Her Majesty's ships from Regulations for Preventing Collisions at Sea—Order in Council of June 1899 *applying collision regulations to Her Majesty's ships—Regulations for Preventing Collisions at Sea, arts.* 19, 21, 27, 29—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 419, 741.

The statutory sanction imposed by sect. 419 *of the Merchant Shipping Act* 1894 *for a breach of the collision regulations has no application to a merchant trader which is crossing the course of one of Her Majesty's ships from starboard to port, because the obligations imposed by arts.* 21 *and* 27 *are only applicable to ships both of which are bound to obey the regulations.*

Under ordinary circumstances a tug and tow are not justified in crossing ahead of a fleet of warships which has the tug and tow on the starboard hand, and the tug and tow ought not to keep their course and speed under art. 21 *of the collision regulations.*

A vessel which neglects, in disregard of arts. 27 *and* 29 *of the collision regulations, to depart from any of the collision regulations is not to be deemed in fault under sect.* 419 *of the Merchant Shipping Act* 1894.

THIS was an appeal by the defendant, the navigating officer of H.M.S. *Sanspareil*, from a judgment of Gorell Barnes, J. pronouncing him alone in fault for a collision between the *Sanspareil* and the plaintiffs' sailing ship *East Lothian* (82 L. T. Rep. 356; 9 Asp. Mar. Law Cas. 59).

About 10.30 p.m. on the 7th Aug. 1899 the *East Lothian*, while on a voyage from Nantes to Cardiff in tow of the tug *Sir W. T. Lewis*, was in the English Channel on a course N. 9 degrees E., the Wolf Rock bearing about N. by W., distant about thirteen miles.

The *Sanspareil* was one of a large squadron of ships of war returning from the manœuvres. The tug and tow were heading so as to cross the course of the squadron from starboard to port.

The ships were proceeding in four columns, in line ahead, and the *Sanspareil* was the leading ship of the second column.

The tug and tow kept their course ahead of the first column of ships and safely passed them, and as they approached the second column the helm of the *Sanspareil* was ported in order to pass astern of them, but shortly afterwards starboarded, with the result that the ram struck the port side of the *East Lothian*, causing such damage that she sank in a few minutes.

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

At the trial of the action Gorell Barnes, J. gave judgment for the plaintiffs.

The defendant appealed.

The *Attorney-General* (Sir R. B. Finlay, Q.C.) and *Acland* for the appellant.—It was bad seamanship of the tug and tow to attempt to pass ahead of the fleet. They ought to have waited until it had passed. There were here special circumstances within the meaning of art. 27, and it was consequently the duty of the tug and tow to depart from art. 21. In other words, arts. 27 and 29 of the regulations were applicable. The plaintiffs have infringed those articles, and therefore their ship ought to be deemed to be in fault within the meaning of sect. 419 of the Merchant Shipping Act 1894.

Joseph Walton, Q.C. and *Scrutton* for the respondents.—There was no duty on the tug and tow to keep out of the way of the fleet. The duty, if it exists at all, is outside the Regulations for Preventing Collisions at Sea. It is impossible to say when such duty arises. Are merchant ships bound to get out of the way of one or two ships of war when in company? The regulations are expressly silent as to this. But, even if the plaintiffs were wrong in keeping on across the fleet, it is submitted they cannot be held to blame. Such negligence would not be a breach of a statutory rule, and therefore the case of *The Monte Rosa* (68 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 326; (1893) P. 23) is in point, for the defendant by the exercise of ordinary care and skill could have avoided the consequences of the plaintiff's negligence:

The Margaret, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 204; 9 App. Cas. 873.

Art. 27 does not apply because there were no "special circumstances" in this case. It is admitted the collision was due to a wrong manœuvre on the part of the defendant. Had not the helm of the *Sanspareil* been starboarded at a wrong time she would have cleared the *East Lothian*.

The *Attorney-General* replied.

SMITH, L.J.—This is an appeal from my brother Barnes, and it is an action brought by the merchant ship *East Lothian* against the navigating lieutenant of H.M.S. *Sanspareil*. No technicalities have been raised, but the action has been fought upon the basis that it is an action between subjects of the Queen. The merchant ship contended that she was run into and rammed by the *Sanspareil* by reason of the neglect of those in charge of the *Sanspareil* on the day on which the occurrence took place. It took place at about 11 p.m. on the 7th Aug. last, S.W. of Lizard Point, and the *East Lothian* sank, and some loss of life occurred. Whereupon the *East Lothian* brings an action against the *Sanspareil*. The facts are not in dispute, and are very clear. On the night in question the fleet, a squadron of H.M. ships of war, was steaming up Channel. They were in four lines or columns. The southernmost line or column consisted of about eight cruisers, headed by a cruiser called the *Europa*. On the port side of that line—that is, to the north of that line—came a line of battleships. There were seven battleships in that line, headed by the *Sanspareil*, which is the battleship which ran down and sank the *East Lothian*. To the north of that line of battleships there was

another line of battleships, headed by a battleship called the *Alexandria*, and there were seven vessels in that line. To the north of that line there was another line of cruisers, consisting of eight vessels. The squadron, coming up the English Channel, was two and a quarter miles in breadth, and the length of the different columns was from a mile and three-quarters to two miles. The *East Lothian* was going from Nantes to Cardiff, and was proceeding in a northerly direction; in other words, it was crossing the water which this squadron was in, and came up with the squadron when the *East Lothian* and her tug were going to the north. It is an admitted fact in this case that the tug and tow had all their lights burning properly, and that the tug had two white lights, one above the other, at the regulation distance, which showed any seaman that the tug was a vessel which had another vessel in tow. The squadron, which was on the port side of the *East Lothian*—that is, to the westward—was seen at a distance of about six miles on the night in question, and the vessels in it had all their lights up. The *East Lothian* proceeded on her course, towed by the tug, and so the matter went on. The fleet was steaming at a speed of ten knots an hour, and the *East Lothian* and her tug were going at about six knots an hour. That they were crossing ships—that the *East Lothian* was crossing the squadron—cannot be denied. What happened was this: The *East Lothian* crossed the leading ship of the southernmost line of cruisers, the *Europa*, and nothing occurred. When she got to the line of battleships, at the head of which was the *Sanspareil*—and I should say that the line of battleships was no less than three-quarters of a mile off the southernmost line of cruisers, and each of these four lines were three-quarters of a mile apart, and they were following each other at a distance of somewhere about 400 yards—when the *East Lothian* in the position I have indicated, with lights burning, and with two lights on the tug, got to the first line of battleships, the navigating lieutenant of the *Sanspareil* somehow or other—I do not know how, it is admitted he was negligent about this—ported his helm to go astern of the tug, but understanding and mistaking, and wrongfully mistaking, that the tugboat had nothing behind it, when in reality it had the *East Lothian*, then starboarded his helm to get back into line. He starboarded his helm, and did not see the bright light of the *East Lothian*, and there is no complaint about that light. He starboarded his helm to get back into line and rammed the *East Lothian*, and thereupon the owners of the *East Lothian* bring an action against the *Sanspareil* to recover damages. My brother Barnes has held that the *Sanspareil* was solely to blame, and he was advised by his nautical assessors. We are advised by ours, and I will state what they advise us in a moment.

The proposition which is adumbrated by the learned Attorney-General, though I admit he did not state it in so many words, and when I put my proposition he said he did not contend for it, is really this: That a squadron of Her Majesty's ships might proceed in four lines in the manner which I have described this squadron as doing, and that it is the duty of every one of Her Majesty's subjects, and anybody else, to get out of the way. That is what the Crown wish to have held, and I can find neither rule nor regulation, nor Act of Parliament, nor rule of law, nor anything which will support that, and it seems to me that when Her Majesty's ships are navigating the waters they must observe the good principles of navigation, just the same as any other of Her Majesty's subjects, and that those rules are binding upon Her Majesty's ships just as they are on Her Majesty's other subjects. That brings me to the rules. It is very clear to my mind how these rules stand. Sect. 418 of the Act of 1894 enacts that: "Prevention of Collisions: Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make Regulations for the Prevention of Collisions at Sea"—those are the regulations which bind merchant ships—"and may thereby regulate the lights to be carried and exhibited, the fog-signals to be carried and used, and the steering and sailing rules to be observed by ships, and those regulations shall have effect as if enacted in this Act. The collision regulations, together with the provisions of this part of this Act relating thereto, or otherwise relating to collisions, shall be observed by all foreign ships within British jurisdiction, and in any case arising in a British court concerning matters arising within British jurisdiction foreign ships shall, so far as respects the collision regulations and the said provisions of this Act, be treated as if they were British ships." I won't come to sect. 419 for a moment, but it appears that in the court below it was discovered that there was a section in this Act of 1894 which indicated that this Act shall not, except where specially provided, apply to ships belonging to Her Majesty, and therefore the rules and regulations made under the Act of 1894, and, it seems to me, the statutory provisions relating to those rules, have no application whatever to Her Majesty's ships. What happened was this, that two years after the rules and regulations, which I will call the statutory rules and regulations, Her Majesty enacted rules largely identical with the rules called statutory rules, but they were not statutory rules, and they had no vitality given to them by statute. I come first of all to the statutory rules, so far as they are applicable and relate to the ship in question. Rule 21 is: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed." By another rule (19) it is enacted that where there are crossing ships, and one ship has on its starboard side a crossing ship, it is the duty of the ship which has the other crossing ship on its starboard side to keep out of the way of the ship which is crossing it, and art. 21 enacts that where by any one of these rules one of two vessels is to keep out of the way—in this case it is the *Sanspareil*—the other is to keep her course and speed. As has been pointed out in the court below, and said by my brother Barnes, that only applies to where the rules apply to both crossing ships. Where, by any of these rules the *Sanspareil* is to keep out of the way, the *East Lothian* is to keep her course and speed. It seems to me that the rule does not apply at all to a Queen's ship. Art. 21 also enacts that "when in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving way vessel alone, she shall take such action as will best avert collision." By

art. 27 it is enacted that "in obeying and construing these rules due regard should be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary, in order to avoid immediate danger." Art. 29 is: "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Now, it is said that, although *primâ facie* a crossing vessel should keep its course and speed, the circumstances were such that the *East Lothian* should not have done what she did—namely, keep her course and speed.

The first point which arises is whether or not the *East Lothian*, having done what she did in keeping across the *Sanspareil*, has been guilty of an infringement of a statutory regulation, so that she shall be deemed to be in fault; because if it is a statutory regulation which she has broken then she is to be deemed to be in fault, which would render her jointly liable with the battleship, and the damages, I suppose, would be divided in the manner in which they are divided in the Admiralty Court. But if she has not been guilty of a breach of a statutory regulation, and has been guilty of negligence, then the right of action which the merchantman has against Her Majesty's ship would be an action at common law for negligence, and the doctrine of contributory negligence would apply. The first question, therefore, to make out is this, whether my brother Barnes is right when he has held in his judgment: "It appears to me necessarily to follow that the statutory provisions of the said sect. 419, sub-sect. 4, could not apply in the present case, even if the *East Lothian* and her tug did not act in accordance with art. 27." He says it does not come within the statutory rules, but only the rules with regard to good seamanship. I agree with him in respect of that. What are the provisions of sect. 419 of the Act of 1894? Sub-sect. 3 says: "If any damage to person or property arises from the non-observance by any ship of any of the collision regulations, the damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary." It is said in this case that it was necessary to depart from the regulation to keep both course and speed, because of the special circumstance that a line of battleships was coming up. Sub-sect. 4 says: "Where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary." If it is a statutory regulation that the *East Lothian* has broken, there would be an end of this case. But I do not think these regulations apply. Then, has the *East Lothian* been guilty of any breach of the collision regulations. When I read these collision regulations, it seems to me that they contemplate a departure from the regulations if there are special circumstances which necessitate it. It seems to me that then the regulations are to be observed no further, and that a master is left to do what, according to his best knowledge, is the course of good seamanship. That is not a regulation in any shape or form. He must do what is best in the circumstances to avoid collision or anything else. The regulation is done with and departed from, and I think therefore that, when you come to arts. 27 or 29, they ought not to be held—and I do not hold them—to be collision regulations, or that when a man is put to do his best because the collision regulations cannot be carried out, that there can be a breach of the regulations within sect. 419 of the Merchant Shipping Act. Therefore, in this case I do not think the *East Lothian* can be held to be in fault under the statute, and the result is that the cause of action by the merchantmen against the *Sanspareil* is really for negligence. Now, with regard to the *Sanspareil*, I understand that the late Attorney-General in the court below raised no point, and practically admitted, that the *Sanspareil* was to blame. Then how does this question arise? The merchant ship says to the battleship, "You ran into me by reason of your negligence." True! What does the battleship say? "Yes! and you were guilty of negligence also, and therefore you cannot recover." We have asked our assessors this question: "Was the *East Lothian* under the circumstances of this case guilty of negligence in passing across the bows of the *Sanspareil*?" And the answer is that it was improper navigation. I take that to mean, and it does mean, that it was not what the assessors advised my brother Barnes; and I think our assessors are right upon this, and I must exercise my own opinion, and I think it was an improper act of navigation for this vessel, the *East Lothian*, to continue its course when it saw this fleet coming up on its port side, six miles off, and to persist in going across this fleet. It has been pointed out by the Attorney-General that with a very slight deviation, by starboarding, of the tug and tow, there would have been no danger of collision at all. Instead of that they go across the bows of the fleet, and the result was that the *Sanspareil* rammed the *East Lothian*. What is the law applicable to a case like this, supposing you get a case of commom law negligence? What is the law about contributory negligence? It is laid down in the House of Lords by Lord Penzance, and agreed to by Lord Cairns and Lord Blackburn, and Lord Gordon. "The first proposition," says Lord Penzance, "is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The case of *The Margaret* also shows that the common law doctrine is applicable to such a case as this. Now, the question is

whether on the facts of this case, the *Sanspareil* by the exercise of ordinary care and diligence could have avoided the mischief which happened. It seems perfectly clear that she could. The navigating lieutenant of the *Sanspareil* saw the tug, and did that which was perfectly right. He saw the tug crossing his bows, and he rightly ported so as to go behind her. But somehow or other he negligently failed to see the tow, although she had all her lights burning, and then he did the act which brings about the collision. He starboarded back again. If he had only kept on for a very short period—if he had only kept his helm a-port for a very short time indeed—if he had seen or known, as he ought to have known, that there was a tow behind the tug and kept his helm a-port, he would have gone astern of the tow. What he does is this: Thinking that everything has passed him, he put his helm a-starboard to get back into his line. There was nothing in the position of the fleet on either side or behind which incommoded him, and with regard to this part of the case it may be considered that the *Sanspareil* was there and nobody else, because the vessel on the starboard side was three-quarters of a mile off. It did not hamper him one bit. If he had been hampered by the fleet other considerations would have arisen, but he was not. The negligence which he was guilty of was in trying to go round negligently, by starboarding his helm, without seeing the *East Lothian*. How can it be said in these circumstances that the *Sanspareil* could not by the exercise of ordinary care and skill have avoided the collision? It seems perfectly plain that she could. For these reasons I am of opinion that this judgment must stand and the appeal be dismissed.

WILLIAMS, L.J.—In the view which we take of this case it is of no great importance so far as it determines any matter of principle, because we take the view that under the circumstances of this case, to which I will allude a little more presently, there has been no infringement of the regulations; and that as there has been no infringement of the regulations, the question is merely a question of either common law or Admiralty law; and that, having regard to what has been thoroughly well established, as to both common law and Admiralty law, there can be no serious question in this case after the admission of the Attorney-General in the court below. I do not know, therefore, that any useful purpose can be served by an expression by me of any opinion of mine as to what are the rights of Her Majesty's ships of war, when they are going together in squadron, as these ships of war were. But as something has been said about it, I wish to say for myself that I do not assent to the proposition that Her Majesty's ships of war, going in squadron in this way, are governed by the same rules that other ships are. It seems to me manifest that if Her Majesty's ships were held in such circumstances to be governed by the ordinary regulations, it would result in extreme danger not only to such ships as the squadron should happen to meet in its course, but obviously to the men-of-war in the squadron, *inter se*. It seems to me that under those special circumstances it is impossible to say that the ordinary rules of navigation, and the ordinary rules for the Prevention of Collisions at Sea, apply, and this is not because there is any special favour or exemption to Her Majesty's ships of war. It is because when Her Majesty's ships of war are sailing together in squadron, as they have a perfect right to do, you have a special set of circumstances which would make it dangerous and bad seamanship to apply the ordinary regulations. To apply the ordinary regulations would put the squadron and the ships that it met in serious danger of collision, both between the men-of-war and the other ships, and amongst the ships of war, *inter se*. The advice that has been given to us by those who have to advise us seems to me to be based upon this view, which I have tried to enunciate. They tell us that for the tug and tow to pass across the bows of the ships of the squadron was reckless and improper navigation, and, to my mind, it is perfectly clear that that was so. I therefore say no more upon that point at present.

Well, now, having regard to what I have said, one has to consider here two questions—first, whether there was an infringement of the rules by the tug and the *East Lothian*, which for this purpose must be considered as one ship; and secondly, whether, if there was no such infringement, under the circumstances, there was such contributory negligence by the tug and tow which would prevent the plaintiffs recovering in this case. With regard to the regulations, I should hesitate myself to assent to the proposition that because you meet a ship not bound by the regulations that therefore the regulations do not bind the British ship, because it may be that the very fact that you meet a foreign ship, and happen to know that it is a foreign ship, and that it is a ship of such a character that it must not be assumed to be likely to follow the regulations, is a very good reason for departure from the regulations. But it seems to me that it by no means follows from that that the regulations do not apply. The only thing you can say is that such circumstances are special circumstances which justify a departure by the British ship from the regulations. That being so, according to my judgment we ought, notwithstanding the fact that the regulations which are made under the Merchant Shipping Act do not apply to H.M.'s ships of war, to look and see whether there has been any breach of the regulations by the plaintiff ship. The Crown do not insist upon it that there has been any breach of art. 21, because they say, and justly say, that the circumstances of this case were such that art. 21 could not be insisted on; that the special circumstances not only warranted but necessitated a departure from arts. 19 and 21. The question here is whether there has been any breach of arts. 27 and 29. Now, art. 27 says: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." I quite feel the force of the argument addressed to us that the words "regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary," go to show that the moment you have got such circumstances that justify a departure from the rules, in one sense, at all events, it can be no longer said that those rules from which you may depart are obligatory.

But it does not seem to me that that quite disposes of the whole question, because on the facts here there is a good deal to show that the *East Lothian* and the tug in dealing with these rules refused to depart from them, notwithstanding the fact that there were special circumstances which rendered it necessary to depart from those rules in order to avoid immediate danger. What the tug and the *East Lothian* did was this: There being a rule which if they had met another vessel under ordinary circumstances would have justified them in going on on their course, and at the same speed, persisted in so doing, although there were special circumstances which rendered departure from the rules necessary in order to avoid immediate danger. I am not myself, at all sure that that might not be a case of an infringement of the rule within the meaning of the 419th section of the Merchant Shipping Act Of course the importance of this is that if you once get an infringement of such a rule, the mere fact of the proof of the infringement is sufficient to make it necessary to deem the ship guilty of the infringement in fault, and so to deem it in fault notwithstanding the fact that the particular infringement may not in any sense have brought about the collision or the accident. Under the circumstances, without saying that it is impossible that it should be a breach of the rules, particularly of art. 27, for a vessel to insist upon going on abiding by the express rules, notwithstanding the special circumstances, I am not prepared to say that in this particular case it was. If one says that, the only remaining question is whether, applying the common law rules to this matter, there is evidence of such a state of circumstances that the plaintiff is disentitled to recover. That there was negligence by the plaintiffs there can be, to my mind, no doubt. If the advice of our assessors is right, there obviously was, and, speaking for myself, I entirely agree with the view they take. That is not sufficient, according to the rules laid down in *Radley* v. *The North-Western Railway Company* you must show that the negligence was of such a character that the defendant could not with ordinary skill and care have avoided any accident. That that rule applies even in the Court of Admiralty—where as a rule the practice is that if both ships have been to blame the damages must be divided—is plain from the case of *The Margaret*, which is reported under the name of *Cayzer* v. *Carron Company* in 5 Asp. Mar. Law Cas. 371; 9 App. Cas. 873. If one reads there the opinions of Lord Blackburn and Lord Watson, they both of them, to my mind, make it clear that the common law principle governs the Admiralty rule. The short passage by Lord Blackburn, on page 881, is: "I do not think that the judges of the Court of Appeal for a moment meant to say that the transgression of this rule"—they were dealing with the Thames rules—"was in itself sufficient, unless it was an occasion of the accident." So he assumes that the principle of *Radley* v. *North-Western Railway Company* applies, and Lord Watson, when he delivers his opinion in the House of Lords, on page 887, says: "And the ground of my judgment is shortly this, that assuming there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*." And so he again assumes that if the consequences of the neglect of the plaintiffs could have been avoided by ordinary care and prudence on the part of the defendants, the negligence of the plaintiffs would be no answer to the action. These rules which are laid down by Lord Penzance are really rules of evidence and not rules of law, but it all goes back to the common law rule that the plaintiff must prove the negligence of the defendants to have been the cause of the accident. But when one applies it to this case, and takes into consideration the admission of the Attorney-General, what does it come to? Why, it comes to this, that he practically admits—the admission is given on pages 11 and 12 of the record—that the cause of this accident was the mistake of the navigating lieutenant. Under those circumstances, it seems to me impossible for us to go into the question whether that which Lieut. Potter did was or was not inconsistent with the exercise of ordinary care and prudence on his part. I cannot help saying for myself that but for that admission I should have been very far from thinking that it was perfectly clear that the consequences of the improper navigation of the tug and tow could have been avoided by the ordinary care and skill of the navigating lieutenant. It is not the rule that those who have to meet the negligence of the plaintiffs have to act up to counsels of perfection. The very words of the rule, "ordinary care and prudence," assume a margin of deviation from counsels of perfection, and I should require to consider some time before I came to the conclusion that having regard to the short space of time that elapsed, and the difficult circumstances the navigating lieutenant was placed in by the misconduct of the tug and tow, the consequences of their misconduct could have been avoided by ordinary care and prudence on the part of the navigating lieutenant.

ROMER, L.J.—The first question we have to consider, and it is the only question in the case of real general importance, is whether or not the tug and the *East Lothian* were or were not justified in trying to cross in front of the Channel Squadron. In the court below the Elder Brethren have found, on being asked, that "the position and movements of the fleet did not constitute such a danger to navigation or of collision, or such circumstances as to render it necessary for the tug and tow to wait till the fleet had passed, or to starboard and go under the stern of the fleet; in other words, they do not consider that the tug and tow acted improperly in this case in proceeding as they did." I am bound to say I entirely disagree with that finding. I think that in the circumstances of this case the tug and tow were not justified either under arts. 19 and 21 of the Regulations for Preventing Collisions at Sea, or otherwise, in attempting as they did to pass in front of this Channel Fleet. The special circumstances of the case, to my mind, ought to have negatived to the tug and tow any such idea. Consider the position. The whole fleet was coming up Channel in four columns, each column consisting of several ships. The ships being in that formation, it is of the utmost importance that perfect order should be preserved, because to become disorganised is to run risk of great disaster and to cause great danger. That the Channel Fleet had a perfect right to come up Channel as it was in that formation cannot be

challenged. They had, on the other hand, no special right beyond that which all ships have, but it cannot be said that in coming up in that formation and in the way they did the Channel Fleet were acting in any degree improperly. On the other hand they, of course, had no right to assume that their path up the Channel would be left perfectly clear; still less had they a right to assume that they could go up Channel without keeping a good look-out without being guilty of negligence. Nor is any such right claimed on the part of the Crown. But on coming up with a big fleet like that, what, under the circumstances, ought the tug and tow to have done? Consider what the tug and tow proposed to do. They proposed to keep a course which would have just cleared them of the first column of cruisers, which would just land them, if the squadron did not stop, in front of the leading ship of the second column, which would carry them into the centre of the third column, and if they escaped those battleships would carry them into the centre, or about the centre. of the fourth column. What must have been the probability, or possibility, of such a course of conduct? Consider the danger that is cast upon a Channel fleet in having its columns broken in such a way—the difficulty of stopping ships of that huge build and weight suddenly and interfering with their course. Assume, as I think might have happened, that the second column might have avoided any collision, what would have happened to the third column? It must have been wholly disorganised if the tug and tow had persisted in their course. Still more, it appears to me that even if the case had been the case of a single steamship, prudence dictated that that vessel should not attempt to cross in front of that squadron. It was still less prudent or proper, in my opinion, on the part of a tug towing a ship with a long scope of hawser. It could not be said to have been reasonable that this tug and tow should have expected that the whole Channel Squadron should manœuvre so as to try and escape from proceeding on its way. I do not see how, without great difficulty and danger, the Channel Fleet could possibly have done so without running great risk of injury to its vessels. The tug and tow were not entitled to expect that it would have altered its course and formation simply to avoid them, but that does not end the matter. The tug and tow did cross, and, as I have already said, the fleet were bound to keep a good look-out and not be guilty of negligence, but to do all they could to avoid disaster. It could not be said that, because the tug and tow improperly crossed the line of the fleet, every accident that might subsequently ensue, though directly caused by the negligence of one of Her Majesty's ships, was to be held to have been contributed to by the initial error of the tug and tow in crossing the line. But the question where the line of demarcation is to be drawn is a very difficult one. I think, as at present advised, that though some negligence on the part of one or more of the vessels of the fleet were proved, yet if the accident had to an appreciable extent arisen from the formation of the fleet, the case should be dealt with as one of contributory negligence. But in the special facts of this case it appears to me that the accident had nothing really to do, except remotely, with that difficulty. It arose wholly, speaking in any substantial sense, by reason of the negligence of the navigating lieutenant on board the *Sanspareil* in not seeing, or properly interpreting, the lights on the tug, and not observing the ship in tow. Had it not been for that negligence of the navigating lieutenant the accident could easily have been avoided, and would have been, for the *Sanspareil* could have kept under its port helm a little longer, and then starboarded, and so escaped both tug and tow, and that without any difficulty whatever, or any danger to the fleet, either as a column or as individual ships in each column. So that the truth is that this accident has been brought about by that negligence of the navigating lieutenant of the *Sanspareil*, as if that had been a ship by itself. It is really an accident which has nothing to do with the fleet, and which arose by the negligence of a particular ship, and so far as appears it would have happened if that vessel had been steaming by itself. Under those circumstances it appears to me that the *Sanspareil* cannot avail itself of the initial error of the steamtug and tow, and say it is to be dealt with as a case of joint or contributory negligence.

I should like to add this with regard to the point taken on behalf of the Crown, which is of some importance in the legal sense—with reference to the contention on behalf of the Crown that the tug and tow were to be deemed in default under sect. 419, sub-sect. 4, because they had infringed some of the collision regulations. The only regulations which it can be suggested they did infringe are arts. 27 and 29. In my opinion the case here is not one to which sect. 419, sub-sect. 4, of the Merchant Shipping Act of 1894 applies. Art. 27 does not, in my opinion, create any regulations within the meaning of sect. 419, sub-sect. 4, at all. The kind of regulation that the sub-section is referring to is well shown by the words used in the sub-section, that "the ship by which the regulation has been infringed shall be deemed to be in fault unless it shall be shown to the satisfaction of the court that special circumstances made a departure necessary." Those last words are to my mind significant, and if you look at art. 27 it will be seen that so far as there are express directions in that article at all they are carefully limited. Art. 27 does say that due regard shall be had to all dangers of navition and collision, but for all purposes it is limited—"In obeying and construing these rules"—and although it does say "due regard shall be had to any special circumstance," it is only when it shall render departure from the above necessary. Now, in the case before us there is no question of construing this. The only question is whether rules 19 and 21 should be obeyed, and under art. 27, if you obey that article all you have to do is to disregard the prior rules, 19 and 21. Art. 27 is only stating what you are to do as to obeying or not obeying the other rules. It contains no directions, and no rule in itself as to what you are to do when the rules are held not to apply. The parties are then left to the ordinary rules of good conduct and seamanship, and if a vessel or any master broke such rules of good conduct and seamanship, then there is negligence; but though there has been negligence the party has not been guilty of a breach of the collision regulations within the meaning of sect. 419, sub-sect. 4. Similar observations apply with regard to art. 29. There is no express rule or regulation there. That article

only prevents the other rules acting as exonerating the vessel under circumstances specified in the articles. For these reasons it appears to me that the Crown is wrong in the contention that the tug and tow are to be treated as if they had been guilty of a breach of the collision regulations, and so brought themselves under sect. 419, sub-sect. 4. That being so, the case remains to be dealt with on the footing of my first observation, and I therefore agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *The Treasury Solicitor.*

Solicitors for the plaintiff, *T. Cooper* and *Co.*

Friday, May 25, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

HOGARTH AND CO. *v.* WALKER. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance, marine—Policy on ship and furniture —What included in "furniture"—Dunnage mats and separation cloths.

A ship, which was employed in the grain trade, carried separation cloths and dunnage mats in accordance with the recognised custom of that trade. She was insured by a time policy in the form of an ordinary Lloyd's policy. The cloths and mats were lost by perils of the sea on a voyage during which they were not in use.

Held (affirming the judgment of Bigham, J.), that the cloths and mats were covered by the policy of insurance as "furniture" of the ship.

THIS was an appeal by the defendant from the judgment of Bigham, J. at the trial of the action without a jury in Middlesex.

The plaintiffs sued the defendant, upon a policy of insurance upon the plaintiffs' ship *Felbridge* for twelve months, to recover for the loss of dunnage mats and separation cloths.

The policy of insurance was in the ordinary form of a Lloyd's policy, and was for twelve months, "at all times, in all places, and on all occasions, services, and trades, whatever and wheresoever," upon the "body, tackle, apparel, ordnance, munitions, artillery, boats, and other furniture of and in the good ship or vessel *Felbridge*."

The *Felbridge* was continuously employed in the grain-carrying trade. It was the recognised custom of that trade for the vessels employed in it to carry separation cloths and dunnage mats. The separation cloths were used for the purpose of dividing the different parcels of grain, and the dunnage mats were used mainly for the purpose of keeping the grain off the ship's floor.

The *Felbridge* was generally engaged in carrying grain from the Black Sea; and, as in that trade grain was shipped in many different parcels, the use of separation cloths was absolutely necessary.

In a cargo of grain from America there is never more than one parcel, and therefore separation cloths are not necessary in that trade.

It is not the practice in the American trade to use dunnage mats, wooden battens being used instead for dunnage purposes.

During the currency of the policy of insurance, the *Felbridge*, being homeward bound from an American port with a cargo of grain, and having her separation cloths and dunnage mats stowed away in the forepeak, came into collision with a pierhead stem on. Her stem was damaged, and a large quantity of the cloths and mats were washed out of the forepeak and lost.

The underwriters refused to pay for the loss of the separation cloths and dunnage mats upon the ground that they were not covered by the policy of insurance.

The defendant was one of the underwriters.

The action was tried before Bigham, J. without a jury.

Rufus Isaacs, Q.C. and *Montague Lush* for the plaintiffs.

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendant.

July 5, 1899.—BIGHAM, J.—I think that the plaintiffs are entitled to succeed in this case. The question is whether the ordinary Lloyd's time policy covers the things which are called separation cloths and dunnage mats used in connection with the carriage of grain cargoes. Now, it is not to be forgotten that this was a grain ship, and, as a grain ship, she would require all the things necessary to adapt her for the trade with which she was connected. Those things included the separation cloths and the dunnage mats; and, if she went to sea in the trade for which she was meant and for which she was being worked without those appliances, she would, in my opinion, be an unseaworthy ship. It seems to me, therefore, to follow that those things are part of her equipment, within the meaning of the policy; they are part of her furniture. I see no distinction between such things and a movable bulkhead, which is admitted to be part of a ship's furniture. A movable bulkhead is simply intended to separate one class of cargo from another, and I do not know why there should be a difference between the movable bulkhead and these separation cloths and dunnage mats, both of them being things that could be moved from one portion of the ship to another, and both being things intended for the same purpose. It is true that in one case the thing is made of wood, and in the other it is made of cloth, but, in principle, there is no distinction between the two. I think, therefore, that the underwriters ought to pay, and my judgment is for the plaintiffs.

Judgment for the plaintiffs.

The defendant appealed.

J. A. Hamilton (*Joseph Walton*, Q.C. with him) for the appellant.—The learned judge was wrong in holding that these cloths and mats were covered by the policy. Things like these, which are no part of the ship as a ship, but are only incidental to and used for the purposes of the business of the shipowner as a carrier of goods, are not part of the "apparel, furniture," &c., of the ship. The shipowner is not necessarily himself a carrier at all, for he may charter or demise his ship. If he does also carry on the business of a carrier, the things which are necessary and incidental to his business as a carrier are not necessarily part of his property as a shipowner. These particular things were things which he had in his business as carrier of grain, and not as shipowner; they are in no way necessary to him as

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

shipowner. This was a time policy, which would cover many voyages, and voyages for trading of any kind. That is important, for in that case the underwriter would not contemplate that he was insuring, as part of the ship and furniture, things used only for voyages in a particular trade. In *Hoskins* v. *Pickersgill* (3 Doug. 222) it was held that the fishing tackle of a ship employed in the Greenland trade was not covered by an insurance on the "ship, tackle, apparel, and furniture." [WILLIAMS, L.J. referred to *Gale v. Laurie* (5 B. & C. 156, 164), where Abbott, C.J. said: "The fishing stores were not carried on board the ship as merchandise, but for the accomplishment of the objects of the voyage; and we think that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this Act, whether the object be warfare, the conveyance of passengers or goods, or the fishery. This construction furnishes a plain and intelligible general rule; whereas if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions and much discussion and cavil."] Bigham, J. founded his judgment upon the ground that, without these cloths and mats, the ship would not be seaworthy. That cannot be so, for these things are not in any sense necessary for the navigation of the ship, and grain could be carried just as safely without them. Seaworthiness is not, however, the proper test by which to try whether these things come within the words of the policy. Such things as these would be properly included in an insurance upon "goods" or "disbursements," but not in an insurance upon ship and apparel. [WILLIAMS, L.J. referred to *Hill* v. *Patten* (8 East, 373).] He cited also

Robertson v. *Ewer*, 1 T. R. 127;
Brough v. *Whitmore*, 4 T. R. 206.

Rufus Isaacs, Q.C. and *Montague Lush*, for the respondents, were not called upon to argue.

SMITH, L.J.—I think that the judgment of Bigham, J. in this case was quite right. The question turns upon the meaning of a clause in a Lloyd's policy. The policy covers a trading ship in the largest possible way for the period of one year. The words of the policy are: "At all times in all places, and on all occasions, services, and trades, whatever and wheresoever." Therefore it was allowed to the ship, which was covered by the policy, to trade in the largest possible manner, and therefore the policy covers the trading of the ship to the Black Sea for grain. The subject-matter of the policy is the "body, tackle, apparel, ordnance, munitions, artillery, boats, and other furniture of and in the good ship or vessel *Felbridge*." Now, evidence was given at the trial that in the Black Sea grain trade separation cloths and dunnage mats were always required. If that were so, and these things were always required for that trade upon which this ship was entitled to go, do these dunnage mats and separation cloths form part of the furniture, &c., of the ship within the meaning of the policy? It seems to me that only one answer is possible—*i.e.*, that they do. The judgment of Bigham, J. has been criticised because he said that, if the ship went to sea without these things, she would be unseaworthy. Now, I should think that she would certainly be unseaworthy if she was without the protection for a grain cargo afforded by dunnage mats. Even if that would not be so with regard to the separation cloths, that would not affect the correctness of the decision. Those things are a part of the furniture of the ship. It was admitted before Bigham, J., and has been admitted in this court, that movable bulkheads would form part of the ship's furniture, and I cannot see any distinction in principle between the two things, or why the one is not just as much furniture of the ship as the other. I think, therefore, that the judgment of Bigham, J. was right, and that this appeal must be dismissed.

WILLIAMS, L.J.—I agree, and have nothing to add.

ROMER, L.J.—I agree. I think that in such a time policy as we have in this case there would be included in the "furniture," &c., of the ship all those fittings or things in the nature of fixtures, though not actually fixed to the ship, provided by the shipowner for use on the ship, and reasonably necessary to enable the ship to carry properly the kind of cargo ordinarily carried by such a ship, and even though those things are not being used at the time when the loss is incurred. I agree that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Waltons, Johnson, Bubb*, and *Whatton*.

Solicitors for the respondents, *Botterell* and *Roche*, for *Vaughan* and *Roche*, Cardiff.

June 20 *and* 21, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

BURGER *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance, marine—Collision clause—Insurance against liabilities in respect of collision—"Sums paid in respect of injury to other ship itself"—Expenses of removal of wreck of other ship.

By a policy of marine insurance the underwriters agreed that, if the ship assured came into collision with any other ship and the assured in consequence thereof was bound to pay any sum "in respect of injury to such other ship or vessel itself, or to the goods or effects on board thereof, or for loss of freight then being earned by such other ship or vessel," they would pay to the assured a proportion of such sum.

The ship assured ran into and sank another ship in the Tees. The owner of the wreck was compelled to pay to the harbour authorities the expenses of removing the wreck, and he recovered the amount from the owner of the ship assured.

Held, that the sum paid by the assured in respect of the removal of the wreck of the other ship was not a sum paid by him "in respect of injury to such other ship or vessel itself," within the meaning of the policy.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

THIS was an appeal by the defendants from the judgment of Mathew, J. at the trial of the action as a commercial cause without a jury.

The plaintiff was the owner of the ship *Durward*, and the defendants granted a policy of insurance for 3500*l.* on the hull and machinery of the *Durward* for twelve months from the 1st April 1897.

The policy of insurance contained the following clause:

Collision Clause.—Cross Liability.—And we further agree that if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay and shall pay any sums (not exceeding the value of the ship assured) in respect of injury to such other ship or vessel itself, or to the goods or effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured such proportion of three fourth parts of the said sums as our respective subscriptions hereto bear to the value of the ship hereby assured. . . . But this agreement is in no case to be construed as extending to any sums the assured may become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever.

On the 25th Nov. 1897 the *Durward* came into collision with, and sank, the tug *Victory* in the river Tees.

The *Victory* became a total wreck, which was subsequently dispersed by the Tees Conservancy Board, acting under their statutory powers. The expenses of dispersing the wreck amounted to 1178*l.* 19*s.* 10*d.*, and were recovered by the Tees Conservancy Board from the owner of the *Victory*.

In an action in the Admiralty Division the *Durward* was held to be alone to blame for the collision, and the present plaintiff, her owner, was held liable to pay as part of the damages, and did pay, to the owner of the *Victory* that sum of 1178*l.* 19*s.* 10*d.*

The plaintiff claimed a proportion of that sum from the defendants under the policy of insurance, and brought this action to recover the same.

The action was tried before Mathew, J., as a commercial cause, without a jury, and the learned judge gave judgment in favour of the plaintiff.

The defendants appealed.

Carver, Q.C. and *T. E. Scrutton* for the appellants.—The learned judge at the trial was wrong in holding that this claim was covered by the policy of insurance. This sum of 1178*l.* was not a sum which the assured became liable to pay "in respect of injury to such other ship or vessel itself," within the meaning of the policy, and, if it does not come within those words, it cannot be covered by the policy. If the words "in respect of injury to the ship itself" were intended to include these damages, then the express provisions as to injury to cargo and loss of freight would be unnecessary, as liability in respect of those matters could in fact only be incurred if there were injury to the ship itself. The liability in respect of freight is further limited to freight then being earned, so as not to include freight under a future contract as in *The Argentino* (61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433; 14 App. Cas. 519). That shows that the underwriters did not intend to be liable for all the damages which might be recoverable in a collision action. The meaning of this clause is that the underwriters contract to be liable for three kinds of loss, which are expressly specified—that is, for injury to the ship itself, for injury to the cargo, and for loss of freight then being earned, and that everything else is excluded. No argument in favour of the plaintiff really arises from the insertion of the proviso at the end; that proviso is used only *ex abundanti cautelâ*. In some cases, where very wide words are used in the clause imposing liability, this particular liability in respect of the expenses of removing a wreck is excluded by a proviso:

The North Britain, 70 L. T. Rep. 210; 7 Asp. Mar. Law Cas. 413; (1894) P. 77;
The Engineer, 78 L. T. Rep 473; 8 Asp. Mar. Law Cas. 401; (1898) A. C. 382.

In such a case as this, where the words imposing liability are restricted, there is no necessity for a proviso such as was used in the above cases. They cited also

Taylor v. *Dewar*, 10 L. T. Rep. 267; 5 B. & S. 58.

Joseph Walton, Q.C. and *J. A. Hamilton* for the respondent.—The judgment of Mathew, J. was right. The only reasonable construction of this clause is that which was put upon it by the learned judge. The words "injury to the ship itself" are used because liability for loss of life or personal injuries is excluded by the proviso. The specific provision as to freight is inserted because the liability in respect of freight is specially restricted to freight "then being earned." The words "in respect of injury to the ship" are the widest words which can be used, and there is no reason why those words should be cut down in any way; they include all damages which would have to be paid because of the collision and of the injury to the ship. The liability to pay the expenses of the removal of the wreck from the fairway was a direct consequence of the injury to the ship, and the words "in respect of injury to the ship" must include everything which is a direct consequence of such injury.

Carver, Q.C. was not called upon to reply.

SMITH, L.J.—This is an appeal by the defendants from the judgment of Mathew, J. I cannot agree with his decision in this case, though I feel some diffidence in differing from that learned judge who has had such very great experience in matters of this kind. [His Lordship summarised the facts and continued:] The sole question is, What is the true construction of the clause in question in this policy of insurance? Mathew, J. has held that the sum of 1178*l.* 19*s.* 10*d.* paid by this plaintiff in respect of these expenses is covered by this policy of insurance. The underwriters have appealed. Now, the clause in question is as follows: "And we further agree that if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay, and shall pay, any sums (not exceeding the value of the ship assured) in respect of injury to such other ship or vessel itself, or to the goods or effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured," &c. That clause is in respect of three subject-matters; that is my view of the meaning of the clause. It is limited to those three subject-matters, and they alone are covered by the policy of insurance. The first subject-matter is any sums which the assured may

be liable to pay "in respect of injury to such other ship or vessel itself." The plain meaning of that, in my opinion, is the injury to the tug *Victory* itself, which has been paid for by the defendants. The second subject-matter of insurance is sums paid in respect of injury "to the goods or effects on board" of such other vessel; and the third is any sums paid "for loss of freight then being earned by such other ship or vessel." Those are the three subject-matters in respect of which the underwriters have agreed to pay three-fourths of the loss incurred by the owner of the *Durward*. Now, stopping there, I must say that those three subject-matters are plain and clear according to the ordinary meaning of the English language, and I do not intend to alter the meaning of the words which have been used. I will take them as they are. The meaning of the words "in respect of injury to such other ship or vessel itself" is quite plain. The underwriters have paid all that loss. The damages which the plaintiff has paid for the expenses of removing the wreck were not damages paid for injury to the ship itself. Then there is a proviso upon which an argument has been founded by the respondent; it is said that as there is such a proviso, which is not a proviso relating to the statutory liability to pay the expenses of removing a wreck, it shows that the previous part of the clause includes damages payable in respect of that liability. I think that this proviso was inserted *ex abundanti cautelâ*, and that it is not enough to make the first part of the clause read otherwise than I have read it. I think, therefore, that the appellants are right, and that in this case the decision of Mathew, J. was wrong. This appeal must therefore be allowed.

WILLIAMS, J.—I agree. The assured in this case was held liable to pay to the owner of the tug *Victory* the expenses incurred in dispersing the wreck, which the owner of the *Victory* was obliged to pay to the harbour authorities. The assured now seeks to recover that amount from the underwriters under this policy of insurance. The question whether he can do so plainly depends upon the meaning of these words in the policy: "And we further agree that if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay and shall pay any sums . . . in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay," &c. It seems to me that those words are so plain that they really require no explanation whatever. They catalogue the injuries in respect of which the underwriters undertake to pay to the assured three-fourths of the amount which he has to pay. It seems to me *primâ facie* to be impossible to say that the money which the assured has been bound to pay in respect of the expenses of clearing away the wreck from the fairway is money paid by him "in respect of injury to such other ship or vessel itself." That being so, we are asked to give a different meaning to those words by reason of the proviso at the end of the clause, which is as follows: "But this agreement is in no case to be construed as extending to any sums the assured may become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever." If the words defining the subject-matter of the insurance are plain, I do not think that we can alter them by reason of the introduction of this proviso, which is a proviso which from natural motives of prudence underwriters might think it desirable to introduce into every policy whatever its special terms might be. The learned judge in the court below does not seem to have relied upon this proviso at all, but to have based his decision upon a construction of the earlier words of the clause, with which we do not agree. This appeal therefore succeeds and must be allowed.

ROMER, L.J.—I think that one thing is quite clear—viz., that this clause was not intended to make the underwriters liable for every loss which might happen to the assured. It was intended to limit the liability of the underwriters in some respects. I think that it was intended to limit their liability to three heads of loss: (1) In respect of injury to such other ship or vessel itself; or (2) to the goods or effects on board thereof; and (3) for loss of freight then being earned by such other ship. As to the proviso at the end, I think that it was unnecessary and was inserted *ex abundanti cautelâ*. The mere addition of such a clause as that contained in the proviso is not enough to alter the construction of the plain words of the first part. If the earlier words are to be read, as contended by the respondent, so as to cover all consequences of the injuries to another ship, it is difficult to see why there should be a specific addition as to injury to cargo or loss of freight, for I cannot see how the latter could arise without injury to the ship itself. There would therefore arise the same difficulty as to the use of unnecessary words and clauses if we were to accept the contention of the respondent. I agree, therefore, that the judgment of Mathew, J. was wrong, and that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Waltons, Johnson, Bubb*, and *Whatton*.

Solicitors for the respondent, *W. A. Crump* and *Son*.

Friday, June 22, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

THALMANN AND OTHERS *v.* TEXAS STAR FLOUR MILLS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sale of goods—Contract—Sale of wheat for shipment in United States—"Clearance not later than May 31"—Certificate of clearance given before completion of loading — Meaning of "clearance."

Wheat was sold for shipment at Galveston, in the United States, by a specified vessel for Havre, "clearance" to be not later than the 31st May.

A certificate of clearance was obtained on the 28th May. Part only of the cargo was then on board, the rest being alongside ready to be loaded. The loading was not completed until the 2nd June, when the vessel sailed.

By the statute of the United States the master must

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

furnish a manifest of the cargo "on board, whereupon the collector shall grant a clearance." It was, however, customary to grant a clearance before the completion of loading, and such a clearance was valid and effective for all purposes, and entitled the vessel to sail immediately.

Held (affirming the judgment of Bigham, J.), that the vessel had obtained a "clearance" within the meaning of the contract, when the certificate of clearance was granted.

THIS was an appeal by the plaintiffs from the judgment of Bigham, J. at the trial of the action, as a commercial cause, without a jury.

The plaintiffs brought this action to recover damages from the defendants for breach of contract.

The defendants had agreed to sell to the plaintiffs two parcels of Colorado wheat, to be shipped at Galveston, in the United States, by the steamship *Highfield* for Havre.

The contract contained a provision as follows: "Clearance not later than 31st May 1898."

On the 28th May a certificate of clearance was issued to the *Highfield* by the Customs authorities at Galveston. On that day the loading of the cargo of the *Highfield* was not completed, part being on board and the remainder being on the quay alongside ready to be loaded.

The loading was not in fact completed until the 2nd June, on which day the vessel sailed.

The vessel was delayed on the voyage by a breakdown of machinery, and consequently did not arrive at Havre until the 1st July.

The French Government had temporarily suspended the import duty on wheat, and in order that the plaintiffs might obtain the benefit of this remission of duty it was necessary that the wheat should arrive at Havre by the end of June, as after the 30th June the duty again became payable.

By the United States statute which regulates the granting of clearances, the master of a ship is required to furnish the Customs authorities with a manifest of the cargo "on board, whereupon the collector shall grant a clearance."

It was proved, by an affidavit of the special deputy collector and chief executive officer of the port of Galveston, that it is the custom, and for very many years has been the custom, of this port and other ports of the United States to clear vessels at the Custom House before they have completed loading, and that such clearance is and has been regarded by the Treasury Department as regular, valid, effective, and final. That no other clearance of the *Highfield* was issued by this Custom House, that the vessel required no other clearance, and that the clearance so issued was the final and valid and only clearance of the vessel for the voyage issued by the Custom House. That the vessel was entitled to sail immediately and at the convenience of her master after the issuance of the said clearance. That it is a common and well-known and recognised practice, and one of long standing, both in the port of Galveston and other ports of the United States, and lawful under the rules and regulations of the Treasury Department of the United States, to grant a clearance to a vessel whose cargo is delivered and alongside, and, if known, can be manifested before the whole cargo is actually placed on board of the vessel; that such a clearance is not provisional, there being no such clearance in the American usage as a temporary or provisional clearance; but that such a clearance is immediate, effective, and valid, and entitles a vessel to sail with the whole or any part of the cargo comprised in the manifest.

The master of the ship, by an affidavit, proved that he obtained the clearance on the 28th May for the purpose of being able to sail as soon as possible in the usual and ordinary course; that it was his regular practice in American ports, when he was in a position to give a complete manifest of the cargo, to obtain clearance before the completion of the loading so as to be able to sail at the earliest possible moment after the loading is completed; and that sailing would often be unnecessarily delayed if it were compulsory to wait for clearance until after the loading was completed.

The action was tried before Bigham, J. without a jury as a commercial cause.

Joseph Walton, Q.C. and *J. A. Hamilton* for the plaintiffs.

R. M. Bray, Q.C. and *E. Bray* for the defendants.

July 5, 1899.—BIGHAM, J.—The plaintiffs are corn merchants carrying on business in Paris, and the defendants are corn shippers in Galveston. On the 10th May 1898 the defendants telegraphed to the plaintiffs offering to sell two parcels of wheat on c.i.f. terms, by the steamer *Highfield* for Havre, "shipment within twenty-one days." On the 11th May the plaintiffs answered: "*Highfield*. Steamer's clearance not later than 25th May, we accept, &c." On the same day the defendants replied: "*Highfield* now on passage from Las Palmas since the 5th May, expected ready to load on May 22nd; steamer's clearance early as possible; steamer's clearance not later than end of this month; cable immediately if in order." On the 12th May the plaintiffs closed the negotiation by wiring: "*Highfield*, we accept your offer." Then the contract was made on the conditions that the steamer's clearance should be as early as possible and not later than the end of May. Contracts were subsequently exchanged on the forms of the London Corn Trade Association, and in these contracts the expression used was: "Clearance not later than 31st May instant." The question in the case is whether the condition as to clearance by the 31st May was complied with. No doubt the stipulation was made by the plaintiffs because it was necessary to have an early delivery of wheat in Havre. The French Government had temporarily suspended the import duty on wheat, and in order that the plaintiffs might obtain the benefit of this remission it was necessary that the wheat should arrive in Havre by the end of June; after that date the duty would become again payable. The vessel was not under the control or in the management of the defendants. She was a general ship managed by her own agents. She arrived at Galveston on the 26th May, and at once began taking in cargo—cotton and grain. She continued taking in cargo on the 27th and 28th May, and on the latter date she was moved to another pier where further cargo was waiting for her. There she completed her loading, the last cargo being taken on board on the 2nd June,

on which date the vessel sailed. She was delayed on her voyage by a breakdown of machinery, and consequently did not arrive in Havre until the 1st July, a day too late to enable the plaintiffs to secure the benefit of the remission of the duty. Meanwhile, the plaintiffs had paid the defendants drafts for the price of the wheat and had obtained the shipping documents. This action was brought to recover back the money so paid, on the ground that the vessel had not "cleared" on the 28th May according to the contract.

Now, "clearance," in my opinion, has a well-known and definite meaning. It is a certificate issued by the Customs showing that the vessel named in it has complied with the Customs requirements and is authorised to proceed to sea, and the acts which have to be done at the Customs to procure such a certificate constitute the process of "clearing the vessel." In this case the clearance was issued to the *Highfield* on the 28th May. The document, or a certified copy of the document, was produced to me, and it reads as follows: "(Clearance.) The United States of America. Clearance of vessel to foreign port. District of Galveston, Port of Galveston. These are to certify all whom it doth concern that W. Richardson, Master or Commander of the British steamship *Highfield*, burden 164 tons or thereabouts, mounted with guns, navigated with 26 seamen all told, steel built, and bound for Havre, *viâ* Newport, Va., having on board hath here entered and cleared his said vessel, according to law." It is true that this document was issued before all the cargo was on board, but it was issued at a time when all the cargo was alongside and waiting to be put into the ship. The affidavits from America, which were read at the trial, satisfy me that it was issued in the ordinary course of business, and that it is customary to obtain the clearance of vessels before the loading is actually complete, so that there need be no delay in putting out to sea. I believe the practice is the same in this country and elsewhere, and it is obviously convenient because, if the formalities at the customs could not be gone through until every package was on board, great delay would be occasioned. A diligent captain, therefore, obtains his clearance as soon as his cargo is in such a position as to enable him to make out his manifest for use at the Customs, and that course was followed in this case. It was said that by the United States statute regulating the granting of clearances (sect. 197) the master of a ship is required to furnish the custom authorities with a manifest of the cargo, "on board . . . whereupon the collector shall grant a clearance." And it was suggested that, inasmuch as the cargo was not all on board, the clearance in this case was null and void. I cannot, however, listen to such a suggestion. For the purpose of the section in question it is obvious to me that the authorities treat cargo as on board if in fact it is already alongside the ship and in such circumstances that it must in the ordinary course of business find its way on board. The clearance obtained in this case was the only clearance ever issued, and the affidavits satisfy me beyond all doubt that it was issued in accordance with the usual practice, and that it authorised the vessel to sail whenever it pleased her master to put to sea. There is an affidavit by Mr. Rosenthal, the special deputy collector or chief executive officer of the port of Galveston. In that affidavit he says:—"It is the custom, and for very many years has been the custom, of this port and other ports of the United States to clear vessels at the Customs House before they have completed loading; and such clearance is and has been regarded by the Treasury Department as regular, legal, valid, effective and final." He further says, with reference to the clearance of this particular vessel: "No other clearance of the said vessel was issued by this Custom House; the vessel required no other clearance; and the clearance so issued was the final and valid and only clearance of the vessel for the voyage issued by the Custom House." He further says: "The vessel was entitled to sail immediately, and at the convenience of her master, after the issuance of the said clearance." He goes on further to say: "It is a common and well known recognised practice, and one of long standing both in the port of Galveston and other ports of the United States, and lawful under the rules and regulations of the Treasury Department of the United States to grant a clearance to a vessel whose cargo is delivered and alongside, and if known can be manifested before the whole cargo is actually placed on board of the vessel; that such a clearance is not provisional, there being no such clearance in the American usage as a temporary or provisional clearance; but that such a clearance is immediate, effective, and valid, and entitles a vessel to sail with the whole or any part of the cargo comprised in the manifest." There is not only the affidavit of the collector of Customs, but there is the affidavit of the master of this ship, William Richardson, in which he says: "I anticipated and hoped that I should have been able to complete the loading of the cargo by the 30th May or early on the 31st. The 29th was a Sunday, and the 30th was a public holiday, on which days I should have been unable to obtain clearance, and I was anxious to be in a position to sail without unnecessary delay and at the earliest possible moment, especially in view of the promise of a gratuity which had been offered to me by the above-named Messrs. Thalman Frères if I arrived in French waters by or before a certain date. The said clearance was issued to me regularly in accordance with the usual practice, and was final and complete when so issued, entitling me to sail whenever I chose after the said clearance and when loading was completed. It was applied for by me in the ordinary and usual course of my business for convenience of sailing. It has been my regular practice in American ports when, as in this case, I am in a position to give a complete manifest of my cargo as known to me, and it is, I believe, the almost universal practice of masters in similar circumstances, to obtain clearance before the completion of the loading, so as to be able to sail at the earliest possible moment after the loading is completed, which sailing might and often would be unnecessarily delayed by reason of the Customs office being closed at the time of the completion of the loading if it were compulsory to wait until this was completed." It was said that, having regard to the object of the stipulation as to clearance, I ought to put upon the terms a meaning different to that which I believe to be its ordinary meaning, and that I should read the words of the contract as meaning

"cleared and ready to sail" not later than the 31st May. But it is not my duty to read into the contract words which the parties have not chosen to use; my duty is to give to the words which I find in the contract their ordinary signification and to interpret the contract accordingly. If the plaintiffs had chosen to do so, they could have stipulated that the vessel should sail by the date named—a very ordinary stipulation in contracts such as this. Such a stipulation, however, is by no means the same as clearing. Clearing and sailing are two quite different things, and clearing and being ready to sail are by no means necessarily the same thing. The plaintiffs chose their own expression—an expression, the meaning of which is to my mind not in the least doubtful—and, having chosen their own expression, their contract must be interpreted according to the meaning which I attribute to the word they have used. In these circumstances it appears to me that the condition in the contract has been performed, and the plaintiffs must therefore abide by their bargain, and having paid their money and taken their cargo, in my opinion the best thing they can do now is to abide by it. There will be judgment for the defendants.

Judgment for the defendants.

Carver, Q.C. and *J. A. Hamilton* for the appellants.—The learned judge was wrong in holding that the certificate of clearance given in this case was a "clearance" within the meaning of the contract. The statute of the United States provides that a clearance is to be given when the cargo is on board, and that clearance is obtained upon a sworn statement of the master declaring all the cargo which is on board. A certificate of clearance can only be obtained before the loading of the cargo is completed if the master makes a false declaration that all the cargo is on board. The intention of the parties in this contract was that a "clearance" should be obtained in accordance with the law of the United States, and not that a certificate of clearance improperly obtained before all the cargo was loaded should satisfy the contract. The object of the purchasers was to make it certain that the vessel should sail soon enough to reach Havre before the end of June, and by "clearance" the parties meant that the vessel should have all the cargo on board so as to be ready to sail. Bigham, J. relied upon the practice in England as to giving clearances before all the cargo is loaded, but the statutory provisions in this country are not the same as those of the United States statute. The Customs Laws Consolidation Act 1876 (39 & 40 Vict. c. 36), by sect. 128 provides that "before any ship shall be cleared outwards the master . . . shall deliver to the collector a content of the ship" in the prescribed form, and by that form the master declares that the content is a true account of all goods "shipped and intended to be shipped on board;" and therefore a clearance may be given before the cargo is all loaded.

R. M. Bray, Q.C. and *E. Bray*, for the respondents, were not called upon to argue.

SMITH, L.J.—This is an appeal by the plaintiffs from the judgment of Bigham, J. The action is brought by the purchasers of some wheat against the vendors for not delivering the wheat according to the contract. The term of the contract which it is alleged has been broken is that the vessel, by which the wheat was to be carried from Galveston to Havre, should be cleared not later than the 31st May. The plaintiffs say that they have suffered great damage by reason of the breach of that condition, because, if the wheat had arrived at Havre before the 1st July, it would have been free from import duty, and as the vessel did not arrive until the 1st July it was not in time and the import duty had to be paid. The only question in this case is whether, within the meaning of the contract, the vessel was cleared not later than the 31st May. The vendors say that it was, because the document known as a "clearance" was obtained by the master of the vessel on the 28th May, and therefore not later than the 31st May, and that it was an effective and valid clearance under which the vessel could sail at any time from Galveston, and under which she did in fact sail. What is the meaning of "clearance" in the contract? In my opinion it clearly means the obtaining of a certificate of clearance. The appellants say that it means a clearance according to the law of the United States, which cannot be given until all the cargo is on board, and that in this case the cargo was not all on board on the 28th May, when the certificate in question was given. I do not think that the meaning of this contract is that there must be a certificate of clearance given in strict accordance with the statute of the United States. I read the contract as meaning a clearance in accordance with the practice in vogue at Galveston, under which certificates of clearance are given by the Custom House authorities at Galveston. The certificate of clearance in this case was given in accordance with the practice at Galveston and at many other ports of the United States, and documents so given are valid and effective clearances which would entitle a vessel to sail from the port. The statement in the affidavit of the official at Galveston is that this clearance was regarded as "regular, valid, effective, and final"; that the vessel required no other clearance; that it is not provisional but is immediate, effective, and valid, and entitles a vessel to sail at the convenience of the master. What then is the meaning of "clearance" in this contract? It is not contended that it means that the ship shall sail not later than the 31st May. "Clearance" means the document of clearance which is usually given when the vessel is about ready to sail. It means the certificate of clearance, and Bigham, J. was right in so holding. I think, therefore, that the judgment of Bigham, J. was right and that this appeal must be dismissed.

WILLIAMS, L.J.—I agree. The plaintiffs did not enter into a contract by which it was agreed that the vessel should sail not later than the 31st May. The agreement is for "clearance not later than the 31st May." I think that that means a certificate of clearance, an *exeat*, which permits the vessel to leave the port. It seems to me that the condition was performed in this case. It is admitted that a certificate of clearance was obtained not later than the 31st May, and that that certificate was valid and effective in the United States. Under those circumstances it seems to me that this condition was performed, and that

there is nothing in the defence which has been set up.

ROMER, L.J.—I agree. *Appeal dismissed.*

Solicitors for the appellants, *Hollams, Son, Coward*, and *Hawkesley*.

Solicitor for the respondents, *Tilleards*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, March 12, 1900.

(Before KENNEDY, J.)

HARROWING STEAMSHIP COMPANY LIMITED v. TOOHEY. (a)

Shares in ships — Transfer — Registration of transfer—Fees payable on registration—Mode of calculating—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 26—*Merchant Shipping (Mercantile Marine Fund) Act* 1898 (61 & 62 *Vict. c.* 44), *s.* 3, *sched.* 1.

Sect. 3 *of the Merchant Shipping (Mercantile Marine Fund) Act* 1898 *provides that "such fees shall be paid in respect of the registration, transfer, and mortgage of British ships as the Board of Trade determine, not exceeding those specified in the first schedule to the Act"; and by the* 1*st schedule the fees to be paid on the transfer of ships are to be "according to the gross tonnage represented by the ships or shares of ships transferred."*

Held, that, where shares in a ship are transferred by different bills of sale to the same transferee, each bill of sale is a separate transfer of interest, and on the registration of such bills of sale by the transferee a separate fee, according to the scale, is payable on the tonnage represented by the shares transferred by each bill of sale.

Fifty-eight shares in a ship were transferred by twenty bills of sale to the plaintiffs:

Held, that, on the registration of these bills of sale, the plaintiffs were bound to pay a separate fee on each bill of sale calculated on the tonnage transferred by such bill of sale, and not merely one fee on the total tonnage represented by all the shares transferred.

ACTION tried before Kennedy, J. in the Commercial Court.

The action was brought to recover damages for the alleged wrongful refusal of the defendant to register the plaintiffs' name as transferees and owners of certain shares in six ships.

The action was tried upon an agreed statement of facts as follows:

The defendant is, or was recently, chief officer of Customs at the port of Whitby, within the meaning of sect. 4 (1) (*a*) of the Merchant Shipping Act 1894, and is or was recently therefore registrar of British ships at the said port.

On the 4th July 1899 the plaintiffs produced to the defendant as such registrar 166 bills of sale for the transfer to the plaintiffs of in all 316 shares in six registered ships, with the declarations of transfer required by sect. 26 of the Merchant Shipping Act 1894, and requested the defendant to enter their name as transferees in the register book as owners of the said shares, and indorse on the said bills of sale the fact of such entry having been made in accordance with the provisions of the last-mentioned section. The bills of sale represented the under-mentioned shares in respect of the six vessels:

Name of vessel.	Gross tonnage.	No. of 64th shares.	No. of bills of sale.	Gross tonnage represented by such number of 64th shares.	Fees.
Ethelburga	2223	58	20	2015	£4 0 0
Ethelreda	2160	47	28	1589	£3 7 6

[The names, gross tonnage, &c., with regard to the four other ships were given in the same way, and the total amount of the fees in the last column was 24*l.* 10*s.*, which was the sum tendered by the plaintiffs in respect of the six vessels.]

There was only one delaration of transfer tendered in the case of each ship, which declaration included all the shares dealt with by the separate transfers relating to shares in such ship. It was not admitted, on the part of the defendant, that separate declarations in respect of each transfer could not, strictly speaking, have been required.

The plaintiffs at the same time tendered to the defendant the sum of 24*l.* 10*s.* as the amount due for fees upon such registration under the provisions of sect. 3 of the Merchant Shipping (Mercantile Marine Fund) Act 1898. The sum of 24*l.* 10*s.* was arrived at by charging one fee on the scale mentioned in the said Act upon the total of the tonnage on each of the six ships represented by the shares transferred in such ships respectively and dealt with by the transfers relating thereto respectively.

The defendant refused to register the plaintiffs' name without the payment of a separate fee upon the said scale on the tonnage transferred by each bill of sale. The amount payable on this principle would be 118*l.* 17*s.* 6*d.*

The point for the decision of the court was whether the fees tendered by the plaintiffs were sufficient. If such fees were sufficient, it was agreed that the plaintiffs are entitled to judgment and damages for a nominal amount with costs.

Then there followed a complete list of the bills of sale, giving, with regard to each ship, the name of the transferor and of the transferees (the plaintiffs), the tonnage transferred for assessment per bill of sale, and the fee on the said tonnage if chargeable separately according to the tonnage transferred by each bill of sale.

For instance, taking the *Ethelburga*, out of a gross tonnage of 2223 tons there was a gross tonnage transferred of 2015 tons by twenty bills of sale. In each of fifteen of these bills of sale there was a tonnage of 34 tons transferred, and if separately chargeable—as the defendant contended—there would be a fee of 10*s.* in respect of the 34 tons transferred by each of these bills of sale, in all 7*l.* 10*s.*; there was one bill of sale transferring 69 tons (separate fee, 15*s.*); one transferring 104 tons (separate fee, 1*l.*); one transferring 138 tons (separate fee, 1*l.* 2*s.* 6*d.*); one transferring 555 tons (separate fee, 2*l.* 2*s.* 6*d.*); and one transferring 624 tons (separate fee, 2*l.* 5*s.*); so that if the fees were separately chargeable on the number of tons transferred by each bill of sale of shares relating to this one ship, the total fees would be for the *Ethelburga*, 14*l.* 15*s.*; whereas by the plaintiffs' contention only one fee was chargeable on the total tonnage (2015 tons) in the *Ethelburga*

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

transferred by all the bills of sale, which according to the scale was 4*l.*

The difference in the amount of fees payable in respect of each ship according to the two modes of estimating the amount was as follows:

Name of vessel.	Fees according to plaintiffs' contention.	Fees according to defendant's contention.
Ethelburga ...	£4 0 0	£14 15 0
Ethelreda ...	3 7 6	17 0 0
Ethelwalda ..	4 0 0	22 17 6
Ethelaida ...	4 2 6	24 2 6
Ethelhilda ...	4 2 6	21 17 6
Ethelbryghta	4 17 6	18 5 0
Total ...	£24 10 0	£118 17 6

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 26.—(1) Every bill of sale for the transfer of a registered ship or of a share therein, when duly executed, shall be produced to the registrar of her port of registry, with the declaration of transfer, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share, and shall indorse on the bill of sale the fact of that entry having been made, with the day and hour thereof.

The Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 & 62 Vict. c. 44), provides:

Sect. 3. Such fees shall be paid in respect of the registration, transfer (including transmission), and mortgage of British ships as the Board of Trade, with the consent of the Treasury, determine, not exceeding those specified in the first schedule to this Act, and all such fees shall be paid into the Exchequer. Provided that fees shall not be payable under this section in respect of vessels solely employed in fishing or sailing ships of under one hundred tons.

First Schedule.—Table of maximum fees to be paid on the registration, transfer, and mortgage of ships.—2. Transfer and mortgage. — On transfer, transmission, registry anew, transfer of registry, mortgage and transfer of mortgage. According to the gross tonnage represented by the ships or shares of ships transferred, &c. (*e.g.*, the transfer of a one-sixty-fourth share in a ship of 6400 tons to be reckoned as the transfer of 100 tons)

	£	s.	d.
Under 10 tons	0	2	6
10 tons and under 20 tons	0	5	0
20 „ „ 30 „	0	7	6
30 „ „ 40 „	0	10	0
40 „ „ 50 „	0	12	6
50 „ „ 75 „	0	15	0
75 „ „ 100 „	0	17	6
100 „ „ 125 „	1	0	0

and a further fee of 2s. 6*d.* for every additional fifty tons, or part of fifty tons, up to 500 tons, after which 2s. 6*d.* for every 100 tons, or part of 100 tons.

Horridge for the plaintiffs.—On the construction of the sections the basis of calculating these fees adopted by the plaintiffs is the correct one. These fees, specified in sched. 1, were not intended to meet the expenses of the registration of each transfer, but were intended to go to the General Lighthouse Fund constituted under the Act of 1898. The transaction must be looked at as a whole, and the intention of the Act clearly was that one fee should be payable in respect of the gross tonnage of all the shares in any one ship transferred to the person who seeks to be registered as owner of those shares, and it is immaterial that these shares are transferred to this person by more transfers than one. The fee is payable on the transaction as a whole, and not on the several transfers or several documents by which the shares are transferred to the plaintiffs. The fee is payable in respect of the ownership of a ship or shares where those have been transferred to one person. It is, as stated in the schedule, payable "according to the gross tonnage represented by the ships or shares of ships transferred"; and it makes no difference that the transfer of the ship or shares to one person has been effected by transfers from different transferors. The Act may fairly bear this construction, but if there be any doubt as to its construction, then, as it is a Taxing Act, it ought to be construed in favour of the plaintiffs. In *Stockton Railway Company* v. *Barrett* (11 Cl. & F. 590, at p. 607) Lord Brougham says: "It must be observed that, *in dubio*, you are always to lean against the construction which imposes a burthen on the subject. The meaning of the Legislature to tax him must be clear." In the case of *Re J. Thorley; Thorley* v. *Massam* (64 L. T. Rep. at p. 517; (1891) 2 Ch. at p. 623) Lindley, L.J.—speaking of Acts of Parliament which impose legacy duty—says: "Those Acts, like all other Taxing Acts, are to be read strictly; that is to say, they are not to be extended so as to have the effect of imposing on the subject a tax which Parliament has not clearly made him pay." The principle laid down in Maxwell on the Interpretation of Statutes (3rd edit. pp. 401, 402) is to the same effect.

The *Solicitor-General* (Sir Robert Finlay, Q.C.) (*S. A. T. Rowlatt* with him) for the defendant.—The fee is to be paid not on the transaction as a whole, but upon each transfer of interest. "According to the gross tonnage represented by the shares transferred" means according to the shares transferred by each transfer, and not according to the total shares transferred to one transferee by all the transfers relating to one ship. To see what fees are payable, we have to find out how many transfers of interest there have been to the person seeking to be registered as owner. In the case of the first ship, the *Ethelburga*, there were twenty separate transfers to the plaintiffs, and therefore twenty separate interests have been transferred to the plaintiffs. If these twenty separate transfers had been to twenty separate persons, instead of to one person (the plaintiffs), then it could not have been contended that the fee would not have been payable on each transfer. Take the case of a person having five shares which he transfers to five different persons, then clearly there would be five different transfers of interest, and the fee would be payable on the tonnage transferred by each transfer. In the same way if there be five persons who have between them five shares and they transfer these five shares to one person, there would be five transfers of interest; and there are none the less five transfers because they result in transferring the five shares to one person instead of to five persons. The basis of calculation, therefore, adopted by the defendant is in accordance with the intention of the Act, and is the correct one.

Horridge in reply.

KENNEDY, J.—I think that this matter is reasonably clear, and that the view which is taken by the Customs is the right one. As I read the

section, on a transfer there is to be a payment of a fee according to the gross tonnage represented by the ships or shares of ships transferred. Now, in the present case one purchaser gets transferred to him a number of shares, but each of those shares, or a certain number of those shares, are not merely transferred in different documents—and this is not a tax or charge upon documents—but each of those transfers is in fact a separate transaction, and is in that sense a separate transfer. Just as, I take it, if a man got by will a transmission of ten shares and by purchase another ten, each of these would be chargeable with a separate fee when he came to register, although he might buy the ten shares, and have possibly transmitted to him the other ten shares by succession or by devise at the same time. So it seems to me that, although it is a purchasing at the same time from different persons, the plaintiffs ought to pay according to this scale on the gross tonnage represented by the shares in each transfer as a separate transaction, and as if they had not at the same time bought the others. Therefore to my mind it appears to be clear that the defendant is entitled to judgment.

Judgment for the defendant with costs.

Solicitors for the plaintiffs, *Holman, Birdwood, and Co.*

Solicitor for the defendant, *C. J. Follett*, Solicitor of the Customs.

April 25 *and* 30, 1900.

(Before MATHEW, J.)

TURNBULL, MARTIN, AND CO. *v.* HULL UNDERWRITERS' ASSOCIATION. (*a*)

Marine insurance—Loss of freight—Exception——"Claim consequent on loss of time"—Frozen meat—Destruction of refrigerator.

A policy on freight of frozen meat contained the clause, "Chartered freights and freights are warranted free from any claim consequent on loss of time." Before the vessel loaded the meat, a fire destroyed her refrigerating machinery, so that she could not carry frozen meat. It was necessary to bring the materials to repair from England to Australia, where the fire occurred, which would have involved great delay.

Held, that, as this would have rendered the earning the freight commercially impossible, this was a loss "consequent on loss of time" within the words of the policy.

THIS was an action to recover a total loss on a policy on freight on a cargo of frozen meat.

The insurance was on the outward voyage of the steamship *Buteshire* for freight expected to be earned on the homeward voyage, and the risk was described in the following terms:

At and from London to any port or ports and (or) place or places in any order or rotation in Australia and (or) Tasmania and (or) New Zealand, risk to continue until steamer sails from final loading port on homeward voyage.

The subject-matter was described as follows:

Upon freight of frozen meat, chartered or as if chartered, on board or not on board, full interest admitted.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The policy also contained the following special clause:

Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

It was not disputed that the words "or otherwise" meant other perils insured against.

The evidence showed that at the time when the vessel sailed no contracts had been secured by the plaintiffs for the shipment of frozen meat from the colonial ports, but such contracts were made, and the homeward cargo was booked at Newcastle, Melbourne, and New Zealand ports, while the vessel was making her outward voyage. Frozen meat must be shipped at the times specified in the contracts with shippers, and the shipments cannot be delayed. Where the vessel is disabled from fulfilling her engagements frozen meat would in the ordinary course be forwarded in another vessel. A delay involving no great length of time due to damage by perils insured against, either to ship or machinery, would prevent the vessel from earning freight contracted for, and would thus defeat the object of the adventure. The risk is therefore one which underwriters would be cautious about accepting. The *Buteshire* was fitted with refrigerating machinery of a special kind in three of her five holds. The other holds were used for ordinary cargo.

The ship arrived at Sydney on the 15th Oct. 1898 and discharged her outward cargo.

On the 18th Oct. a fire occurred on board, and so damaged her refrigerating machinery that she was disabled from carrying a cargo of frozen meat. Materials for the repair of the refrigerating machinery could not be procured, and must have been brought from England, and the owners properly determined to send the vessel home with such ordinary cargo as she could procure and to have the damage repaired in England. The earning of the freight was in this way rendered commercially impossible.

Carver, Q.C. and *J. A. Hamilton* for the plaintiffs.—The clause that "chartered freights and freights are warranted free from any claim consequent on loss of time" has no application here. The case upon which the defendants are relying is *Bensaude* v. *Thames and Mersey Marine Insurance Company* (77 L. T. Rep. 282; 8 Asp. Mar. Law Cas. 315; (1897) A. C. 609). In that case the clause was "free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise," and owing to the shaft breaking and the delay arising the charterers put an end to the charter. Here the loss is not one of time, but of machinery, and the power of carrying frozen meat only arose because the refrigeration was gone. This was not a case of a chartered freight. They also referred to

Jackson v. *Union Marine Insurance Company*, 31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125.

Joseph Walton, Q.C. and *Theobald Mathew* for the defendants.—This case cannot in principle be distinguished from *Bensaude* v. *Thames and Mersey Marine Insurance Company* (*ubi sup.*), and this is a "claim consequent on loss of time." The whole loss was incurred here because the refrigerating machinery could not be repaired

quickly, and so it was "consequent on loss of time."

Carver, Q.C. in reply.

April 30.—MATHEW, J. read the following judgment:—[His Lordship, after stating the facts set out above, continued:] It was argued for the plaintiffs upon the authority of *Jackson* v. *Union Marine Insurance Company* (31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125) that a delay due to a peril insured against which frustrated the object of the voyage and prevented the vessel from earning her homeward freight entitled the plaintiffs to recover as for a total loss. For the defendants reliance was placed on the terms of the warranty and upon the decision in the case of *Bensaude* v. *Thames and Mersey Marine Insurance Company* (77 L. T. Rep. 282; 8 Asp. Mar. Law Cas. 315; (1897) A. C. 609). The loss, it was argued, was due not merely to the fire, but to the time which the repairs must have taken. The argument for the plaintiffs, on the other hand, that the claim was consequent not upon loss of time but upon the disablement of the vessel by a peril insured against was rejected by the Court of Appeal and the House of Lords in that case. The damage in both cases was of such a character that it became impossible to prosecute the voyage within the necessary time. An attempt was made to distinguish the present case from the decision in *Bensaude* v. *Thames and Mersey Marine Insurance Company* on the ground that this was not chartered freight; but the warranty applies not only to chartered freight but to all freights; and the several contracts of affreightment made with the shippers had the same operation as if they were grouped in a charter-party. In each case the result of the peril insured against would have been the same—viz., to disable the ship from fulfilling her engagements in proper time. It seems to me that no such distinction can be reasonably made. The ship was damaged by a peril insured against; and her capacity to carry frozen meat was suspended until her machinery had been repaired. If she could have been repaired promptly there would have been no loss of freight. The loss, therefore, was "consequent on loss of time" within the meaning of the warranty. I give judgment for the defendants.

Judgment accordingly.

Solicitors: *Hollams, Son, Coward*, and *Hawksley*; *Waltons, Johnson, Bubb*, and *Whatton*.

May 2 *and* 7, 1900.

(Before MATHEW, J.)

NICKOLL AND KNIGHT *v.* ASHTON, EDRIDGE, AND CO. (*a*)

Sale of goods—Contract for sale of cargo—Cargo to be shipped by specified ship at specified time—Impossibility of performance through damage to ship—Liability of seller—Implied condition as to ending of contract.

The defendants on the 24*th Oct.* 1899 *made a contract with the plaintiffs for the sale to the plaintiffs of a cargo of cotton seed to be shipped at Alexandria during the month of Jan.* 1900 *by the steamship* Orlando, *which had been chartered on the* 13*th Oct. by Messrs. B. to proceed to Alexandria and load the cargo, the charterers having the option of cancelling the charter if the ship did not arrive by the* 25*th Jan.* 1900. *Messrs. B. sold the cargo to the defendants, who in turn sold it to the plaintiffs. While the ship was on her way to load her outward cargo she was, on the* 21*st Nov., so damaged by perils of the seas through stranding as to make it impossible for her to arrive at the port of loading in time to take the cargo on board. and on the* 20*th Dec. notice of this fact, and that it would be impossible for the ship to load before March, was given to the plaintiffs. The contract contained no express provision as to what was to happen in the event of the ship being so damaged as to be unable to perform the contract. and its performance thus became impossible through no fault of either party. In an action by the plaintiffs for damages for breach of the contract:*

Held, that the contract having become impossible of performance through the damage to the ship, a condition ought to be implied in it that under the circumstances neither party was bound by it; that the contract was therefore at an end, and that the defendants were not liable to the plaintiffs for its non-performance by them.

ACTION tried before Mathew, J. in the Commercial Court.

The plaintiffs Messrs. Nickoll and Knight carried on business in the city of London as grain and seed merchants and oil brokers, and the defendants carried on business there as grain and seed brokers.

The action was brought to recover a sum of 2808*l.* 2*s.* 9*d.* as damages for breach of a contract dated the 24th Oct. 1899, for the sale by the defendants to the plaintiffs of a cargo of Egyptian cotton-seed for shipment in the month of Jan. 1900, per the steamer *Orlando*.

On the 13th Oct. 1899, Messrs. Behrend, of London, agreed with the owner of the *Orlando* to charter the steamer, which was to proceed from the Baltic or the United Kingdom or Continent to Alexandria, in Egypt, and there load a cargo not exceeding 1900 tons of cotton-seed for a safe port in the United Kingdom or Continent within certain limits. By clauses in the charter-party the owner was to be at liberty to take an outward cargo to the Mediterranean or any ports on the way to Alexandria, and lay days were not to commence until the 1st Jan. 1900, unless both ship and cargo were ready before that date, and the charterers were to have the option of cancelling the charter if the steamer did not arrive and be ready to load by the 25th Jan. 1900; and the act of God, perils, dangers, and accidents of the sea, fire from any cause, strandings, collisions, and all other accidents of navigation and all losses and damages caused thereby were excepted in the usual way.

On the 24th Oct. 1899, Messrs. Behrend instructed the defendants to sell a cargo of from 1600 tons to 1900 tons of cotton-seed for shipment by the *Orlando*, in Jan. 1900, and on the same day the defendants arranged for the sale to the plaintiffs. The defendants not giving the name of their principals became liable as principals

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

on this contract. The sale was effected by the defendants passing to the plaintiffs a sold contract, and to Messrs. Behrend a bought contract in identical terms (except as to commission).

The material parts of this contract were as follows:

Sold this day (24th Oct. 1899) to Messrs. Nickoll and Knight the following Egyptian cotton-seed, namely, a cargo to consist of from 1600 tons to 1900 tons to be shipped by a steamer at Alexandria and (or) Port Said and (or) Ismalia, during the month of Jan. 1900, per ss. *Orlando*, at 6*l*. 3*s*. 9*d*. per ton. The seed is to be delivered at destined port to buyers' craft alongside in sound and merchantable condition, and paid for in London in fourteen days from being ready for delivery by cash (against shipping documents or delivery order if required), &c. Particulars of shipment are to be duly declared, the vessel to go to any safe floating port in the United Kingdom, buyers to give destination in writing immediately upon receiving notice from the sellers that such is required, &c.

Clause 5 was as follows:

In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract, or any unfulfilled part thereof, is to be cancelled.

Clause 6 dealt with the case of the non-discharge of the cargo by reason of a strike or lock-out, and clause 7 provided as to arbitration in case the whole or any portion of the seed should on arrival turn out not equal to the warranty or be damaged or out of condition and generally in case there should be any claim or dispute arising out of the contract, and the contract was to be void as regards any portion that might not arrive by the steamer declared under this contract.

The contract made no provision as to what should be the rights of the parties in case the vessel were unable to perform the contract.

While the vessel was proceeding on her way from West Hartlepool to load her outward cargo she grounded in the Baltic on the 21st Nov. She was salved, taken into harbour, and was found to be so severely damaged as to render it impossible for her to proceed to Alexandria in the stipulated time.

The repairs were not completed till the end of February or early in March.

On the 19th Dec. the shipbrokers wrote that the ship was so damaged that it would be impossible for her to load before March, and on the 20th Dec. the defendants sent a copy of this letter to the plaintiffs with the additional statement by the shipbrokers that it would possibly be May before the ship could be loaded, so that the plaintiffs knew on the 20th Dec. that it would be impossible for the ship to arrive and load the cargo at the stipulated time.

As soon as it became apparent that the ship could not arrive in time to carry out the contract arbitration proceedings took place between the parties, but these proceedings ultimately proved abortive, and the present action was begun on the 28th Feb. 1900.

A week after action brought Messrs. Behrend heard that the *Orlando* was about to proceed to Alexandria to fulfil her charter, and on the 8th March the defendants wrote to the plaintiffs and offered to load the cargo, but the plaintiffs refused.

The question now was whether, the contract having become impossible of performance through the damage to the vessel without any default on the part of the defendants, the defendants were liable to the plaintiffs for breach of the contract, the contract itself making no provision for what happened to the vessel.

Joseph Walton, Q.C. (*F. W. Hollams* with him) for the plaintiffs.—The contract was an absolute contract to load this cargo during the month of January, and amounted to an implied undertaking or a warranty by the defendants that the ship should be able and ready to take the cargo on board at the stipulated time. By the contract the defendants undertook the risk of the vessel being disabled or damaged by perils of the seas and not being able to perform the contract, and the defendants are liable in damages if the ship is so damaged that she cannot arrive in time to perform the contract. It may be said that the damage to the ship arose from unforeseen circumstances over which the defendants had no control, and the defendants ought not to be liable in damages in consequence. The answer to that is that the defendants could have, and ought to have, provided against that in the contract, but they have not done so. There is no such clause in the contract as would exonerate the defendants from the risk of damage to the vessel; on the contrary, there is an indication in the contract that the defendants are to be liable in such a case. It is said that there ought to be a condition implied in the contract that if the contract becomes impossible of performance without default of either party, then neither party ought to be bound. But clause 5 of the contract expressly provides for the cases where the contract was to be cancelled, and these must be taken to be exclusive of all other causes. The non-arrival of the ship to take the cargo on board at the proper time is not one of these cases, and must therefore be taken to be excluded from the causes which entitle the defendants to cancel the contract. The defendants, therefore, not having loaded the cargo according to the contract, are liable in damages to the plaintiffs: *Ashmore and Son* v. *C. S. Cox and Co.* (1899) 1 Q. B. 436).

Bray, Q.C. (*Edward Bray* with him) for the defendants.—When the contract became impossible of performance by the damage to the ship the defendants were no longer bound by it, and a condition ought to be implied in the contract that under such circumstances the defendants were excused from the performance of it. The argument for the plaintiffs rests on this, that a warranty should be implied in the contract that the ship should be in existence, and should be able to take the cargo on board in January. That would amount to insuring the ship, and it would be most unreasonable to throw that burden upon the defendants in the absence of an express stipulation for the purpose. There is no such express stipulation. The principle applicable in this case is well laid down by Blackburn, J. in *Taylor* v. *Caldwell* (8 L. T. Rep. 356, at p. 358; 3 B. & S. 826, at p. 839), thus: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." Here the performance depends on

the continued existence of the ship, and it became impossible to perform the contract in January without any fault on our part, and therefore in the words of Blackburn, J. that excuses the performance. Again he says that in such a contract as this, "in the absence of any warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." This language is cited and approved of by Kelly, C.B. in *Robinson* v. *Davison* (24 L. T. Rep. 755; L. Rep. 6 Ex. 269). So, in *Howell* v. *Coupland* (30 L. T. Rep. 677; L. Rep. 9 Q. B. 462), where the defendant agreed to sell to the plaintiff a quantity of potatoes to be grown, and where before the time for delivery the potato blight appeared and the crop failed, it was held that the contract was subject to the implied condition that the defendant should be excused when the performance had become impossible without any default on his part; and Blackburn, J. held that the principle he had laid down in *Taylor* v. *Caldwell* (*ubi sup.*), applied. The same principle was laid down in *Baily* v. *De Crespigny* (19 L. T. Rep. 681; L. Rep. 4 Q. B. 180), and in *Clifford* v. *Watts* (22 L. T. Rep. 717; L. Rep. 5 C. P. 577). This was the case of a cargo to be shipped by a particular vessel, to arrive at a particular time with a particular cargo, and every one of these decisions shows that in the absence of an express warranty that she should arrive, there is no contract that she should arrive. The whole thing is made to depend on the vessel arriving, and it assumes the continued existence and safe arrival of the vessel. In the words of Parke, B., in the case of a similar contract, in *Johnson* v. *Macdonald* (9 M. & W. 600, at p. 605): "I think, therefore, that according to its true meaning, the language of this contract renders the performance of it conditional on a double event, the arrival in safety of the vessel and her cargo . . . and that, if the vessel is lost, the contract is to be altogether void." No inference can be drawn from the insertion in the printed contract of clause 5, which has been relied on by the plaintiffs. There is nothing in that clause which excludes the implication which is shown by the above cases to exist. [MATHEW, J. referred to *Roth* v. *Taysen, Townsend, and Co.* (73 L. T. Rep. 628; 8 Asp. Mar. Law Cas. 120; 1 Com. Cas. 306); and to *Jackson* v. *Union Marine Insurance Company Limited* (31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125.]

Joseph Walton, Q.C. in reply.

Cur. adv. vult.

May 7.—MATHEW, J.—This was an action brought to recover 2808*l.* 2*s.* 9*d.* as damages for breach of contract for the sale by the defendants to the plaintiffs of a cargo of cotton-seed. The contract was entered into on the 24th Oct. 1899, and the defendants by that contract sold to the plaintiffs a cargo of Egyptian cotton-seed consisting of from 1600 to 1900 tons to be shipped at Alexandria and (or) Port Said and (or) Ismalia during the month of Jan. 1900 by the steamship *Orlando* at 6*l.* 3*s.* 9*d.* per ton. The contract contained a series of clauses, each of which is important in arriving at the meaning of the contract. What happened was this. The ship was disabled by perils of the seas from arriving in time to take the cargo on board, and in these circumstances damages were claimed by the plaintiffs because the defendants had not done what was impossible, namely, to ship the cargo as provided for in the contract. It is only necessary to say that the 3rd, 4th, 5th, 6th, and 7th clauses of the contract all would seem to assume that the contract was to become operative on its being shown that the ship was fit to take the cargo on board in the time specified in the contract. No express provision was made in the contract for what happened to the ship. The contract having been made in October, in the following month the ship, which was then in the Baltic, was stranded by perils of the sea and was so damaged, it was agreed, as to make it impossible for her to arrive in time at the port of loading. Notice of this fact was given to the plaintiffs on the 20th Dec. and the position of the parties to the transaction at that time was this: From the correspondence it appears that a firm of Behrend and Co. had chartered the ship to bring the cargo home. They sold the cargo to the defendants who, by a contract in similar terms, sold it to the plaintiffs. When notice was given of the condition of the ship and it was clear that she could not be repaired in time, there was a proposal to settle any dispute between the parties by arbitration. The attempt to arbitrate became abortive. The umpire who was appointed refused to state a case upon the question of law proposed to be raised, and upon that he withdrew from his position of umpire, and the case then came into court. The argument for the plaintiffs was this: The contract, it was said, was an absolute contract to load the cargo in January and that a warranty should therefore be implied that the ship would then be able to take the cargo on board. The defendants, it was said, took upon themselves the risk of the ship being lost or disabled by perils of the sea and must therefore be answerable in damages. It was said that the matter occurred from unforeseen circumstances which were beyond the control of the defendants, but that they ought to have provided against any such contingency by the terms of their contract. The principle upon which the plaintiffs based their argument is indicated in very many cases; and I may refer to the recent case of *Ashmore and Son* v. *C. S. Cox and Co.* (1899) 1 Q. B. 436), as indicating that principle. On the other hand, for the defendants it was urged that any such warranty was unreasonable and ought not to be implied, as no man of business would be likely in such a contract to insure the safety of the ship from the date of the contract in October until the following January. Both parties, it was argued, assumed that the ship would be fit to fulfil her engagement and therefore had contemplated her continued existence and her fitness to take cargo on board and that this was the basis of what was to be done. Therefore, it was argued, a condition ought to be implied that the defendants should be excused when performance became impossible by the loss or damage to the ship by a sea peril. Many cases were cited in support of this contention; but reliance was principally placed upon the statement of the law in *Taylor* v. *Caldwell* (*ubi sup.*). There the rule is stated in the following terms by Lord Blackburn (then Blackburn, J.) (8 L. T. Rep., at p. 357; 3 B. & S.,

at p. 833): "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Many cases were cited in the course of the argument to show that that is an established principle of law, and it may be pointed out that it is recognised in the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 7. That section runs: "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."

It seems to me that the contention of the defendants is right, and that in the circumstances of this case the contract was at an end. It had become impossible of performance, and the condition ought to be implied that in the circumstances neither party was to be bound. It was further contended for the plaintiffs that, although such an implication might arise in other circumstances, it was not reasonable having regard to clause 5 of the contract in question. That clause contained, it was said, the sole conditions upon which the contract was not to be binding. The clause ran thus: "In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof, is to be cancelled." It was said that no additional condition ought to have been implied—*expressum facit cessare tacitum*—and it will be remembered that a similar argument was urged in *Jackson* v. *Union Marine Insurance Company Limited* (31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125); but the stipulations are not repugnant to each other. They are all useful and reasonable, and the stipulation in question, the implied stipulation contended for by the defendants, applies to a different stage of the transaction than that contemplated by clause 5. I therefore think that contention on the part of the plaintiffs fails. Then it was asked how far will this implied condition go? Was it to be applied in all cases, as, for example, where the shipowner was guilty of a breach of the charter-party and sent the vessel elsewhere, or absolutely refused to take the cargo on board? In such a case the implication would not be reasonable, for the plaintiffs would assume that the defendants had entered into a contract of charter, or were protected by a contract of charter, which would bind the owner to take the cargo on board, and there would be a remedy over against the owner of the ship for any breach of his charter-party. It is only necessary to refer to one other point in the case. There was a prolonged argument as to the proper measure of damages, and it appeared that towards the end of December the plaintiffs might have obtained another cargo at the then market price much less than the price at the end of the month of January. That they might have obtained it was clear from the fact that they did procure another cargo, but it was insisted that the plaintiffs were entitled to wait and watch the rising market until the end of January and claim their damages on the footing of the then market rate. I can only express the opinion—because it is not necessary for my judgment—that no such contention is tenable on the part of the plaintiffs. I think, having regard to the decision in *Roth* v. *Taysen, Townsend, and Co.* (73 L. T. Rep. 628; 8 Asp. Mar. Law Cas. 120; affirmed in C. A. 1 Com. Cas. 306), the plaintiffs here would have been bound to endeavour to mitigate the loss by acting as ordinary men of business would act, and determining the liability at the date when they entered into the second contract. If that is the proper measure of damages the amount that has been paid into court would cover the plaintiffs' claim. I therefore give judgment for the defendants with costs.

Judgment for defendants with costs.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawkesly*.

Solicitors for the defendants, *Tilleards*.

May 7, 8, 9, *and* 22, 1900.

(Before BIGHAM, J.)

SLEIGH *v.* TYSER. (*a*)

Marine insurance — Policy — Cargo — Implied warranty as to seaworthiness—Approval of Lloyd's agents' surveyor—Ventilation—Insufficiency of cattlemen.

In a policy on a cargo the implied warranty of seaworthiness is not excluded by a provision that "fittings and conditions of the cattle to be approved by Lloyd's agents' surveyor."

Insufficient ventilation and an insufficient supply of cattlemen constitute a breach of the implied condition of seaworthiness of a cargo of cattle.

THIS was an action brought on a Lloyd's policy to recover from the defendant his proportion of the amount payable in respect of a loss of cattle shipped at Brisbane in the steamer *Ningchow* for carriage to Lorenço Marques in Delagoa Bay.

The defence was that the ship was unseaworthy for the carriage of the cargo because of want of proper appliances for ventilation, and because she carried an insufficient number of cattlemen to attend to the beasts.

The reply to that defence consisted of a denial of the unseaworthiness and of an allegation that the implied warranty of unseaworthiness was excluded by the express terms of the policy.

The policy was dated the 10th Feb. 1899.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

It was in the usual form, but contained some special provisions.

The subject-matter of the insurance was described as "500 cattle valued at 14*l.* each."

The premium was 15 guineas per cent., but to return 3 per cent. for no claim.

The insurance was to cover "all risks of shipping, unloading craft, &c., until safely landed; all risks including mortality and jettison arising from any cause whatever; animals walking ashore or when slung from the vessel, walking after being taken out of the slings, and landed, to be deemed arrived and no claim to attach to this policy on such animals. Each animal to be deemed a separate insurance. Fittings and conditions of the cattle to be approved by Lloyd's agents' surveyor."

The *Ningchow* had been chartered by the plaintiff under a time charter which provided that the owners of the ship should allow the charterer to erect and secure stock and extra passenger fittings, and should provide accommodation for not exceeding twelve stockmen, the charterer paying the owners two shillings per man per day for victualling the number carried.

The shipment of the cattle began on the 20th Feb. and finished on the 22nd Feb. 1899, 438 beasts being put on board. Of this number eighty-eight were put on an orlop deck, which was laid at the bottom of the vessel; 180 were put on the between decks, and 170 on the main deck. Above the cattle on the main deck 1000 sheep were carried on a temporary staging erected for the purpose. The animals were in charge of a body of about fourteen stockmen furnished by the plaintiff, a man named Monro being their foreman or captain.

Before the vessel arrived at Lorenço Marques practically all the cattle on the between decks had died, and over 30 per cent. of those on the orlop and main decks had met the same fate. Only 185 beasts out of the whole number were landed alive at the port of destination.

Joseph Walton, Q.C. and *G. A. Hamilton* for the plaintiff.—The bad weather was the cause of the mortality of the cattle. If there ever was any defect in the ventilation it was put right before the ship sailed. The fittings and the condition of the cattle were all approved by Lloyd's agents' surveyor before the voyage commenced, and this under the express terms of the policy excludes the implied warranty of seaworthiness.

Robson, Q.C. and *Scrutton* for the defendant.—There was a breach of the implied warranty of seaworthiness, as the ship was not seaworthy as a cattle ship. It was laid down in *Quebec Marine Insurance Company* v. *Commercial Bank of Canada* (22 L. T. Rep. 559; 3 Mar. Law Cas. O. S. 414; L. Rep. 3 P. C. 234) that there may be different stages of seaworthiness in cases where the different stages of navigation involve the necessity of a different equipment or state of seaworthiness, but the vessel must be properly equipped, and in all respects seaworthy for each of the stages respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with. The Court of Appeal held in *Owners of Cargo on Ship Maori King* v. *Hughes* (73 L. T. Rep. 141; 8 Asp. Mar. Law Cas. 65; (1895) 2 Q. B. 550) that there was an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat in good condition; so here there must be such a warranty implied that the ventilation was sufficient to carry cattle safely. It is said that the clause relating to the approval of Lloyd's agents' surveyor excludes the implied warranty, but that is not so. In *Bigge* v. *Parkinson* (7 L. T. Rep. 92; 7 H. & N. 955), where the defendant undertook to supply the plaintiffs with troop stores "guaranteed to pass survey of the East India Company's officers," it was held that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended.

Walton, Q.C., in reply, referred to

Mody v. *Gregson*, 19 L. T. Rep. 458; L. Rep. 4 Ex. 49;

Dickson v. *Zinzinia*, 15 Jur. 359.

May 22.—Bigham, J. read the following judgment:—[After stating the facts set out above, his Lordship continued:] This mortality (about 60 per cent.) is admittedly far in excess of what might reasonably be expected. The bulk of it occurred during the first part of the voyage when the ship was traversing Australian waters, where the carrying of live cattle is a common trade, and where the evidence shows that the mortality in ordinary circumstances seldom exceeds 3 per cent. To what was this exceptional mortality due? On the one hand, the defendant says it was due to bad ventilation and insufficient attendance to the wants of the cattle. On the other hand, the plaintiff says it was due to the weather and the consequent rolling of the ship. I am satisfied that there was no weather to account for the loss. Before the vessel went to sea—namely, on the 22nd Feb.—dead bullocks were being thrown out of No. 1 and No. 2 holds, and the same thing was taking place on the day after the vessel sailed, the 24th. On these two days nineteen beasts were thrown into the sea. No weather or rolling of the sea can account for this initial mortality, and indeed counsel for the plaintiffs admits that he cannot claim for this part of the loss, because he says that the deaths may be reasonably attributed to bad ventilation existing on the 21st and 22nd Feb. He says, however, that the defects in ventilation were remedied on the 23rd, and on that day, which is the day of sailing, it was in proper order. But what happened immediately after sailing? The ship rolled heavily at times, at times she was pitching, and for two or three days the weather may be described as bad—namely, from the 28th Feb. to the 2nd March. In my opinion this weather was by no means exceptional; it was such as might be expected, and should be provided against by making the fittings and the construction of the pens such as to prevent undue damage to the cattle by being knocked about. What happened to the cattle during this short period from the 25th Feb. to the 3rd March? Twenty were thrown overboard on the 25th, twenty-four on the 26th, twenty-three on the 27th, two on the 28th, twenty-six on the 1st March, &c. So by the time the vessel had been out eight days she had lost more than a third of her shipments. After this no doubt the weather became fine, and the number of deaths decreased. But the number, having regard to the small number of beasts on

board, was still quite exceptional. The facts I have already mentioned appear in the log. Then the captain, although in cross-examination he says there was enough in the weather to account for a great deal of the loss, in examination in chief he says that the deaths were due to heat, overloading, and insufficiency of cattlemen. In that I agree with him, and also in what he says that there was no weather to account for the heavy mortality. The vessel, in my opinion, went to sea most insufficiently ventilated for the cargo she had to carry. Evidence was called before me which satisfied me that the ventilation on all three decks was insufficient. To this cause I attribute the abnormal mortality. I think also that the number of men, fourteen, put on board for attending to the cattle was not large enough to secure the carriage of the cattle in safety to their destination. I do not forget in coming to these conclusions either the certificate of Lloyd's agents' surveyor or the fact that certain statutory provisions had to be complied with, and are certified by a Government official as having been complied with in connection with the accommodation for the cattle on board the vessel. I arrive at my conclusions notwithstanding this double certification. The insurance having been effected the cattle were hurriedly shipped without any proper care being taken to secure their safe arrival. Of course, the onus of proving the unseaworthiness is upon the defendant; but he fully discharged it. The question then arises whether insufficient ventilation and an insufficient supply of men constitute a breach of the implied condition of seaworthiness. I think they do. This implied condition in a policy on cargo is exactly the same as in a policy on ship—viz., that the ship shall be seaworthy for the adventure on which she starts; stating the condition with particular reference to a policy on cargo, it may be defined as a condition that the ship shall be fit for the proposed service; fit, that is, in respect of all those things which appertain to the safe carriage of the cargo in question to its destination. No doubt it is not usual for underwriters on cargo to rely on the defence of unseaworthiness; the underwriter usually pays the cargo owner and avails himself of the latter's rights against the shipowner, the benefit of which he obtains by subrogation: (see McArthur, Contract of Marine Insurance, 2nd edit., p. 13). But this is because of the supposed hardship of the law which makes innocent shippers of cargo responsible for the oversight or negligence of the shipowner. The practice does not modify the law, and in the present case the hardship out of which the practice has sprung does not exist, for the plaintiff had himself undertaken with the shipowner to provide both the ventilation appliances and the cattlemen. Then were proper ventilation and a sufficient number of men to attend to the beasts things which were required on board this vessel for the safe carriage of the cargo to its destination? I am clearly of opinion that they were. Many cargoes besides cargoes of living animals require ventilation if they are to be carried safely, and it cannot be doubted that a ship which put to sea without proper means of providing the necessary ventilation, or without sufficient men to utilise those means, would be unseaworthy for the service required.

But it is said that in this case the implied warranty is gone by reason of the express words in the policy to which I have already referred—"the fittings and conditions of the cattle to be approved by Lloyd's agents' surveyor." They were in a somewhat halting way so approved; the certificate of the surveyor has been read, and it sufficiently complies with the requirements of the clause. It is argued for the plaintiff that his compliance with this express provision discharges him from further obligation. I do not think so. The certificate has nothing to do with the sufficiency of men shipped on board to attend to the cattle; with that matter the surveyor did not concern himself; and though ventilation appliances may well come within the meaning of the word "fittings," the question remains, Did the parties by this stipulation, that the fittings should be approved by the surveyor, intend to supersede the implied warranty of seaworthiness in respect of ventilation? I am of opinion that they did not. I think this stipulation was inserted in the policy for the benefit of the underwriter, and was intended to be additional to and not in substitution for the important condition upon the basis of which all contracts of this description are *primâ facie* made. It may be asked what additional advantage does the stipulation give to the underwriter? I think the answer is that it probably enables him to reinsure with greater ease, and it affords him some assurance that he will not find himself involved in an action such as this. To exclude the implied warranty of seaworthiness the words used must be express, pertinent, and apposite: (per Lord Penzance in *Quebec Marine Insurance Company* v. *Commercial Bank of Canada*, 22 L. T. Rep. 559; 3 Mar. Law Cas. O. S. 414; L. Rep. 3 P. C. 234). If I could find in these words sufficient to satisfy me that the parties intended that Lloyd's agents' surveyor should be put in the position of a sole judge to decide once for all whether the fittings were enough for the purpose required, I should probably come to a different conclusion as to the intention of the parties in introducing the stipulation relied on. But I do not find anything of the kind. The stipulation is, in my opinion, merely superadded for the benefit of the underwriter, and therefore does not exclude the implied warranty: (*Mody* v. *Gregson*, 19 L. T. Rep. 458; L. Rep. 4 Ex. 49). A question was raised by me during the hearing of the case as to the effect of the clause in the policy by which each animal is to be deemed a separate insurance; but I think nothing turns on that clause. It is inserted with a view to qualifying the liability for particular average, and with that view only. The result is that there must be judgment for the defendant. *Judgment accordingly.*

Solicitors: *James Ballantyne*; *Parker, Garrett,* and *Holman.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 30 *and May* 11, 1900.

(Before BARNES, J.)

THE CATHAY. (a)

Limitation of liability—Foreign ship—Foreign certificate of registry—Deduction of crew space—Sects. 79, 84, 210, 503, *and 6th schedule of the Merchant Shipping Act* 1894.

The owners of a Danish ship are not entitled in limiting their liability to deduct crew space from the gross tonnage, although the tonnage regulations of the Merchant Shipping Act 1894 *have been adopted by Denmark, and according to the Danish certificate of registry the crew space is stated therein and it is proved that the dimensions of crew space have been cut up over the hatchway. To entitle a ship to such deduction it is necessary to prove that the certificate mentioned in the 3rd paragraph of the 6th schedule to the Merchant Shipping Act* 1894 *has been given by a surveyor of ships to the collector of customs.*

THIS was a limitation suit which arose out of a collision between the Danish steamship *Cathay* and the defendants' steamship *Clan Macgregor*, off Cape St. Vincent, on the 4th Sept. 1899. There was no loss of life. The plaintiffs, the owners of the *Cathay*, now sought to limit their liability under sect. 503 of the Merchant Shipping Act 1894.

The gross tonnage of the *Cathay*, as shown on her certificate of registry, without deduction on account of engine-room, was 4112·37, and from this the plaintiffs claimed to be entitled to deduct 106·53 tons for the space occupied by the crew. The defendants contended that, the *Cathay* being a foreign vessel and registered abroad, the owners were not entitled to make any deductions for crew space, as the 6th schedule of the Merchant Shipping Act 1894 could only be complied with by British ships. Evidence was called by the plaintiffs to prove that the vessel, which had been built in 1898 in England, had been surveyed by a Board of Trade surveyor, as required by sect. 210 of the Merchant Shipping Act 1894, and a certificate given, and that the dimensions of the accommodation supplied to the crew had been cut up over the hatchway in compliance with the requirements of the 6th schedule. The plaintiffs also put in an affidavit by the owners of the *Cathay* that there had been no structural alterations since the certificate had been given by the Board of Trade surveyor.

The material parts of sects. 79 and 210 and the 6th schedule of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) are as follows:

Sect. 79.—(1) In measuring or remeasuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage, namely: (*a*) in the case of any ship, (i.) Any space used exclusively for the accommodation of the master; and any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto. (2) The deductions allowed under this section, other than a deduction for a space occupied by seamen or apprentices, and certified as aforesaid, shall be subject to the following provisions, namely: (*a*) the space deducted must be certified by a surveyor of ships as reasonable in extent, and properly and efficiently constructed for the purpose for which it is intended; (*b*) there must be permanently marked in or over every such space a notice stating the purpose to which it is to be applied, and that whilst so applied it is to be deducted from the tonnage of the ship.

Sect. 210.—(1) Every place in any British ship occupied by seamen or apprentices, and appropriated to their use, shall have for each of those seamen or apprentices a space of not less than seventy-two cubic feet, and of not less than twelve superficial feet measured on the deck or floor of that place, and shall be subject to the regulations in the sixth schedule to this Act, and those regulations shall have effect as part of this section, and if any of the foregoing requirements of this section is not complied with in the case of any ship, the owner of the ship shall for each offence be liable to a fine not exceeding twenty pounds. (2) Every place so occupied and appropriated shall be kept free from goods and stores of any kind not being the personal property of the crew in use during the voyage, and if any such place is not so kept free, the master shall forfeit and pay to each seaman or apprentice lodged in that place the sum of one shilling for each day during which, after complaint has been made to him by any two or more of the seamen so lodged, it is not kept so free.

The 6th schedule of the Merchant Shipping Act 1894 requires:

(1) Every place in a ship occupied by seamen or apprentices, and appropriated to their use, shall be such as to make the space which it is required by the second part of this Act to contain available for the proper accommodation of the men who are to occupy it, and shall be securely constructed, properly lighted and ventilated, properly protected from weather and sea, and, as far as practicable, properly shut off and protected from effluvium which may be caused by cargo or bilge water.

(2) A place so occupied and appropriated as aforesaid shall not authorise a deduction from registered tonnage under the tonnage regulations of this Act unless there be in the ship properly constructed privies for the use of the crew, of such number and of such construction as may be approved by the surveyor of ships.

(3) Every place so occupied and appropriated as aforesaid shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors of ships under this Act, who shall, if satisfied that the same is in all respects such as is required by this Act, give to the collector of Customs a certificate to that effect, and if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage.

(4) No deduction from tonnage as aforesaid shall be authorised unless there is permanently cut in a beam, and cut in or painted on or over the doorway or hatchway of every place so occupied and appropriated, the number of men which it is constructed to accommodate, with the words "Certified to accommodate . . . seamen."

(5) Upon any complaint concerning any place so occupied and appropriated as aforesaid, a surveyor of ships may inspect the place, and if he finds that any of the provisions of this Act with respect to the same are not complied with he shall report the same to the chief officer of Customs at the port where the ship is registered, and thereupon the registered tonnage shall be altered, and the deduction aforesaid in respect of space disallowed, unless and until it be certified by the surveyor, or by some other surveyor of ships, that the provisions of this Act in respect of the place are fully complied with.

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

Sect. 84.—(1) Wherever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being remeasured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purpose as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship.

By an Order in Council of the 21st Nov. 1895 it appeared that the tonnage regulations of the Merchant Shipping Act 1894 had been adopted by Denmark.

Scrutton for the defendants.—The plaintiffs are not entitled to deduct the crew space. Sect. 503, sub-sect. 2 (*a*), only allows crew space to be deducted "which is certified under the regulations scheduled to this Act with regard thereto." Only registered British ships can obtain the required certificate, as the schedule provides that it is to be given upon registry or re-registry to the collector of Customs:

The Brunel, 79 L. T. Rep. 527; 81 L. T. Rep. 500; 8 Asp. Mar. Law Cas. 477; 9 Asp. Mar. Law Cas. 10; (1899) P. 45; (1900) P. 24.

In this case the certificate given by the Board of Trade surveyor was not given under any provision of the Merchant Shipping Act 1894. What is required is a certificate given at the time of registry or re-registry to the collector of Customs. As regards the foreign certificate of registry, the Order in Council makes it *primâ facie* evidence of the ship's tonnage, but does not affect the law as regards the deduction of crew spaces for the purpose of limitation of liability:

The Franconia, 39 L. T. Rep. 57; 4 Asp. Mar. Law Cas. 1; 3 P. Div. 164.

H. Stokes for the plaintiffs.—The question is what is the meaning of the words "certified under the regulations scheduled to this Act." *The Franconia* (*ubi sup.*) is not in point. In that case sect. 60 of the Act of 1862 and the Order in Council made under that section dealt only with the "rules concerning the measurement of tonnage," and it was held that the effect of the Order in Council was to make the foreign certificate *primâ facie* evidence that the rules of measurement had been complied with and correctly taken. But sect. 84 of the present Act deals not with measurement only, but with the tonnage regulations of the Act, including all the provisions as to the accommodation to be afforded to seamen, and the Order in Council of the 21st Nov. 1895 recites that the "tonnage regulations" have been adopted by Denmark, and are in force there. Therefore, following the decision in *The Franconia*, the foreign certificate is evidence that the tonnage regulations have been complied with, including the regulations with regard to crew spaces. It must have been contemplated that as regards foreign countries within sect. 84 the tonnage regulations should be adopted without the intervention of a British surveyor, and that the measurement of the spaces and the necessary certificates should be given by the foreign surveyor to the foreign official representing the collector of Customs in this country. If that is the intention of the Act, it is submitted the foreign certificate is evidence that the requirements of the Act with regard to crew space have been complied with, and that evidence has not been rebutted. Further, if the defendants' contention is correct, the owners of foreign vessels will not be entitled to deduct crew space for any purposes at all, and will have to pay harbour dues on it, which up till now they have never been required to do. *Cur. adv. vult.*

May 11.—BARNES, J.—In this case the owners of the *Cathay* seek to limit their liability in respect of a collision which took place on the 4th Sept. in last year, and the defendants are the owners of the steamship *Clan Macgregor*, with which the *Cathay* had been in collision, and the owners of her cargo. As I understand, all the parties connected with and interested in the *Clan Macgregor* are represented, or have consented to have the case heard in the way in which it has been heard. The case was originally heard by my brother Bucknill, but owing to the fact that he was only sitting here for a time, and owing to his absence on circuit a request was made by him that the matter should come before me, and, with the consent of all parties, the case has been, perhaps I should say reheard, before me, on the evidence which was taken before Bucknill, J., supplemented by an affidavit verifying the translation of the foreign certificate. Now, the point in the case is this, that the defendants do not dispute that the plaintiffs are entitled to limit their liability, but they say that in arriving at that limit of liability the plaintiffs are not entitled to deduct the crew space of their ship. The foreign certificate of register shows the gross registered tonnage to be 4112·37 tons, and the crew space to be 106·53 tons, so that I think I am correct in saying that the contention of the defendants is that the amount is to be calculated as on 4112·37 tons, whereas the plaintiffs contend that it should be calculated on that figure, less 106·53 tons. Now, the point raised in this case is to my mind of very general and great importance. The vessel is a foreign ship—a Danish vessel—and, apart from one point in the case, this matter affects all foreign vessels seeking to limit their liability in collision cases, and possibly too, though I am not sure how that will be, their tonnage in regard to the calculation of dues. I have considered with some care the Act of Parliament which now deals with the matter in question, and the result is that I have come to the conclusion that it is not necessary for me to consider strictly what conclusion I should have come to about this matter if the case of *The Franconia* (39 L. T. Rep. 57; 4 Asp. Mar. Law Cas. 1; 3 P. Div. 64) had not been decided. I think that, although that case was on an earlier Act, that case is practically conclusive of this matter. Now, the reasons for that opinion are these: *The Franconia* (*ubi sup.*) was to this effect—I am reading the headnote: "The owners of a German steam vessel instituted an action under the Merchant Shipping Act 1862, s. 54, to limit their liability for damages occasioned by a collision. The vessel had three decks, and her crew were berthed below the spar deck. By Order in Council, dated the 26th June 1873, made under sect. 60 of the same Act, it was directed that German steamships measured after the 1st Jan. 1873, should be deemed to be of the tonnage mentioned in their registers in the same manner and to the same extent as the tonnage denoted in the

certificate of registry of British ships was deemed to be their tonnage. In the register of this ship the crew space was deducted. Held, by the judge of the Court of Admiralty, that in estimating the tonnage for the purpose of limitation of liability, the crew space must be deducted. Held, by the Court of Appeal, that the Order in Council of the 26th June 1873 did not make the certificate of registry conclusive evidence of the tonnage, or of the propriety of deducting the space solely appropriated for berthing the crew. Held, further, that under the Merchant Shipping Act 1854, s. 21, sub-s. 4, a closed-in space solely appropriated to the berthing of the crew is to be excepted in estimating the tonnage only when it is on the upper deck, and not when it is between the spar deck and the tonnage deck. Held, also, that the crew space cannot in the case of a foreign, any more than of a British, ship be deducted under the Merchant Shipping Act 1867, s. 9, unless the provisions of that section as to inspection by a surveyor appointed by the Board of Trade, and the other conditions therein contained, have been complied with; and therefore that, as in the present case these conditions had not been complied with, the space appropriated for berthing the crew must not be deducted." That was a case of crew space below the spar deck, and the only means that I can see by which the crew space could be deducted was by virtue of the Merchant Shipping Act 1867. That that is so appears clearly, I think, from the subsequent decision in the case of *The Palermo* (52 L. T. Rep. 390; 5 Asp. Mar. Law Cas. 369; 10 P. Div. 21). The headnote to that case is this: "The owners of a foreign ship with a closed-in space on the upper deck, solely appropriated to the berthing of the crew, are entitled, in limiting their liability, to deduct such space under the Merchant Shipping Act 1854, s. 21, sub-s. 4, though the provisions of the Merchant Shipping Act 1867, s. 9, have not been complied with." The reason for the difference between these two cases is to be found upon consideration of sect. 21, sub-sect. 4, which I have referred to, because that provides as follows: that "If there be a break, a poop, or any other permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows." Then it deals with how the tonnage is to be ascertained, and says it is to be subjected to the following provisions, and that nothing shall be added for a closed-in space solely appropriated for the berthing of the crew, unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of this excess the excess only shall be added. As Butt, J. pointed out in giving his judgment in *The Palermo*, the deduction in the case before him was to be made, although it was not to be made in the case of *The Franconia*, and for these reasons. He said *The Franconia* decided "not that the German ship in that action was not entitled to deduct from the registered tonnage the spaces allotted to the crew which were inclosed and which were above the upper deck, that being the deduction contemplated by the Act of 1854, but that she was not entitled to further deductions provided by the more recent Act of 1867, unless she had in all respects complied with the requirements of that Act."

Now, it seems to me that the difference between these two cases was practically got rid of by the Act of 1889, which by sect. 1 said: "In the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction shall be allowed in respect of any space which has not been included in the measurement of her tonnage." Sub-sect. 2 says: "In sect. 21, par. 4, of the Merchant Shipping Act 1854 the words 'first that nothing shall be added for a closed in space solely appropriated to the berthing of the crew, unless such space exceeds one-twentieth of the remaining tonnage of the ship and in the case of this excess the excess only shall be added, and secondly;' and in sect. 22, par. 2, of the same Act, the words 'subject to the deduction for a closed-in space appropriated to the crew, as mentioned in rule 1,' shall be repealed." It is not at all easy to follow these Acts without very close scrutiny, and I should like to state what I conceive to have been the general position with regard to these spaces prior to the Act of 1889. The upper deck crew space does not seem to have been included in the tonnage, but the upper deck was. But the Act of 1867 says that was to be excluded if you complied with certain conditions. The Act of 1889 practically, seems to me, to put both sets of crew space on the same footing, and say you must not deduct crew space unless it has already been included in the tonnage, and then you can only deduct it if you comply with certain conditions. That seems to explain these two cases. Now we come to the Act of 1894, which has several sections which bear upon this subject. There is sect. 210, which provides for the accommodation of seamen and what it is to be, and which is practically a repetition of the provision, so far as the accommodation itself is concerned, of sect. 9 of the Act of 1867. Then there is further in the Act of 1894 the 6th schedule, which I need not read at any length, but the whole of it is material in considering whether the case of *The Franconia* (*ubi sup.*) is binding upon me in this case. The first rule of the 6th schedule provides that "Every place occupied by seamen or apprentices, and appropriated to their use, shall be such as to make the space which it is required by the second part of this Act to contain available for the proper accommodation of the men who are to occupy it," and so on. The second paragraph provides that "A place so occupied and appropriated as aforesaid shall not authorise a deduction from registered tonnage under the tonnage regulations of this Act unless there be in the ship" certain conveniences. The 3rd paragraph provides that: "Every place so occupied and appropriated as aforesaid shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors of ships under this Act, who shall, if satisfied that the same is in all respects such as is required by this Act, give to the collector of customs a certificate to that effect, and if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage." That is, in substance, the same as the 4th sub-section of sect. 9 of the Act of 1867. Then there is a provision that no deduction shall be authorised unless there is permanently cut in a beam, and cut in or painted over the door or hatchway, the number of the men which the place is constructed to accommodate. Then there is a

provision as to what an inspector of ships may do on complaint being made, and that is a very important provision in this case, because it says: "Upon any complaint concerning any place so occupied and appropriated, as aforesaid, a surveyor of ships may inspect the place, and if he finds that any provisions of this Act with respect to the same are not complied with he shall report the same to the chief officer of Customs at the port where the ship is registered, and thereupon the registered tonnage shall be altered, and the deduction aforesaid in respect of space disallowed, unless and until it be certified by the surveyor, or by some other surveyor of ships, that the provisions of this Act in respect of the place are fully complied with." That is the same as sub-sect. 7 of the 9th section of the Act of 1867. I have shown that clause 210 of the Act of 1894 provides that British ships are to provide certain accommodation for their crews, and that the means of getting a deduction from the registered tonnage is provided for by the 6th schedule when certain conditions are complied with, and I think that it follows from a careful examination of the 6th schedule that, as drawn, it really only relates to British ships. That I think is the decision on the analagous provisions in the case of *The Franconia* (*ubi sup.*). The reason for saying that is this. The 6th schedule, which I have summarised, shows that at the time of registry certain things are to be done if it is desired to get a deduction for crew space, and at any time afterwards, if the provisions imposed on a British ship are not complied with, the benefit of the deduction can be got rid of by the surveyor inspecting it, and certifying that the provisions have not been complied with. None of that is applicable to foreign ships. There is this further point that, as drawn, that schedule seems to contemplate that at the outset the certificate shall be obtained when the ship is registered or re-registered, because the certificate has to be given to the collector of Customs, and if the provisions are not complied with a report has to be made by the chief officer of Customs. I find by sect. 4 that the chief officer of Customs is a registrar of British ships, and by sect. 742, the definition clause, that "a chief officer of Customs includes the collector." I have very little doubt that it was contemplated, in transferring the provisions of the earlier Acts to the 6th schedule, that in providing that the certificate should be given to the collector of Customs it really was meant that it should go to the registrar to register the ship as of the tonnage which was properly certified by the surveyor. Leaving out for the moment foreign ships when the limitation section, sect. 503, is referred to, it is found that a shipowner may limit his liability to a certain amount on his ship's tonnage, and in case of a steamer that shall be her gross tonnage without deduction on account of engine-room, and in the case of a sailing ship that shall be her registered tonnage. Then there is this: "Provided that there shall not be included in such tonnage any space occupied by seamen and apprentices, and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto." So that in order to limit his liability the owner of a British steamship has to take the gross tonnage, without deduction on account of engine-room, but less the space occupied by seamen and apprentices, and appropriated to their use, and which is certified under this Act, and that certificate can only be obtained at a certain time and from a certain person, and when certain provisions are complied with. Of course the object of that is to see that the crew are properly provided for. With regard to the other sections which deal with this subject, they are the 77th and 79th, which provide for the measurement of a ship and her tonnage, and for the deductions. In sect. 79 there is this provision: "In measuring or re-measuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage, namely:—(*a*) in the case of any ship (1) Any space used exclusively for the accommodation of the master; and any space occupied by seamen or apprentices, and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto." The deduction in regard to seamen and apprentices is to be made when and if there has been a certificate under the regulations scheduled to the Act. So much with regard to British ships. The point made by Mr. Stokes, who argued this case very ably for the plaintiffs, is that sect. 84 of the Act 1894, which deals with the tonnage of foreign ships adopting tonnage regulations, makes the certificate which has been put in in this case from abroad evidence of the tonnage and of the deductions on which he is entitled to rely, and that when that certificate is looked at that 106·53 tons is to come off. That section is: "Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being re-measured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry, or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship." The 2nd and 3rd sub-sections were not, I think, relied on. Then there was the Order in Council made in regard to Danish ships on the 21st Nov 1895. That follows the terms of the Act. The words of sect. 84 of the Act of 1894 are the same as sect. 60 of the Act of 1862, which was before the Court of Appeal in *The Franconia* (*ubi sup.*) with a slight variation. They are precisely the same, according to my reading of the Act, so far as the operative part of the words is concerned. So that when the Court of Appeal held that the certificate of registry produced from abroad was not conclusive, but might be examined to see whether the provisions in regard to crew space had been complied with, and when as it was found that they had not been complied with, it was held that the deduction could not be obtained, the reasoning of that judgment appears to apply to the present case, having regard to the words which are used in sect. 84.

There is, therefore, this position of things, that a shipowner in limiting his liability can obtain a deduction in respect of crew space which has been certified in a certain way, but cannot get the benefit unless it has been certified in that way. Although it is true that the schedule which provides for that certificate is one which the foreigner cannot comply with, yet so it

is, and there it was in the case of *The Franconia* (*ubi sup.*), and the judges felt they could not alter that Act of Parliament. They could not legislate about the matter. They practically treated it as an oversight. Assuming their decision to have been correct and taking it as binding upon me, it seems to me the reasoning which produced that decision is entirely applicable to the situation in this case. I do not feel that I can, myself, commence to reconsider these sections, and do what Mr. Stokes asked me to do, and look at the matter from the point of view of its being impossible for the foreigner to comply with these regulations, and, therefore, to regard the certificate he produces as one giving him the benefit of the deductions, without it being shown on the face of it how they are arrived at. There is one other point made by Mr. Stokes—namely, that there had, in fact, been a certificate given at the time when this ship was built, because I understand she was built in England, which would sufficiently comply with the provisions of the 6th schedule. That certificate was given by a surveyor and sent to the Board of Trade, according to the evidence, for departmental purposes, whatsoever that may mean. It was not a certificate given or sent to the collector of Customs, and although this point may seem to be a fine one, it appears to me to have this substance in it, that there can be little doubt this 6th schedule was drawn as applicable to ships which would be surveyed by British surveyors when registered in British ports, and that it was contemplated that the certificate should be given to the registrar—in other words, the collector of Customs—the result or effect of it to appear in the register when the ship was registered, and the benefit of which might be got rid of at any time if a surveyor or surveyors afterwards found that the provisions had not been complied with. Therefore it seems to me to follow that the certificate which was obtained in this case, and sent to the Board of Trade for departmental purposes, was not a certificate which was given in accordance with the regulations contained in the schedule to which I have referred. The point in this case, as I have said, is one of very great importance, and of very great substance, in connection with foreign ships, because, although I have not to decide it here, one must not lose sight of this fact, that apparently the 79th section, which deals with the registry of ships, and provides for this deduction in respect of crew space, is made very much in the same way as the provisions which are put in force when limitation of liability comes to be considered. Of course I have not got to consider that particular point. It is not necessary that I should do so. But Mr. Stokes pressed upon me that if this decision in *The Franconia* (*ubi sup.*) was to stand in this case it might affect all foreign ships as regards tonnage dues. I am not concerned to decide that point. It seems to me there is some little difficulty about it. All I say is that on the whole I feel bound by the decision in *The Franconia* (*ubi sup.*), and I do not feel entitled, even if I were desirous of doing so, to review the Act in a general way, so as to give to a foreign ship the benefit of this deduction on some broad principle. I hold that if it is to be done it must be done by a higher tribunal than myself, and it may be that if the case is carried further the Court of Appeal may take the view that their previous decision is not one which actually governs this case. For myself I think it does. In the result, therefore, my judgment is that, while the plaintiffs are entitled to limit their liability, it must be for an amount calculated upon the tonnage without the benefit of this deduction in respect of crew space.

Solicitors for the plaintiffs, *Stokes* and *Stokes*.

Solicitors for the defendants, *Hollams, Son, Coward*, and *Hawkesley*.

Monday, May 14, 1900.

(Before BARNES, J.)

THE CRIMDON. (a)

Practice—Undertaking to give bail—Rules of Supreme Court, Order XXIX., rr. 11, 12. 18—*Damages for arrest without cause after undertaking given—Caveat—Salvage.*

Where plaintiffs in a salvage action insisted on arresting the defendants' ship after a caveat warrant had been entered by the defendants' solicitors, the court was of opinion that the defendants had not shown "good and sufficient reason" within the meaning of Order XXIX., r. 18, *for arresting, and ordered the defendants to pay the costs and damages of and incidental to the arrest.*

THIS was an application, adjourned into court in order that it might be dealt with by the judge at the trial of the action, in which the defendants in an action for salvage asked for damages and costs of and incidental to the arrest, detention, and release of the *Crimdon*, her cargo and freight.

The steamship *Crimdon* broke down while on a voyage from Freijo to Cardiff, and was towed into Plymouth by the foreign steamship *Helene Woernann* on the 25th Feb. 1900.

On the 26th Feb. a caveat was entered by the defendants' solicitors, in accordance with Order XXIX, r. 11, 12, and bail was offered, but the plaintiffs refused to accept their undertaking and arrested the ship the next day.

On the 28th Feb. an application was made to Barnes, J. in chambers, and he ordered the ship to be released, and the question whether the defendants were entitled to costs and damages for the arrest of their vessel after the caveat had been entered to be dealt with at the trial of the action.

Order XXIX., r. 11.—A party desiring to prevent the arrest of any property may cause a caveat against the issue of a warrant for the arrest thereof to be entered in the principal registry.

Order XXIX., r. 18.—Nothing in this rule shall prevent a solicitor from taking out a warrant for the arrest of any property, notwithstanding the entry of a caveat in the Caveat Warrant Book, but the party at whose instance any property in respect of which a caveat is entered shall be arrested shall be liable to have the warrant discharged and to be condemned in costs and damages unless he shall show to the satisfaction of the judge good and sufficient reason for having so done.

The caveat was in the form prescribed by the Rules of Court, and was as follows :

We, D. B. and Co., of 44, Leadenhall-street, in the city of London, hereby undertake to enter an appearance in any action that may be commenced in the High

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

Court of Justice against the ss. *Crimdon* or *Cumdon*, her cargo and freight, and within three days after we shall have been served with a notice of the commencement of any such action to give bail therein in a sum not exceeding value of ship, cargo, and freight, or to pay such sum into the Admiralty Registry. And we consent that all instruments and other documents in such action may be left for us at 44, Leadenhall-street, in the city of London. —Dated the day .—D. B. and Co., 44-46, Leadenhall-street, E.C.

D. B. and Co. were the defendants' solicitors.

It appeared from the correspondence that, although the plaintiffs' solicitors instructed their clients that they ought to accept the personal undertaking of D. B. and Co., the plaintiffs insisted upon the vessel being arrested.

Butler Aspinall, Q.C. (with him *Noad*) for the defendants.—The plaintiffs are liable in costs and damages unless they can show good and sufficient reason for having arrested the ship. Plaintiffs are not entitled to insist upon the security of the *res* if good and adequate personal security is offered. In *The Johan Benjamin* (Prit. Digest, vol. 1, p. 370, No. 1628, the 20th Oct. 1863) the plaintiff was condemned in costs for taking out a warrant of arrest, notwithstanding the entry of a caveat warrant and of appearance and undertaking for bail.

Scrutton and *Chaytor* for the plaintiffs *contrà*. —The caveat does not state on whose behalf bail is to be given or the amount. The plaintiffs, instead of the security of the *res*, are merely offered a solicitor's personal undertaking. The court only gives damages if the arrest is made *mala fide* or through gross negligence:

The Evangelismos, Swa. 378;
The Corner, Br. & L. 161;
The Don Ricardo, 42 L. T. Rep. 32; 4 Asp. Mar. Law Cas. 225; 5 P. Div. 121.

BARNES, J.—In this case the question which I have to determine was left over after the determination of the principal point in the case. It is whether the plaintiffs are liable in the circumstances to be condemned in costs and damages under the 18th rule of Order XXIX., for arresting the *Crimdon* after a caveat warrant had been filed by the solicitors for the defendants. The dates, as far as I can make out appear to be as follows: The writ in the action was issued against this ship, the *Crimdon*, on the 26th March in the district registry of East Stonehouse, which, I believe, is the district of Plymouth. On the same day the warrant to arrest was extracted in the same registry, but before doing so—before, I mean, the warrant was issued—apparently the plaintiffs and the registrar of the district ascertained, in accordance with the practice, whether a caveat had been filed against the arrest of the *Crimdon*; and this registry communicated by telegram the fact that there had been a caveat against the arrest already entered. It appears that on the same day, the 26th, Messrs. Downing, Bolam, and Co. filed the usual undertaking, which was termed the caveat warrant. It was signed by Messrs. Downing, Bolam, and Co., without any qualification. The plaintiffs, however, according to the correspondence, were not satisfied with the undertaking of the solicitors, although their own solicitors appear to have been so. The clients themselves were not ready to accept it, and decided that the ship should be arrested. The ship was arrested on the following day, the 27th, and she remained under arrest until the evening of the 28th. In the meantime, on the 28th the application was made to me to direct the ship to be discharged from arrest, and on the 28th I ordered that the ship should be discharged. At that time, according to my recollection, and I believe I am right, no objection was made to the solicitors who had signed this undertaking, and I ordered the release of the ship, and she was accordingly released. Then the question comes to be this, whether for the day's detention from the 27th to the 28th, which has been proved to have cost the defendants about 18*l.* and costs, the plaintiffs ought to be held responsible.

Now, there are two or three points taken on the form of the undertaking by Mr. Scrutton, on behalf of the plaintiffs, but it does not seem to me that there is any substance whatever in them. It is in accordance with the rules, and my opinion distinctly is that if the solicitor himself signs an undertaking of this kind without any qualification whatever he would be personally responsible to see that it is carried out. I am of opinion that the course of business which is intended to be followed in that way is purposely followed in order to facilitate matters. The position taken up by the plaintiffs is that it is not unreasonable to object to the personal undertaking and to insist upon the arrest. Rule 18 comes in in connection with that matter, and that rule is this: "Nothing in this order shall prevent a solicitor from taking out a warrant for the arrest of any property, notwithstanding the entry of a caveat in the Caveat Warrant Book; but the party, at whose instance any property in respect of which a caveat is entered shall be arrested, shall be liable to have the warrant discharged and to be condemned in costs and damages, unless he shall show, to the satisfaction of the judge, good and sufficient reason for having so done." Now, the good and sufficient reason suggested by the plaintiffs in this case is a broad one—namely, that they were not bound to accept a solicitor's undertaking, and were entitled to arrest the ship. I think that that is an erroneous position to take up, having regard to the rules and practice of this court. It seems to me that the position arrived at by these rules is analogous to that of bail being tendered. In the case of bail being tendered names have to be given, and the other party has twenty-four hours to consider whether he will object to the bail or not, and if he objects to the bail he can do so; but I think he objects more or less at his peril, because there is one case in which, after objection had been taken and found to be unfounded, the party objecting was held liable in damages. It seems to me that a precisely similar class of considerations comes in in this case. There is an undertaking, and the object of it is to prevent a ship being arrested, and to get rid of the trouble and inconvenience to the shipowner which he incurs if his ship is arrested when there is adequate security elsewhere to be availed of. Then, what is the position if that undertaking is given? It appears to me to be this: That the plaintiff is to have a reasonable opportunity of seeing whether he ought to be bound to accept it or not, and then if he does not and shows to the satisfaction of the court good and sufficient reason for objecting, then, of course, he will not

be condemned in the costs. I think in this case if the plaintiffs had said, "We have not time to act," or "we are not satisfied on some grounds that there is adequate security," the point would have been a perfectly good one to take; but neither of those points were raised. The plaintiffs themselves—not their solicitors—said, "No, we will not have this undertaking at all; we will have the security of the ship," and they never raised any question of time to investigate. The answer to that is that when the case came before me the ship was released without any objection. Again when the case comes on here the only point raised is whether the plaintiffs are entitled to have the security of the ship. The rules say, "No, if you have adequate security otherwise." That is the real principle, and I think it is right from a business point of view. The whole object of the rules, and of the practice in this court, is to facilitate business, and not to check it, and if a man, such as a solicitor, can give an undertaking which is satisfactory, then business will proceed easily and satisfactorily. On the other hand, if no facilities of this kind are to be allowed, the rules are practically useless; and the argument put forward by the plaintiffs is that the rules are practically useless. To my mind, therefore, as soon as it was seen that there was reasonable time—because there was practically a day—if the point had been taken, to inquire into the standing of the parties, there was no reason whatever for arresting, because the plaintiffs solicitors themselves were satisfied. It therefore seems to me that there is no ground shown at all for objecting to this undertaking, and that that being so, the plaintiffs are liable for the costs and damages occasioned by the arrest. So far as damages are concerned, I think that they ought to be fixed at 18*l.*, and with regard to the costs, they must be a matter for taxation.

Solicitors for the plaintiffs, *Hollams, Son, Coward*, and *Hawksley*.

Solicitors for the defendants, *Downing, Bolam*, and *Co.*, agents for *Downing* and *Handcock*, Cardiff.

July 2, 3, *and* 4, 1900.

(Before Sir F. JEUNE, President.)

THE RONDANE. (*a*)

Collision—Fog—Failure to stop and ascertain position of approaching vessel—Regulations for Preventing Collisions at Sea, art. 16.

It is the duty of a steam vessel in a fog, under art. 16, *on first hearing forward of her beam another vessel's fog signal, to stop her engines and to keep them stopped until by hearing further signals she ascertains the position of the other vessel.*

THIS was a collision action brought by the owners of cargo lately laden on board the German steamship *Hermann Koeppen* against the owners of the Norwegian steamship *Rondane*.

The collision occurred at about 8.25 p.m. on 9th May 1900, in the North Sea, near the Newarp Lightship. The weather at the time was a thick fog.

The plaintiffs' case was that about 8.15 p.m. the *Hermann Koeppen*, a steamer of 1609 tons gross and 1097 tons net register, manned by a crew of eighteen hands all told, was, whilst on a voyage from South Shields to Barcelona with a cargo of coals, in the Would Channel off the Norfolk coast. Her whistle was being sounded at proper intervals for fog, and she was proceeding with engines at slow, making about three knots an hour. She was on a course S.S.E. ½ E. magnetic. In these circumstances the whistle of an approaching steamship which proved to be the *Rondane* was heard about a point on the port bow, and from one and a half to two miles off.

The *Hermann Koeppen* was kept on her course and her whistle blown in reply, and the whistle of the *Rondane* was heard several times afterwards, getting each time a little broader on the port bow. The helm was ported a point and then steadied, and a short blast sounded in order to give the *Rondane* more room to pass. The whistle of the *Rondane* continued to be heard, but, although in a position to pass port to port, the *Rondane*, when close to, was heard to blow two short blasts, whereupon the engines of the *Hermann Koeppen* were put full speed astern, but shortly afterwards the masthead and green lights of the *Rondane* came into sight about three points on the port bow and about a ship's length off. She came on at great speed and struck with her stem the bluff of the port bow of the *Hermann Koeppen*, doing her such damage that she afterwards sank and was lost with the plaintiffs' cargo on board of her.

The plaintiffs charged the defendants with neglecting to keep a good look-out, improperly starboarding, failing to pass port to port, proceeding at an excessive rate of speed, and not stopping and reversing. They also charged them with breach of arts. 16, 19, 22, 23, and 29 of the Regulations for Preventing Collisions at Sea.

The defendants' case was that the *Rondane*, a steamship of 1131 tons gross and 749 tons net register, whilst on a voyage from Rouen to Blyth in ballast, manned by a crew of seventeen hands all told, was near the Newarp Lightship. She was on a course of N.W. ½ N. magnetic, making about two knots an hour. Her whistle was being sounded at short intervals for fog. Under these circumstances a faint prolonged blast was heard from a steamship which proved to be the *Hermann Koeppen* apparently a long way off, and about three points on the starboard bow of the *Rondane*.

The engines of the *Rondane* were kept working slow ahead owing to the whistle of another steamship being heard astern on the port quarter, and shortly afterwards a second faint prolonged blast was heard apparently closer and a little broader on the bow, and almost at the same time the masthead and red lights of the *Hermann Koeppen* came into view about a ship's length off and about four points on the starboard bow. The engines of the *Rondane* were immediately stopped and reversed full speed astern and the helm starboarded, but the *Hermann Koeppen* came on and struck the *Rondane* with her port bow, doing considerable damage.

The defendants charged those on the *Hermann Koeppen* with keeping a bad look-out, proceeding at an excessive speed, not being provided with an

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

efficient whistle, not sounding their whistle, and improperly porting. They also charged them with not stopping when the *Rondane's* whistle was first heard, not stopping and reversing before the collision, and failing to comply with arts. 15, 16, 23, and 29 of the regulations.

Art. 15 deals with signals to be made in a fog.

Arts. 16, 22, 23, and 29 of the Regulations for Preventing Collisions at Sea are as follows:

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary slacken her speed or stop or reverse.

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Baden Powell, Q.C. and Dr. *Stubbs* for the plaintiffs.—The *Rondane* is alone to blame. She never ascertained the bearing of the *Hermann Koeppen*, and ought to have stopped her engines sooner. The vessel following her was not in such a position as to have prevented her stopping in obedience to art. 16 of the collision regulations. In the circumstances there was no obligation on the *Hermann Koeppen* to stop on hearing the *Rondane's* first whistle. She in fact accurately ascertained the position of the *Rondane*. Moreover, if she committed a breach of the article, such breach could not possibly have contributed to the collision.

Butler Aspinall, Q.C. and *Balloch* for the defendants.—The *Hermann Koeppen* is alone to blame. The presence of a vessel immediately astern of the *Rondane* was a circumstance which did not admit of the *Rondane* stopping on hearing the first whistle of the *Hermann Koeppen*. Apart from some such justification, a vessel is bound on first hearing a vessel's whistle to stop in obedience to art. 16.

The PRESIDENT.—This is a case of collision in a fog, which presents most of the ordinary features, but it brings into prominence one feature which up to this time has not been common. It is quite clear that these vessels were approaching one another in a dense fog, and it is quite clear also that the collision was caused by their coming against one another at something very like right angles. So one is presented with this problem, as a matter of navigation, that one or other must have altered its course a great many points, and the question is whether the *Hermann Koeppen* ported to a very considerable extent, or whether the *Rondane* starboarded so much as to bring about what I have said was the actual collision. I do not know that it is necessary in this case to determine very accurately this question of navigation, because I think there are other matters which suffice to decide the liability of the vessels. But I have considered the matter with the Trinity Masters, and the conclusion to which I have come is that the story of the plaintiffs is that which in the main is to be accepted; in other words, that the collision was brought about by very considerable starboarding on the part of the *Rondane*. I have, of course, considered very carefully the arguments which Mr. Aspinall used with regard to the difficulties which that conclusion may be supposed to give rise to, but they do not appear to me to be insuperable. I can see no difficulty in the theory that at a very early time the *Rondane* may have been, and probably was, on the starboard bow of the *Hermann Koeppen*. As the *Rondane* came up towards the Newarp she rounded that, not by a single action but by repeated actions of starboarding, and after that I think she continued that starboarding course, and the suggestion of Mr. Baden Powell that she wished to get into shoaler soundings may be well founded. At any rate there appears to me to have been substantial rounding, and the vessel in that way brought herself into collision at the angle I have described. But apart from that I think the navigation of the *Rondane* is clearly open to blame. It was not what it should have been. She did not hear the whistles of the other vessel until quite close to; in fact, she only heard two whistles. The suggestion which is made is that that must have been because the whistle of the *Hermann Koeppen* was a bad whistle. It is impossible to investigate that with accuracy, but I confess that when I find the speed of the *Rondane* was what I think it was, it appears to me to be on the whole impossible to give force to a suggestion which was a pure hyphothesis, and which hardly appears to me to be compatible with the facts. The look-out on the part of the *Hermann Koeppen* was undoubtedly good, and the conclusion to which I have come is that it was because the *Hermann Koeppen* was keeping a good look-out, that she heard several whistles from the *Rondane*, whereas the *Rondane* heard no whistles, except those I have mentioned, from the *Hermann Koeppen*. When one comes to the speed of the *Rondane*, one is on ground which is far more certain, and it appears to me that when we know she was passing a lighthouse during a dense fog at full speed—and I think she never reduced it at all until she came close to the Newarp—and never went slow at all—because I think the evidence of the chief officer must be accepted on the point—until she was close to and heard the whistle of the *Hermann Koeppen*, then it appears to me to be clearly made out that the speed of the *Rondane* was a matter to which they were not paying sufficient attention. It is impossible not to be impressed, though I do not lay too much stress upon it, by the fact that two blasts are admitted now to have been given by the *Rondane*. Of course they support the view I have expressed that the *Rondane* was starboarding. But I am impressed still more by the fact that although it is now admitted they were given, they were not stated in the preliminary act, where they clearly ought to have been stated; the very object of those additional questions being put in the preliminary act being to bring out matters of that kind. Although it is clear to

me that the *Rondane* did give those two blasts on that last occasion, it becomes equally clear that she did not give those two blasts, or any two blasts, on the previous occasion of her starboarding; and also that it must have been felt, I suppose by those who have the conduct of their case, that those two blasts could not be admitted in the preliminary act. Of course it may have been a mistake, but I think it is a material fact. It must also not be forgotten that it is not until they come into court that the sounding of the two blasts is admitted. It follows from what I have said that I accept substantially the story of the *Hermann Koeppen*. I am not at all inclined to think that the statement made by those on board, to the effect that the whistle of the *Rondane* grew broader and broader, is one which is very easy to explain, but I do not know that it is a matter to which any great importance is to be attached. It is admitted by the other side that the *Hermann Koeppen's* speed was only about two knots at the time of the collision, and she at any rate, was conducting herself in that respect with sufficient care. That brings one to this consideration, that the *Hermann Koeppen* must be absolved from blame unless she is held in fault under art. 16. That article has to be considered with regard to both vessels. I have considered art. 16, and have had the advantage of reading the judgment of Barnes, J. in the case to which I was referred (*The Pontos* v. *The Star of New Zealand*), not reported, which, as far as I know, is the only authority which bears upon the rule. So far as my judgment in the matter goes, I feel no great difficulty in understanding substantially what the rule means. The words are: "A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." I think I understand what that rule means. It was an approach to what many persons had advocated at different times —namely, that in a fog vessels should absolutely stop. Of course a suggestion of that kind applies with far more force to river navigation than to the open sea, because, of course, as has been said over and over again, in the Channel, if vessels had to stop dead, it might be that you would get the Channel crowded with ships, which would be unable to reach their destinations. In a river like the Thames it might be better for vessels to stop and anchor, though what injury it might cause to trade I do not say. This rule stops short of that. It does not say that a vessel is to stop and never move again in the fog. On the contrary all she has to do is to stop her engines and then navigate with caution, and she is to do that because she hears forward of her beam a fog-signal of a vessel, the position of which is not ascertained. She is to keep them stopped until she can, by hearing further signals from the other vessel, ascertain the position of that other vessel. The rule does not say that in terms, but that appears to me to be the meaning. The object, of course, is clear—namely, to give the vessel which stops her engines an opportunity of hearing better than she otherwise would do, and also to specially call the attention of those on board to the matter, so that they may be more acute to hear a second whistle and to locate it if possible. Therefore the duty of a vessel in a fog clearly appears to me to be to stop her engines when the first whistle is heard, for the purpose I have mentioned.

In this case neither vessel stopped her engines. I take the case of the *Rondane* first. She, admittedly, on hearing a whistle did not stop her engines at all. She endeavours to excuse herself under the words in this rule: "Shall so far as circumstances admit." Her case is that there was a vessel following her so closely that it would not have been safe to have stopped her engines without danger of that vessel running into her. I do not, myself, feel very sure of what exactly was in the minds of the framers of this rule when they used those words, because it is not very easy to imagine circumstances under which a vessel could not stop her engines. It does not imply any sudden stopping of her way. I think they must have had in their minds matters connected with river navigation, where, for instance, you might have a vessel coming up the Thames and another small vessel crossing under her stern, and where to take off speed by stopping the engines might at that moment be difficult and dangerous. I can understand the existence of such circumstances in a river, but not in the open sea, and certainly in this case I cannot see that there was any real reason why the *Rondane* should not have stopped her engines. The vessel following the *Rondane* could, I suppose, see her, because she was herself seen, and if the defendant's story is to be accepted the vessel was in such a position that a checking of the *Rondane's* speed could have been perfectly well met by a movement of the other vessel's helm. I have my doubts, I confess, whether the story of the *Rondane* can be accepted in its entirety. That there was a vessel astern at some time I think is very likely, but to suppose that she was so close as the defendants say appears to me to be very difficult to accept, for this among other reasons which have been pointed out, that at the time of the collision, when the movement of the *Rondane* was stopped with considerable suddenness, the other vessel was not seen by anybody. It is curious that in the case before Barnes, J. exactly the same suggestion was made, and under circumstances of peculiar force, if well founded. But the learned judge rejected it upon very similar grounds as those upon which I feel bound to reject it. Therefore there was no reason why the *Rondane* should not have obeyed the rule. I do not know that it was argued, and I do not think it could have been suggested with any force, that it would not have made any difference if she had stopped. Under the circumstances I think the breach of art. 16 is a breach of which the consequences must be visited upon the *Rondane*. What is to be said as to the *Hermann Koeppen*, because she lies under the same stigma of having violated that article? She certainly did violate it. At the first signal of the *Rondane* she did not stop her engines, but it is said, and this of course is a matter which requires careful consideration, that although that was so, in the case of the *Hermann Koeppen* the breach of the rule must necessarily be considered immaterial, because she heard several whistles afterwards, when she was navigating with caution, and if she had stopped her engines she would not have gained any information which she did not have—that she would not have pursued any other course if she had first

stopped her engines. I feel the full force of that suggestion, but I am not able to yield to it, and do not think that this rule is one which can be, under those circumstances, broken with impunity. When a vessel has broken a statutory rule the onus on those who seek to say that it is immaterial is a very considerable one. In this case one is necessarily cast upon a matter of imagination. One has to consider whether it can possibly be the case that the failure of the *Hermann Koeppen* to obey this rule is immaterial. I am not able to come to that conclusion. It is a matter for imagination, and nobody can possibly say what would have happened if the *Hermann Koeppen* had obeyed that rule. Everyone can conjecture what would have happened. The result would have been, in the first instance, that she would have been in a better position to hear the following whistles of the *Rondane*. Those on board of her say that that would have made no difference, because they, in fact, heard them. I am not satisfied that that is a fair observation to make, because if they had heard them with the engines stopped I am not sure they would not have been in a position to appreciate more accurately what the position of the other vessel was. It is said that the whistles kept on broadening, and I have said that I think that is taking an exaggerated view of those whistles, and I am not sure that if the *Hermann Koeppen* had stopped and listened to those whistles those on board would not have ascertained more accurately what it was the *Rondane* was doing—namely, that she was rounding the Newarp. Under the circumstances I feel compelled to say that I do not think the omission of the *Hermann Koeppen* to obey the rule can be excused. I say candidly that I am compelled to find this with great regret, because I think the *Hermann Koeppen* in every other respect appears to be well navigated in somewhat difficult circumstances. I confess I was struck by the way in which the evidence on her behalf was given, both by the master and other persons. I thought the evidence was fairly and sensibly given, and therefore it is with great regret that I feel compelled to say that the *Hermann Koeppen* has brought herself within the words of art. 16, and I feel unable to absolve her from those consequences. For that reason I am compelled to say that in this case both vessels are to blame.

Solicitors for the plaintiffs, *Stokes* and *Stokes*.

Solicitors for the defendants, *Botterell* and *Roche*.

HOUSE OF LORDS.

Monday, May 11, 1900.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, MORRIS, SHAND, and BRAMPTON.)

ISIS STEAMSHIP COMPANY v. BAHR, BEHREND, AND ROSS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Freight—"Full and complete cargo"—Frozen cargo.

By a charter-party made between the appellants and the respondents it was agreed that the respondents should "load a full and complete cargo of wet woodpulp" on board the appellants' ship, at an agreed rate of freight. The cargo was to be loaded in mid-winter at a port where severe frosts were probable. It was delivered frozen hard, and in consequence the ship was only able to load a much smaller quantity than if it had been unfrozen and compressible. The shipowners claimed damages for short shipment of cargo.

Held (affirming the judgment of the court below), that the charterers had not, under the circumstances, broken their contract to load a full and complete cargo.

THIS was an appeal from a judgment of the Court of Appeal (Smith and Rigby, L.JJ.), Williams, L.J. dissenting, who had reversed a judgment of Bruce, J. in favour of the appellants (the plaintiffs below) in a case tried before him without a jury at the Liverpool Assizes.

The case is reported in 81 L. T. Rep. 241; 8 Asp. Mar. Law Cas. 569; (1899) 2 Q. B. 364.

The action was brought to recover 337*l.* 14*s.* 8*d.* dead freight on an alleged short shipment of 450 tons of cargo, or, in the alternative, to recover the like amount as damages for breach of charter in not loading proper or usual wet woodpulp, by reason of which the said pulp stowed so badly that the plaintiffs' ship was prevented from being loaded to within 450 tons of her proper cargo.

Other questions between the parties were discussed in the courts below, but this was the only point raised on this appeal.

The appellants by their statement of claim alleged that the respondents had shipped 450 tons short of a full and complete cargo, and that they had thereby lost freight in respect of which they had sustained a loss of 337*l.* 14*s.* 8*d.*, and they alternatively alleged that the respondents had not shipped proper or usual wet woodpulp which contained about 50 per cent. of water, but improperly and in breach of their charter had shipped bundles of ground woodpulp, which were frozen hard and frozen into different and unusual forms and shapes, and not properly rolled up into proper square bundles secured by paper and string, but had supplied the same in loose and insecure rolls and in rolls and bundles of varying and unusual shapes, in consequence of which the pulp had stowed so badly as to prevent the steamship *Isis* from being loaded so as to carry within 450 tons of her usual and proper cargo.

The respondents in their defence, whilst denying the breaches alleged against them, alleged that a full and complete cargo was not shipped owing to the bales being frozen too hard for compression into the usual space occupied by such bales, in consequence whereof the appellants were unable and refused to receive any further cargo although the respondents were ready and willing to supply further cargo.

The charter-party was made on the 22nd Dec. 1897, between the appellants as the owners of the *Isis* of the one part and Messrs. A. Wertheim and Co. as charterers of the other part, but for the purposes of this action it was arranged between the parties that the respondents, Liverpool charterers, should represent Messrs. Wertheim and Co.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

By the charter-party it was provided that the steamship *Isis* should with all possible despatch sail and proceed to Bangor, which is an inland port in Maine in the United States, as ordered by charterer, or so near thereunto as she might safely get always afloat, and there load under deck from the agents of the freighters a full and complete cargo of wet woodpulp, which contains about 50 per cent. of water, which the freighters bound themselves to ship, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture, and being so loaded, should proceed to Manchester or so near thereunto as she could safely get always afloat. It was further provided that should ice prevent the steamship getting to Bangor she should load at Bucksport, which is a port on the same river as Bangor, but about twenty miles lower down, on the same terms as stipulated for at Bangor.

It was stated that there were two kinds of wet woodpulp answering to the description in the charter-party, one kind known as "moist sulphite fibre pulp," which was compressed into square parcels and wrapped in paper, and was a more expensive kind of wet woodpulp, and "moist ground woodpulp," which was coarser and less expensive, and was usually shipped in loose bales tied up but not pressed or closely packed.

On arrival of the *Isis* at Bucksport, ice having prevented her from reaching Bangor, the respondents tendered a cargo, a small portion of which consisted of the sulphite fibre pulp, and the larger portion consisted of moist ground woodpulp, which, owing to the frost prevailing at the time, was so frozen as to be rendered quite hard. When in their ordinary condition and not frozen, the bales of moist ground woodpulp are flexible and capable of being compressed so as to be stowed closely together in the corners of the ship's hold under the beams and stringers, but when they are frozen they are quite hard, and, owing to their irregular shapes, take up much more room in the ship's hold. In consequence of the frozen condition in which the moist ground woodpulp was shipped there was a large amount of broken stowage, and it was not possible to stow a full and complete cargo.

The cargo actually loaded (about 2496 tons) was short by 450 tons of the cargo which the ship could have carried had the bales been presented for shipment in the ordinary way.

The smaller portion of the cargo, consisting of sulphite fibre pulp, compressed and wrapped in paper, was stowed without difficulty and without any loss of space.

At the trial of the action at Liverpool Bruce, J. gave judgment for appellants for 336*l.* upon the ground that there was no protection in the charter-party relieving the respondents from liability for matters occasioned by frost.

The Court of Appeal reversed this decision as above mentioned.

The shipowners appealed.

Carver, Q.C., *Horridge*, and *Hyslop Maxwell* appeared for the appellants, and contended that this was not a full and complete cargo within the meaning of the charter-party. There was no evidence of any custom to treat it as such. The evidence shows that there are two kinds of wet woodpulp, "chemical" and "mechanical" woodpulp. The former is packed in bales of uniform size and shape which can be conveniently stowed, whether frozen hard or not; the latter can be stowed when it is soft and compressible, but not when frozen hard in irregular packages. If an article packed in one way gives a full cargo, and in another way does not, the charterer is bound to supply it in such a form that a full cargo may be shipped. See

Cuthbert v. *Cumming*, 11 Exch. 405;
Cole v. *Meek*, 15 C. B. N. S. 795; 33 L. J. 183, C. P.

Secondly, they were not entitled under the charter-party to ship "frozen" woodpulp for "wet." See

Southampton Steam Colliery Company v. *Clarke*, 19 L. T. Rep. 651; 3 Mar. Law Cas. O. S. 197; L. Rep. 4 Ex. 73; L. Rep. 6 Ex. 53.

This was not "wet woodpulp" within the meaning of the charter-party, and the charterers should have provided that if they were prevented from shipping "a full and complete cargo of wet woodpulp" as agreed, the loss should fall on the ship. There was no exception in the charter-party to relieve the charterers from liability for matters caused by frost. It is a fallacy to say that it was in the contemplation of both parties. See

Hudson v. *Ede*, 18 L. T. Rep. 764; 3 Mar. Law Cas. O. S. 114; L. Rep. 3 Q. B. 412;
Grant v. *Coverdale*, 51 L. T. Rep. 472; 5 Asp. Mar. Law Cas. 353; 9 App. Cas. 470;
Kearon v. *Pearson*, 7 H. & N. 386; 31 L. J. 1, Ex.

J. Walton, Q.C. and *Collingwood Hope*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: [After going through the facts of the case as set out above, his Lordship continued as follows:] The question is, what was the cargo contracted to be tendered for shipment by the charterers. Was it an unfrozen wet woodpulp cargo as is now set up by the shipowners, or a frozen wet woodpulp cargo as such cargoes always are at Bucksport in the winter? If it was to be unfrozen, where was it to come from with frost of 14 degrees below zero? There is not even a suggestion made by the shipowners as to this, and much less evidence that an unfrozen cargo could have been shipped in winter either at Bangor or Bucksport. It appears to me that when the facts are ascertained, there can be but one answer, and that is that the contract cargo which the defendants were to tender to the ship was that which they did tender as a full and complete cargo of wet woodpulp containing 50 per cent. of water, in its normal winter condition, shipped at Bucksport, namely, as frozen wet woodpulp. All that the charter-party did was to say that the vessel should load a full and complete cargo of wet woodpulp. It has been faintly contended that the merchant was bound to select that class of article which would make the greatest amount of tonnage which could be carried. But it is impossible to maintain that proposition, and counsel wisely abandoned it. Neither of the parties to the charter-party took into contemplation that the pulp became heavier or lighter, or more cumbrous in form, according to the state of the weather.

That it was before their minds must have been clear enough, considering that sometimes they had 14 degrees below zero, at Bucksport. But it was said there should be some exception, and your Lordships were asked to imply an exception. You are not required to do anything of the kind. I look at the charter-party and I find that the article tendered and loaded was within the description of the charty-party, and was so tendered until the ship would hold no more. There has, therefore, been a complete performance of the stipulations of the charter-party. I cannot help thinking that the error which I notice both in the judgment of Bruce, J. and of Williams, L.J.. is that they assumed that there had been a breach of the contract. It is not true to say that the ship did not load a full and complete cargo. It did load a full and complete cargo of the thing contemplated. Under those circumstances it appears to me that the plaintiffs fail, and I move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

Lords MACNAGHTEN, MORRIS, SHAND, and BRAMPTON, concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Rowcliffes, Rawle, Johnstone,* and *Gregory,* for *Hill, Dickinson, Dickinson,* and *Hill,* Liverpool.

Solicitors for the respondents, *Wynne, Holme,* and *Wynne,* for *Forshaw* and *Hawkins,* Liverpool.

July 19, 20, *and* 23, 1900.

(Before Lords DAVEY, BRAMPTON, and ROBERTSON.)

WEIR AND CO. v. UNION STEAMSHIP COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Obligation to supply ballast.

By a charter-party which did not amount to a demise or parting with the possession of the ship by the owners, a ship was, in consideration of a certain sum per month, placed at the disposal of the charterers to be employed in the conveyance of lawful merchandise and (or) passengers between certain ports, and it was stated that she was let for the sole use and benefit of the charterers from a specified date on which she was to be placed "with clear holds" at the disposal of the charterers, they having the "whole reach or burthen" of the vessel, proper and sufficient room being reserved to the owners for the officers, crew, tackle, furniture, stores, and provisions.

Held (affirming the judgment of the court below), that the terms of the charter-party did not rebut the ordinary implication by which the obligation of supplying such ballast as may be necessary for the safe navigation of the ship rests with the owner.

THIS was an appeal from a judgment of the Court of Appeal (Smith, Collins, and Williams, L.JJ.), reported in 81 L. T. Rep. 553; 9 Asp. Mar. Law Cas. 13; (1900) 1 Q. B. 28), who had affirmed a judgment of Bigham, J. upon a preliminary point of law ordered to be tried before him.

The respondents had chartered the steamship *Elleric,* belonging to the appellants, for three round voyages.

The appellants stated that on the first voyage the respondents directed the master to proceed without cargo from South Africa to New York, which he did. It was a disputed point whether or not he demanded ballast beyond the ship's water ballast from the charterers, or informed them that it was dangerous for his vessel to proceed to New York without it. The ship, however, started from South Africa with water ballast only, encountered heavy weather, and in endeavouring to keep her guaranteed speed broke three blades of her propeller, and was thus delayed for three and a half days. In consequence of this delay an additional quantity of coal was consumed, amounting in all to seventy tons. On the steamer's arrival at New York she had to be put into dry dock to repair the damage, and was further delayed five and a half days.

On the second and third voyages the captain refused to proceed without cargo unless the charterers would provide ballast over and above the ship's water ballast. Under protest they did so provide 600 tons upon the second voyage from Natal and 500 tons upon the third voyage from Marseilles.

When paying freight the charterers claimed a right to deduct, and did deduct, the following amounts: 315*l.*, hire of the ship for the nine days during which she was unable to proceed owing to the damage received on the first voyage; 76*l.* 2*s.* 6*d.*, price of the extra coal consumed in consequence of the said damage; 151*l.* 11*s.* 8*d.*, cost of purchasing, shipping, and discharging ballast upon the second voyage; and 92*l.* 5*s.* 7*d.*, cost of purchasing, shipping, and discharging ballast upon the third voyage; and sundry small items for dock dues, wharfage, overtime, &c.

The shipowners refused to admit the charterers' right to make the foregoing deductions, and in consequence brought the present action to recover the balance of freight alleged to be due to them, and in the original claim to recover the cost of repairs of the damage on the first voyage.

The material clauses of the charter-party are set out in the report in the court below and in the judgments of their Lordships.

By an order made by Kennedy, J. at chambers it was directed that the following question should be tried as a preliminary point of law: "Whose duty was it under the charter-party to provide any ballast beyond water ballast that might be necessary for the safe sailing of the *Elleric* on the chartered voyage, and at whose expense?"

Bigham, J. held that it was the duty of the shipowners under the charter-party to supply the ballast, and gave judgment for the defendants accordingly, and his judgment was affirmed as above mentioned.

The plaintiffs appealed.

Carver, Q.C. and *Leck,* for the appellants, contended that though under ordinary circumstances the owner must provide the ship in a fit state for the voyage, here the position was altered by the express provisions of the charter-party. The owners did not agree to supply ballast, and in fact had no right to put any on board, and the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

obligation to do so, if necessary, was on the charterers. They cited

Trinity House v. *Clark*, 4 M. & S. 288;
Towse v. *Henderson*, 4 Ex. 890.

J. Walton, Q.C. and *Scrutton* supported the judgment of the Court of Appeal

Carver, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 23.—Their Lordships gave judgment as follows:—

Lord DAVEY.—My Lords: The appellants are owners of a steamship called the *Elleric*, and the respondents were the charterers of that vessel from the appellants under a charter-party, dated the 10th June 1897. The only question raised on the appeal is whether, in settling the accounts between the parties, the appellants (the owners) ought to be charged with all the expenses of ballasting the vessel with sand, in addition to the water ballast, on a voyage from South Africa to New York. Was it the duty of the shipowners to provide the ballast, or was that a duty which in this case was undertaken by the charterers? The answer to this question must depend on the true construction of the charter-party. The usual form of charter-party is a contract by which the use of the vessel is placed at the disposal of the charterers, but possession remains in the owners who navigate the vessel by their own officers and crew. It is not and cannot be denied that in such a contract the shipowner is bound to provide the necessary ballast for his ship, the reason being, as Smith, L.J. puts it, that as he is responsible for the navigation of his ship by his captain he is responsible for the ballast necessary to enable his ship to perform the contemplated voyage. But of course this *primâ facie* obligation may be rebutted by the express words of the instrument. Mr. Carver's first argument was that the charter-party in the present case was not of the character I have described, viz., a contract of carriage, but amounted to a demise of the ship, and he argued that a provision that the master and crew should be the servants of the owners was not inconsistent with that construction, and in support of this argument he cited the case of *Trinity House* v. *Clark* (4 M. & S. 288). That case was decided on very special circumstances, and can hardly be a precedent for any other. But I cannot entertain any doubt that this contract is one by which the right duty and responsibility of navigating the vessel is on the owners. In this respect the case is hardly distinguishable from that of the *Omoa and Cleland Coal and Iron Company* v. *Huntley* (37 L. T. Rep. 184; 3 Asp. Mar. Law Cas. 501; 2 C. P. Div. 464), and if this point be determined in favour of the respondents the question whether the contract otherwise more nearly resembles one of demise than one of carriage becomes academic. It is clear that this contract is not one in which the ship is completely handed over to the charterers to be navigated by them at their own risk and responsibility. *Primâ facie*, therefore, the obligation of providing the ballast is on the appellants. The second clause of the charter-party provides that on the appointed day the vessel is "to be placed with clear holds at the disposal of the charterers at the port of New York, they having the whole reach or burthen of the vessel, including passenger accommodation, if any, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores, and the vessel is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel. The owners guarantee that the vessel has just been put in dry dock and painted, and undertake to maintain her in a thoroughly efficient state during the currency of the charter." Mr. Carver contended that the obligation to place the vessel "with clear holds" at the disposal of the respondents was inconsistent with the existence of any right or power to place ballast in her. I am not of that opinion. I think that you must read this clause with the other stipulations of the contract, and if you find that the owners are responsible for the safe navigation of the ship they must have the right and the power to do whatever may be necessary to enable them to discharge their responsibility. In other words, you must read such expressions as "with clear holds" or "the whole reach or burthen of the vessel" as meaning the full space of the vessel proper to be filled with cargo—and on this question I think *Towse* v. *Henderson* (4 Ex. 890) is in point. Before parting with the second clause I observe that the charterers are not obliged to ship a full cargo or any cargo, and it was, therefore, within the contemplation of the parties that the vessel might have to sail in ballast. I will not pause on clause 3, which provides that "loading and discharging" is to be carried out by and at the risk and expense of the charterers, because I am clearly of opinion that that provision applies to cargo only.

Reliance was also placed on clause 4, which is in these terms: "The captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment, agency, and other arrangements"—not, your Lordships will observe, as regards navigation — "and the charterers hereby agree to indemnify the owners against all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with such orders and directions." The argument was that the necessity for ballast was the direct consequence of the charterers' orders as to the vessel's employment, and therefore a matter in respect of which the owners were entitled to indemnity. The argument is ingenious, but the answer appears to me to be that the clause has nothing whatever to do with navigation, or any incident of navigation, and was not in my opinion intended to shift the responsibility for the safe navigation of the vessel from the shoulders on which it is placed by other terms of the contract. The only other clause relied on was clause 7, which is in these terms. I only read it so far as it is material —"The charterers shall also bear all port and dock charges, pilotage, light dues, agency commissions, delivery, labourage, and all other duties, charges, and expenses, the owners providing and paying for all ship's stores, insurance, crew's wages and victualling, and necessary stores for the engine-room, and all stores, bedding, crockery, mess utensils, and other requirements for passengers." It was said first that all expenses of every description other than those expressly undertaken by the owners are imposed on the

charterers, and also that "labourage" would include the labour of loading and unloading the ballast. But it is obvious that many expenses relating to the ship and labour employed about her would not be included in these words. For example, expenses connected with maintenance of a ship in an efficient state. And if so, why should expenses necessarily incurred for the purpose of her safe navigation be included? The duties of maintenance and navigation are by the eighth clause of the contract put on the same footing in this respect that the payment of hire is to cease as well from any accident of navigation as from any default in maintaining the vessel in a state of efficiency. I have dealt with these minor points out of respect to the learned counsel who argued the case of the appellants. But the broad and sufficient ground for decision is that the providing proper ballast for the stability of the vessel is incident to her safe navigation, the responsibility for which is by the contract imposed on the appellants. I am of opinion that the judgments of Bigham, J. and of the Court of Appeal are quite right and ought to be affirmed, and I move your Lordships accordingly.

Lord BRAMPTON.—My Lords: The only substantial question in this case appears to me to be whether the charter-party under consideration ought to be construed as a contract for the hire and letting by the owners to the charterers of the ship itself in its integrity, so as to transfer for the time being to the charterers the control over her working and navigation, and making them practically the owners of her during the voyages contemplated by the charter-party, or as a contract conferring upon the charterers a right to insist upon the ship being used and employed to the extent of her carrying power, exclusively on their behalf and for their sole benefit, according to the terms agreed on, the ship itself, subject to such right, remaining for all purposes of navigation and maintenance under the control of the officers and servants of the owners, and on their behalf. Bigham, J. and the Court of Appeal held the latter to be the true construction of the contract. I am of opinion that those judgments are right. I am far from saying that some of the phrases employed in the charter-party do not give colour to the argument for the appellants; for instance, the stipulations in clause 1, that the vessel shall be placed at the disposal of the charterers; in clause 2, that the vessel is let for the sole use of the charterers and with liberty to sublet; and in clause 8, that the freight for the hire of the vessel shall be paid at so much per month until the vessel is again returned by the charterers to the owners at New York, in like good condition as when chartered; but none of them necessarily indicate that it was the intention either of the owners to transfer to the charterers, or of the charterers to accept the absolute possession of the ship, during the currency of the charter; while there are stipulations throughout the charter-party which, to my mind, indicate a contrary intention. Clause 1 provides that the vessel shall be maintained by the owners with sufficient complement of officers, seamen, engineers, firemen, and stewards; and although by clause 2 the charterers are to have the disposal of the whole reach or burthen of the vessel, proper and sufficient room is reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores; and further, in the same clause the owners undertake to maintain the vessel in a thoroughly efficient state during the currency of her charter. These clauses, coupled with clauses 3, 4, 5, and 6, indicate to my mind, that it was the intention of both owners and charterers that the captain with his officers and crew were to remain in actual possession of the vessel as the servants of the owners, for the purposes of her maintenance and proper navigation throughout all the voyages contemplated by the charter, but for such purposes only. In all other respects the carrying capacity of the vessel was at the disposal of the charterers, whose orders and directions as to the voyages were to be obeyed. The case of the *Trinity House* v. *Clark* (*ubi sup.*) turned very much upon the character of the service for which the vessel in that case was chartered, and I do not regard it as any authority against the contention of the respondents. The case of the *Omoa and Cleland Coal and Iron Company* v. *Huntley* (*ubi sup.*) is an authority for holding that in this case the vessel, for the purposes of navigation, remained in the possession and under the control of the owners.

The *Elleric*, the subject of the contract, was duly placed at the disposal of the charterers at New York on the day named with clear holds, as stipulated. It will be observed, however, that the charter-party imposed no obligation upon the charterers to load a full or, indeed, any cargo on board, but the holds were clear to enable them to do as they pleased in that respect, and they did in fact load a cargo which was duly discharged at South African ports. The respondents then directed the captain to take the vessel back to New York without any cargo, as it is conceded they had a perfect right to do. The captain, however, very truly pointed out that the water ballast tanks with which the vessel was fitted were not sufficient to enable her to proceed safely on such a voyage without cargo or extra ballast, which he requested the respondents to furnish. This they refused to do, and the *Elleric* made the voyage without it, but sustained damage in so doing. On the second and third voyages the captain was also requested to take the vessel from a South African port to New York without any cargo or such extra ballast, but he refused to do so. Thereupon the respondents supplied the ballast required under protest, and when they came to make payment to the appellants for the hire of the vessel they deducted the expenses of so doing. It must be conceded that such ballast was absolutely necessary for the safety of the vessel Taking the facts as I have stated them, and construing the contract as I think it ought to be construed, I do not think it open to question that, in the absence of express stipulation to the contrary, the owners would be responsible for the expenses of the requisite ballast so supplied. I fail to find in the charter-party anything which exonerates the owners from the duty of supplying all ballast necessary for the safe navigation of the ship on the voyages for which she was chartered. The requirement that she shall be placed with clear holds at the disposal of the charterers before the commencement of any voyage meant, in my

opinion, no more than this—that the charterers were to have the holds clear to enable them to stow in them such cargo as the ship could reasonably carry. They might stow in and fill them with a cargo of such bulk and weight as to make further ballast, beyond the water ballast, altogether unnecessary. On the other hand, they might think fit to load so light a cargo as that without more ballast the ship would be unsafe for her voyage. Can it be seriously doubted that in such a state of things the captain would be justified in requiring, nay more, that it would be his duty to require space to be reserved for him to put into the hold on behalf of his owners such ballast as was necessary properly to trim the ship and make her fit for the voyage? Let me suppose for a moment that the charterers at starting had determined to send the ship out from New York to South Africa without any cargo (as they did from South Africa to New York); could it be said that, the holds being then clear, the captain would not have been at liberty and that it would not have been his duty towards his owners to put in them such ballast as he deemed necessary for the safety of the ship—of course at their expense? I have read most carefully clause 7—so much relied on for the appellants—but I fail to see any obligation imposed on the charterers to provide anything essential for the navigation of the ship. No such obligation is conveyed in the word "labourage," and it seems to me to be impossible that in the use of the words "other duties, charges, and expenses" the parties meant or had it in contemplation to include ballast if necessary. If it had been their intention to shift on to the shoulders of the charterers the ordinary obligation of the owner under such a contract, I should have expected to find express words to that effect. As the result of the best consideration that I can apply to this case I am of opinion that this appeal should be dismissed with costs.

Lord ROBERTSON.—My Lords: I cannot say that I have any doubt of the soundness of the decision appealed against. The appellants have relied on the peculiar terms of the charter-party and of those I shall presently speak. But the general rule is admittedly that in an ordinary contract of affreightment the owner is liable for ballast. Now, why is this? It is because the function of ballast is, as Tindal, C.J. says, to make the ship trim for her voyage. It is put in, therefore, to fit the ship safely to carry the particular cargo placed on her. One ship will require more ballast and another less, and it is for the master to judge whether any, and what, ballast will be required by his ship during a proposed voyage having regard to the nature of the proposed cargo. The expense of ballast is, therefore, on the owner, because it is an incident of the duty of navigating the ship. It seems to me therefore, that in every case the key to the question, Who pays for ballast? is found in the answer to the question, With whom is the duty of navigating? Now, although there has been some discussion as to whether there is, under this contract, a demise of the ship, there can be no question that the duty of navigation is with the owners. This being so, it seems to me that all controversy as to whether there is not here at the same time a demise of the ship is immaterial and theoretical. But I say this, not in order to suggest any doubt of the soundness of the view expressed on this point in the Court of Appeal, but rather to indicate that *primâ facie* the criterion of such disputes is to be found in what is uncontroverted. Now, it has been argued that certain provisions of the charter-party imply that the charterers undertake the duty of ballasting. The appellants attach much importance to the fact that clause 2 places the ship at the disposal of the charterers "with clear holds." The phrase is striking; but I do not think that it stands the strain of the appellants' argument. If there is anything in the arguments it proves too much, for it would equally show that, whoever paid for it, the putting in ballast at all would be a breach of the contract, as depriving the appellants of part of the stipulated cargo space. In truth, however, the words "with clear holds" must be read along with the sequel of the clause, and the words "and the vessel is not to be required to load more than she can reasonably stow and carry" show that the whole is subject to the effective fulfilment by the owners of the duty of safe navigation. To that extent the "clear holds" mean holds with ballast in if and when required; and no light is obtained from those words as to who is to pay for the ballast. Nor would any repugnancy to clause 2 arise if it be allowed that the well settled rule would apply that the owners might carry freight-earning ballast, for ballast is never anything but the complement of the proposed cargo; and the owner can never claim a right to put in ballast so as to oust cargo which would itself make the ship trim. It is only when the cargo is announced that the question of ballast arises. Clause 7 is the only other which seemed to give a foothold for Mr. Carver's argument, and he relied mainly on the word "labourage." Now, at the best this word is insufficient to cover the whole of the claim now in dispute, for the price of the ballast is one part of the claim. But, apart from this, the very general word "labourage" may well be satisfied by labour required in any of the incidents or contingencies which may occur in port. I do not find in clause 7 or in any other part of the charter-party any implication, much less any provision, sufficiently clear to transfer to the charterers a liability which in its nature falls on the owners as navigating the ship.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondents, *Bircham* and *Co.*

May 21, 22, *and July* 30, 1900.

(Before the LORD CHANCELLOR (Halsbury), Lords ASHBOURNE, MACNAGHTEN, MORRIS, and BRAMPTON.)

SAXON STEAMSHIP COMPANY *v.* UNION STEAMSHIP COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Colliery guarantee—Demurrage—"Colliery working days."

By a charter-party which incorporated a "colliery guarantee" the charterers agreed to load a ship

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

with coal "in twelve clear working days, Sundays and holidays excepted."

Held (reversing the judgment of the court below), that, in the absence of evidence of any special meaning attached to the words "working days," they meant days on which the collieries usually worked, not days on which they actually worked, and that the shipowners were entitled to demurrage in respect of a delay in the loading caused by a strike at the collieries.

THIS was an appeal from a judgment of the Court of Appeal (Lindley, M.R., Smith and Romer, L.JJ.), reported in 81 L. T. Rep. 246; 8 Asp. Mar. Law Cas. 574, who had reversed a judgment of Lord Russell, C.J., reported 79 L. T. Rep. 486; 8 Asp. Mar. Law Cas. 449, in favour of the appellants, the plaintiffs below, in a case tried before him in the Commercial Court.

The appellants, as owners of the steamship *Saxon*, brought their action against the respondents, the charterers, for demurrage alleged to be due under a charter-party and for loss of freight.

The following facts were admitted or proved:—

Under the charter-party of the 25th Jan. 1898 the *Saxon* was to load a cargo of coal at Barry, subject to certain terms and conditions, of which the following are the material parts:

Cargo, except any portion thereof required for stiffening, to be loaded in twelve clear working days, Sundays and holidays excepted, from the time that written notice is given, between 9 a.m. and 6 p.m., that all ballast or inward cargo is discharged and the stiffening coal (if any) is on board, and the ship is ready to receive her cargo. Stiffening coal, if required, is to be supplied at ship's expense, at the rate of 100 tons per clear working day, after twenty-four hours' notice is given of its being required and that the ship is ready to receive the same. The loading both of cargo proper and stiffening coal is subject to the conditions of the colliery guarantee in use at the said colliery. Any time lost through riots, strike, lock-out, or stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the said coal, or from any conditions or exceptions mentioned in the colliery guarantee, or by reason of accidents to mines or machinery, obstruction on the railway and in the docks, or by reason of floods, frosts, storms, or any cause beyond the control of the said colliery, not to be computed as part of the aforesaid loading, or the hereafter mentioned discharging time.

Demurrage at loading ports as per colliery guarantee, at port of discharge at the rate of 3*d.* per register ton per working day.

The colliery guarantee, referred to in the charter-party, was dated the 28th Jan. 1898, and was addressed to the respondents.

By its terms the *Saxon* was to be loaded with a cargo of coal in twelve days, subject to the following:—

The following exceptions not to be computed as part of the aforesaid loading or stiffening time unless used, notwithstanding that during the time of any such exceptions coal may be shipped by us into any other vessel: All holidays, whether public holidays or colliers' holidays, whereby work is suspended, either at the docks, or at our colliery or collieries. Time from 5 p.m. on Saturday until 7 a.m. on Monday. Time occupied in shifting from hatch to hatch and in repairing. Any time lost through riots, strikes, lock-outs, dismissal of workmen, or from any dispute between masters and men causing a stoppage of our colliery or collieries, or of the trimmers, dock, railway, or other hands connected with the working, delivery, shipment, or trimming of the coal or on the railway or railways over which our traffic is usually conveyed to the loading dock or docks, or by reason of accidents to mines or machinery, causing stoppage of the same, or by obstructions or accidents at our colliery or collieries, or on the said railways or in the docks, or by reason of storms, floods, frosts, snow, or from any cause of whatsoever kind or nature. In case of partial holiday or partial stoppage of our colliery or collieries from any or either of the aforenamed causes, the lay days to be extended proportionately to the diminution of output arising from such partial holiday or stoppage. For the purpose of this guarantee, all holidays and full-day stoppages at our collieries shall be deemed to commence at 5 p.m. the working day preceding, and to end at 7 a.m. the working day following such holiday or stoppage. In case the vessel, whether on demurrage or not, can complete loading the cargo by 5 p.m. on the day preceding any Sunday, holiday, or other stoppage of work, and such completion is prevented otherwise than by our act or default, time shall not count either for loading or demurrage until 7 a.m. on the day on which work is resumed.

The colliery guarantee contained a scale of rates for demurrage (if any), the rate applicable to the *Saxon* being 13*l.* per day. The colliery guarantee also provided that demurrage was to be "payable per colliery working day, or in proportion for any part of a day, which for purpose of computation shall be divisible into twenty-four parts."

The *Saxon* arrived at Barry on the 8th March, and the lay days for loading expired on the 31st March at 2 p.m. After the expiration of the lay days—viz., on the 9th April—a strike took place at the Ferndale Company's Collieries, which lasted a long time. The *Saxon* remained waiting for cargo, notice that the vessel was on demurrage being given from time to time to the respondents and the colliery company, until by letter dated the 26th May 1898 the respondents gave notice to the appellants' brokers that they could not load the ship. This notice was communicated to the owners, who thereupon took steps to obtain another charter-party. On the 13th June they chartered her to Messrs. Hickie, Borman, and Co. Under that charter-party she was loaded without delay and sailed on the 17th June. The cargo loaded was 2719 tons of coal, and the freight was 14*s.* per ton to Cape Town as against 18*s.* 6*d.* per ton to the same place under the respondents' charter-party, the freight in each case being subject to certain discounts and deductions.

The claims put forward on behalf of the plaintiffs (appellants) were (1) for loss of freight. The amount claimed was 609*l.* 19*s.* 9*d.*, and was made up of the difference of freight in the two charter-parties, taking all deductions into account and taking a full and complete cargo of coal at 2719 tons, the quantity actually loaded under the second charter-party; and (2) for the detention of the *Saxon* by the respondents. The amount claimed was 785*l.* 8*s.* 4*d.*, being demurrage at the colliery guarantee rate of 13*l.* per day for the colliery working days from 2 p.m. on the 31st March until the 17th June, when the loading under the second charter-party was completed. The appellants' calculation was upon the basis of reckoning every day from the 31st March to the 17th June as a colliery working day, except such days as were Sundays or public holidays, or colliers' holidays,

and therefore excluded the following days: Sunday, April 3; Mabon's Day (colliers' monthly holiday), April 4; Good Friday, April 8; Sunday, April 10; Easter Monday April 11; Sundays, April 17 and 24; Sunday, May 1; Mabon's Day, May 2; Sundays, May 8, 15, 22, and 29; Whit Monday, May 30; Sunday, June 5; Mabon's Day, June 6; and Sunday, June 12, upon the ground that demurrage was payable "per colliery working day," and that the days excluded for the above reasons from the demurrage computation were all such days as were not "colliery working days."

It was admitted that the lay days having expired on the 31st March, at 2 p.m., the respondents were in default and liable to pay demurrage until the 9th April, when the strike began, but the respondents contended that failure to load after the 9th April was due to the strike, and that owing to the strike the days for which demurrage was claimed were not "colliery working days," inasmuch as no work was in fact done at the Ferndale Company's Collieries on the days in question, and that, therefore, no demurrage was payable for the detention after the 9th April. The respondents further contended that all the exceptions, which by the terms of the colliery guarantee were not to be computed as part of the loading or stiffening time, also applied, notwithstanding that the loading time had expired, and the vessel was on demurrage, and, therefore, claimed a right, in any event, to exclude the time from 5 p.m. to midnight on the day before a Sunday or holiday, and from midnight to 7 a.m. on a Monday or day after a holiday, in computing the demurrage time.

The appellants, on the other hand, contended that such exceptions had no application, except for the purpose of computing the loading or stiffening time, and in any event the appellants contended that the 64*l.* 9*s.* 2*d.* allowed by the respondents to be due for demurrage up to the 9th April must be increased by 18*l.* 19s., being the demurrage payable for the thirty-five hours deducted by the respondents in respect of the periods from 5 p.m. to midnight, and midnight to 7 a.m. as aforesaid.

The Lord Chief Justice gave judgment for the appellants on both heads, with certain deductions, but his judgment was reversed as above mentioned.

Rufus Isaacs, Q.C. and *Leck* appeared for the appellants, and argued that "colliery working days" meant days on which the collieries usually worked in the ordinary course, not days on which in fact they did not work for any reason. They cited

Clink v. *Hickie, Borman, and Co.*, 4 Com. Cas. 292; 15 Times L. Rep. 408;
Nielsen v. *Wait*, 54 L. T. Rep. 344; 5 Asp. Mar. Law Cas. 553; 16 Q. B. Div. 67.

J. Walton, Q.C., *Carver*, Q.C., and *Bailhache*, for the respondents, supported the judgment of the Court of Appeal.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 30.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: The controversy between the parties in this case is reduced to very narrow limits, and may, I think, be treated as simply the question of what is the contract between them. The contract is to be found in the charter-party and the colliery guarantee, which, by incorporation and reference, forms part of the contract, and the sole question in the case appears to me to turn upon one phrase—viz., the phrase "colliery working day." If the construction which the Lord Chief Justice placed on that phrase at the trial meant ordinary working days under ordinary normal circumstances, then the demurrage which the appellants claim is clearly due under the contract. If, on the contrary, the period during which a strike in the coal trade prevailed there was no colliery working day, then the demurrage claimed was not due, and it seems to me that, apart from some evidence giving a technical meaning to the phrase, it is impossible to deny that, though workmen were on strike and did not work, these were, as the Lord Chief Justice held, colliery working days. I agree with the Lord Chief Justice that the real question in the case is, What is a "colliery working day"? Does it mean only a day upon which the colliery is in fact working, or does it mean what are ordinary working days in normal times and in normal circumstances? In the first place, I think on the ordinary construction of language that one would understand the words as the Lord Chief Justice has understood them. A working day is I think in ordinary parlance to be understood as distinguished from a holiday—including in that term a Sunday or some fixed and usual day for rest and not for work, as a Sunday, Christmas Day, Good Friday, and the like. But, besides what I have described as the ordinary and natural meaning of the words, there is the additional circumstance that, if the parties had intended what it is now contended that they meant, I see no reason why they should not have said in plain terms that by "colliery working days" they meant days on which the colliery was actually working in fact. I am unable to follow the view of the Court of Appeal; they appear to recognise what I have described as the ordinary and natural meaning of the words, and I quite agree that the ordinary and natural meaning of words may be altered or modified by their use in a particular neighbourhood or in relation to a particular subject-matter. They adopt the Lord Chief Justice's exposition of the words generally, but they add to that exposition, "You must give the qualification as to how these words would be understood in the neighbourhood of the place where the parties were contracting." This would be quite intelligible if there were any evidence that the words were so understood like the custom of a port, or any other evidence which practically makes the use of particular words technical in the neighbourhood or in relation to the particular subject-matter. But the difficulty which I have is that there is no evidence from which any such technical meaning can be gathered, and it certainly lies upon those who wish to give a technical meaning to plain language to establish that the words sought to be modified have acquired the meaning upon which they insist. The truth is that the respondents are endeavouring to establish that a strike, which in this case prevented the loading of the vessel, prevents the days upon which the colliers would be working under ordinary normal circumstances

from being colliery working days. It is, to my mind, very clear that at the time when this contract was signed between the parties no such idea had occurred to them, for in relation to another matter —which, however, does not touch the liability now in question—they expressly mention strikes, and I cannot conceive that, if the construction now sought to be put upon this contractwas in their minds, they should not in plain terms have expressed their meaning. I have spoken of the contract between the parties, and it is, of course, one contract, so far as the present question arises, although one part of the contract is referred to and incorporated by reference instead of being a contract on one piece of paper. And, although some confusion arises from this circumstance, I am unable to see anything in the other parts of the contract which have relation to the question now in debate. If I am right in saying that the words in question ordinarily bear the meaning that I have attributed to them, I do not think it possible in the state of the evidence before your Lordships to assume that there is anything in any other part of the contract which was intended to operate, or does, in fact, operate, to alter the construction which the words would generally bear. It follows from the facts proved that the delay in respect of which the demurrage is claimed was a delay during colliery working days, and the appellants are entitled to the amount which they claim. For these reasons I move, your Lordships, that the judgment of the Lord Chief Justice be restored, and in that respect the judgment of the Court of Appeal reversed, with the usual consequences as to costs.

Lord MACNAGHTEN.—My Lords: This is a case of demurrage. The respondents chartered the ship *Saxon* from the appellants to carry a cargo of steam coal from the Port of Barry to Cape Town. The cargo was to be provided by the owners of the Ferndale Colliery, who were at the time under contract to supply the respondents with a large quantity of coal. In accordance with a well-known practice the colliery owners gave the charterers a guarantee as to the loading and despatch of the vessel, and the charter-party was made in view of this guarantee. The charter-party provided for "demurrage at loading port as per colliery guarantee." According to the guarantee demurrage was to be at a certain scale (about which there is no question), and was expressed to be "payable per colliery working day." The main question is, What is the meaning of the expression "colliery working day"? Does it mean a day on which under ordinary normal circumstances the colliery would be working, or does it mean a day on which the colliery is actually at work? There is a further question as to the exclusion from the period of demurrage of certain hours of grace in extension of non-working days, which for some purposes certainly were to be reckoned from 5 p.m. on the day preceding to 7 a.m. on the day following. The vessel was not loaded in accordance with the charter-party. The lay days in which the loading ought to have been completed expired at 2 p.m. on the 31st March 1898, and thereupon the period of demurrage began. There is no dispute as to the liability of the charterers for demurrage during the period between the expiration of the lay days and the 9th April following. Then came the great South Wales coal strike, and after a time the charter-party was abandoned. The question is as to liability for demurrage during the time while the colliery was idle owing to the strike. Lord Russell, C.J. and Lindley, M.R., who gave the judgment of the Court of Appeal, were both agreed that *primâ facie* the expression "colliery working day" means "ordinary working days under ordinary normal circumstances." But the Court of Appeal, differing from the Lord Chief Justice, was of opinion that this *primâ facie* meaning was displaced by the language of the particular contract under consideration. It was common ground that the liability of the charterers to the ship and the liability of the colliery to the charterers were meant to be co-extensive. Taking first the colliery guarantee, the Master of the Rolls came to the conclusion that the clause as to demurrage in that document excluded days on which the colliery was not at work owing to any cause whatever other than the fault of the owners. Then turning to the charter-party, his Lordship expressed the opinion that there was nothing to be found there repugnant to the construction which he had placed upon the demurrage clause in the colliery guarantee.

The case is certainly not free from difficulty, but on the whole upon this point I prefer the conclusion at which the Lord Chief Justice arrived. The Master of the Rolls relies upon two clauses in the colliery guarantee, which for the sake of convenience of reference were numbered 6 and 7. He thinks that those clauses show that days on which the colliery was not actually worked were not to be treated as "colliery working days." I am not able to agree in this opinion. Clause 7, I think, has not much bearing upon the point. It provides for a very exceptional case when the vessel, "whether on demurrage or not," could complete loading by 5 p.m. on the day preceding "any Sunday, holiday, or other stoppage of work." The expression "working day" is not to be found in that clause at all. The preceding clause, numbered 6, is in these words: "For the purpose of this guarantee all holidays and full day stoppages at the collieries shall be deemed to commence at 5 p.m. the working day preceding and to end at 7 a.m. the working day following such holiday or stoppage." The judgment of the Court of Appeal is, I think, really based on that clause alone. Now, in the first place, it seems to me, reading the whole instrument fairly, that in clause 6 the parties had nothing in view beyond the period of lay days or loading time. In the next place, I cannot myself see anything to show that in clause 6 the expression "working day" means a day on which work is actually done rather than a day which is an ordinary working day under ordinary normal circumstances. The clause is not very artistically drawn. But, whichever construction of the expression "working day" is adopted, the result is the same, and in either case there must be occasionally some overlapping of hours. I am rather disposed to think that the expression "working day" in that clause means an ordinary working day under normal circumstances, because I find in the very next clause, where a day on which work is actually done is evidently meant, the parties do not use the expression "working day." The language is changed. The expression used is "the day on which work is resumed." I may observe in passing that clause 6 does not

take account of Sundays. It only speaks of "holidays and full-day stoppages." Why are Sundays omitted? If you turn to clause 4 you find that Sundays are already provided for by the exclusion of "time from 5 p.m. on Saturday until 7 a.m. on Monday." Now the application of clause 4 is unquestionably confined to lay days or loading time. This circumstance, taken in connection with the special reference to demurrage in clause 7, seems to me to show that, apart from the special case provided for in clause 7, the whole group of clauses 4, 5, 6, and 7 are applicable only to lay days or loading time. There is a further indication tending to show that the charterers meant by the expression "working day" an ordinary working day under ordinary normal circumstances. It is to be found in the charter-party. That instrument provides that the cargo is to be loaded "in twelve clear working days, Sunday and holidays excepted." Now Sundays are not working days, nor are holidays. The provision therefore must, I think, be paraphrased thus—"the loading is to be done in twelve clear working days, but note that by working days we mean days exclusive of Sundays and holidays." I have criticised, perhaps too minutely, the language of these two documents—the charter-party and the colliery guarantee—following the line of argument adopted by the Master of the Rolls. I should, however, prefer to put my judgment on rather a broader ground. When once it is admitted, as it is on all sides, that the expression "colliery working day" *primâ facie* means an ordinary working day under ordinary normal circumstances, it is, I think, for those who say that it means something else to make out their case satisfactorily, and I do not think that the respondents have done so. It seems to me to follow, from the view which I find myself compelled to take on the main question, that in calculating the period of demurrage no account is to be taken of the conventional extension of Sundays and holidays, whether public holidays or colliery holidays. The extension was, I think, introduced for the purpose of reckoning the period of lay days or loading time. It has, as it seems to me, no application to the period of demurrage. I am therefore of the opinion that the appellants are right on both points, and that the appeal must be allowed with costs and the order of the Lord Chief Justice varied accordingly. My noble and learned friends Lord Ashbourne and Lord Morris and Killanin concur in this judgment.

Lord BRAMPTON.—My Lords: [His Lordship stated the facts and continued:] The respondents deny any liability for demurrage after the commencement of the strike, upon the ground that the days of the strike were not "colliery working days" within the meaning of the demurrage clause in the guarantee, because no work was done upon them at the colliery; whether they were so or not depends upon the true interpretation of the clause. Lord Russell, C.J., who tried the case, held that the expression "colliery working days" meant "ordinary working days under ordinary normal circumstances." The Court of Appeal agreed that subject to the addition of the words "in the district within which the Ferndale Collieries are situate," this would be the *primâ facie* interpretation of the expression; but Lindley, M.R. in delivering the judgment of the court, went on to say that this construction was excluded by the language of the guarantee, and particularly by the words of clauses 6 and 7 of that document, holding that Sundays, holidays, and days on which work is stopped are not to be treated as days on which work is going on. On this ground the judgment of the Lord Chief Justice was reversed, so far as it related to the demurrage after the commencement of the strike. With all deference to the Lords Justices I am unable to give my assent to the view thus taken. I should agree with them if the words "working days," according to their true construction, meant "days on which work is going on," but I think they do not bear that construction in the document in question. In ordinary parlance to speak of particular days as working days is to distinguish them from Sundays or recognised and established holidays, and is descriptive of them merely as days on which men ordinarily work in their respective callings; it is a general name applied to such days and means nothing more. In the absence of any fixed holiday a week is commonly said to consist only of Sunday and working days, to distinguish the day of rest from the days devoted to labour. A day so ordinarily spoken of as a working day does not cease to be properly so described because a body of men, who might work if they would, refuse to do so, and make it for their own purposes a day of idleness. Of course, this ordinary interpretation of the expression might be disregarded on proof that the expression in question had, when the guarantee was executed, already acquired a different signification when used in connection with shipping or colliery businesses; or if in the written guarantee from the context, or from other clauses in it, it could be made obvious to the judge charged with the construction of the contract that the expression was not intended by the parties to be used in its ordinary sense, but in the sense contended for by the respondents. No such evidence was given or tendered. The Court of Appeal, however, having held that other clauses in the guarantee, particularly clauses 6 and 7, did justify the interpretation contended for by the respondents, it becomes necessary to refer to those clauses particularly, but I must preface what I have to say about them by a short reference to the substance of the three clauses which immediately precede them, Nos. 3, 4, and 5. No. 3 introduces the others thus: "The following exceptions not to be computed as part of the aforesaid loading or stiffening time." No. 4 enumerates those exceptions: "All holidays, whether public holidays or colliers' holidays, whereby work is suspended, &c. Time from 5 p.m. on Saturday until 7 a.m. on Monday. Any time lost through riots, strikes, &c., causing a stoppage of our colliery, &c., or by reason of accidents, &c., at our colliery, or by reason of storms, &c., or from any cause of whatever kind." No. 5: "In case of partial holiday or partial stoppage of our colliery, the lay days to be extended as therein stated." It will be observed that in neither of these clauses are demurrage days in any way referred to, but the exceptions are confined exclusively to loading and stiffening time, and nowhere in the guarantee is there any reference to any stoppage of work to be found, except in the five clauses I have mentioned. As to No. 6 I confess myself at a loss to understand how it can affect the question at issue.

The object of it is, as it seems to me, simply to define the hours when holidays and full day stoppages shall be deemed to commence and terminate (the hours to be included in the Sunday exception having adready been fixed as from 5 p.m. on Saturday until 7 a.m. on Monday in clause 4, and the mode of extending the lay days in the case of partial holidays or stoppages having been dealt with in clause 5) in using the word "working day." I see no reason for supposing that the colliery company, in using the expression working days in clause 6, intended them to be treated in any other manner than according to their ordinary interpretation as days on which men are accustomed to work. Lindley, M.R. in his judgment pointedly stated that in clause 6 "working day" is contrasted with "holidays" and "full-day stoppages," but in considering the weight to be attached to this observation it must not be overlooked that the word "stoppage" is used, and is to be found only in the clauses relating to exceptions to be made in the computation of the loading and stiffening time, and then only as descriptive of days to be deducted in the computation of those times; and they are not in any way ever referred to as days to be deducted in the computation of "demurrage"—that for the purpose of computing the loading days it is immaterial whether one construction or the other is correct, for with either construction strikes and stoppages are expressly excepted from the loading days, and does not in the least degree depend on whether "working day" is interpreted in the one way or the other. It is further to be observed that demurrage is only mentioned in clauses 10 and 7, and that the only exception in the computation of demurrage is the very exceptional one for which provision is made in clause 7. I cannot bring my mind to the belief that the colliery company, when they signed the guarantee, really considered that the expression "colliery working days" would legally be construed as days only on which work is actually done, for at the end of clause 7, when they intended that the day should be so treated, they carefully use the expression "on the day on which work is resumed," which would be superfluous and unnecessary if the construction now sought to be put upon it be correct. Probably they never gave the matter a thought until they found the strike to be serious and the claims heavy. As to clause 7, it applies only to a case where the loading of a vessel is so far advanced that it might and would be, under ordinary circumstances, completed on a day preceding a Sunday, holiday, or stoppage of work, but for its prevention by a cause for which the colliery is not responsible. In such case it provides that time shall not count for loading or demurrage until the day "on which work is resumed." It is obvious that this clause has no application where there has been no loading of nor even an attempt to load the vessel with any part of her cargo. This is the only clause in which a suspension of demurrage days is provided for. If it had been the intention of the colliery in all cases to suspend them during a strike, it is impossible to suppose they would not have expressly so provided, as they easily could have done, by the addition of a few words to clause 3, or by a short and independent clause. For the reasons which I have stated, I am of opinion that this appeal should be allowed, and that the judgment of the Court of Appeal should be reversed, with costs.

Judgment appealed from reversed. Judgment of the Lord Chief Justice restored with a variation. Respondents to pay to the appellants their costs here and in the courts below.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondents, *Riddell* and *Co.* for *Vachell* and *Co.*, Cardiff.

Supreme Court of Judicature.

COURT OF APPEAL.

June 21, 22, *and July* 3, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

IREDALE AND ANOTHER *v.* CHINA TRADERS INSURANCE COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

General average — Sacrifice of freight—Abandonment of voyage.

A cargo of coal, which was being carried on a voyage from C. to E., became heated during the voyage, and the master for the safety of the ship, freight, and cargo, made for B. and put in there. The cargo was there unloaded, and was found to be in such a state that it could not safely be carried to E.

The cargo was thereupon sold, and the voyage was abandoned, the freight being thereby lost.

Held (affirming the judgment of Bigham, J.), that there was no general average sacrifice of the freight which could give a right to general average contribution.

THIS was an appeal by the defendants from the judgment of Bigham, J. at the trial of the action without a jury.

The plaintiffs owned the iron ship *Lodore*, and by a charter-party, dated the 10th Feb. 1897 chartered her to load coals at Cardiff for Esquimault at 19*s.* 9*d.* per ton delivered.

By a policy of insurance, dated the 3rd March 1897, they insured the chartered freight, valued at 1650*l.*, with the defendants, against (*inter alia*) loss by fire, and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said freight.

The *Lodore* proceeded to Cardiff, and there loaded a full cargo of coals, and sailed on the insured voyage on the 29th March 1897.

On the 26th May 1897 the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo and to bear up for the River Plate.

About forty tons of cargo were jettisoned, and the *Lodore* subsequently anchored in Buenos Ayres Roads on the 29th May 1897.

Between the 29th May and the 25th June 1897 cargo was from time to time discharged and various surveys were held upon the coals, and it was found that the coals continued hot and would heat still further if the voyage was proceeded with.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Accordingly, on the 25th June 1897, the coals were condemned, and were ultimately sold.

The vessel abandoned her voyage to Esquimault and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

It was necessary for the safety of the whole adventure that the vessel should put into Buenos Ayres as aforesaid: and it was reasonably certain that, if she had continued on her direct voyage, the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she so continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimault.

When and while she was at Buenos Ayres, the ship and her cargo, both the portion landed and the portion remaining on board, were in safety, but after she reached Buenos Ayres no part of the cargo could have been reloaded and (or) carried with safety to Esquimault in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres.

This action, in the defence of which all underwriters interested similarly to the defendants concurred, was defended to test the question whether, by way of set-off and deduction from the total loss on the policy, which was admitted, the defendants were entitled to have the said loss of freight made good in general average to any and what extent, and to deduct the contribution to the same, falling on the plaintiffs as shipowners, from the amount due on the policy.

The defendants did not allege or rely on improper condition of the cargo as a defence to any claim there might be.

It was agreed that the court should have power to draw all necessary inferences of fact from the above facts which were agreed to; and the parties agreed to leave the adjustment of figures, on such principle as might be laid down, to an average adjuster.

The action was tried before Bigham, J. without a jury.

The learned judge held that, at the time when the voyage was abandoned, the freight was hopelessly lost, and that there was, therefore, no general average sacrifice of the freight. He therefore gave judgment in favour of the plaintiffs (81 L. T. Rep. 231; 8 Asp. Mar. Law Cas. 580; (1899) 2 Q. B. 356).

The defendants appealed.

Carver, Q.C. and *T. E. Scrutton* for the appellants.—The learned judge in the court below was wrong in holding that there had not been a general average sacrifice of the freight. The question whether an act is a general average sacrifice or not depends upon the intention of the master of the vessel when he does the act:

> *Shepherd* v. *Kottgen*, 37 L. T. Rep. 618; 3 Asp. Mar. Law Cas. 544; 2 C. P. Div. 585.

In this case, when the vessel bore up for the River Plate, the voyage was abandoned. It was not certain that the freight could not be saved; there was a possibility that it might be saved. That question is not to be decided by what happened afterwards. There was here a voluntary giving up of the prosecution of the voyage for the general safety, the ultimate result of which was that the voyage and freight were lost:

> *Pirie* v. *Middle Dock Company*, 44 L. T. Rep. 426; 4 Asp. Mar. Law Cas. 388.

At the time when the master made for Buenos Ayres it was not certain that the freight would be lost, and that was a general average sacrifice.

> *Atwood* v. *Sellar*, 41 L. T. Rep. 83; 4 Asp. Mar. Law Cas. 153, 283; 4 Q. B. Div. 342; 5 Q. B. Div. 286;
> *Barnard* v. *Adams*, 10 Howard's Rep. 270 (American).

In this case the question really to be decided is the question which was left open by Barnes, J. in *The Knight of St. Michael* (78 L. T. Rep. 90; 8 Asp. Mar. Law Cas. 360; (1898) P. 30). In that case Barnes, J. said: "I may add that the case does not raise, and I am not asked to determine, any question as to the right of the defendants to deduct, in settling the loss, the amount which the plaintiffs and his co-owners, as owners of the ship, are liable to contribute in general average towards the loss of freight." At the time when the master decided to make for Buenos Ayres the ship, cargo, and freight were all safe, but a danger was then threatening which might destroy the ship, cargo, and freight. It was then the duty of the master to do what might be necessary to avert the threatened danger, and in order to avert it he made for Buenos Ayres. That turning aside was a general average sacrifice which resulted in the loss of the freight and gave rise to a claim for general average contribution:

> *Anglo-Argentine Live Stock and Produce Agency* v. *Temperley Shipping Company*, 81 L. T. Rep. 296; 8 Asp. Mar. Law Cas. 595; (1899) 2 Q. B. 403.

Joseph Walton, Q.C. and *J. A. Hamilton* for the respondents.—The judgment of the learned judge was right, for he was right in holding that there was no possibility of earning the freight at the time when the voyage was abandoned, and that, therefore, there was no loss of freight by reason of that turning aside. There must be some chance of saving, otherwise there can be no sacrifice. If there is no chance of saving the thing which is given up, there is no sacrifice:

> *Shepherd* v. *Kottgen*, 37 L. T. Rep. 618; 3 Asp. Mar. Law Cas. 544; 2 C. P. Div. 585.

If the condition of the thing in question is such that it must be lost in any event, then there is no general average sacrifice. The cargo was heated at the time of the master's act, and it was proved that it was impossible to carry it to its destination. In putting in to Buenos Ayres the master acted for the safety of ship and cargo, and all that followed from that was a general average loss, such as the expenses of putting in to that port. The impossibility of carrying the cargo to its destination was not, however, a consequence of putting in to Buenos Ayres, but was in consequence of the cargo having been previously heated. The master did not abandon the voyage when he made for Buenos Ayres; he made for that port in order to save the freight if possible. The plain, simple, and well-recognised principles for ascertaining whether there has been a general average sacrifice are stated in *Pirie* v. *Middle Dock Company* (*ubi sup.*), and this case does not come within those principles. The voyage was really abandoned after the vessel

arrived at Buenos Ayres, and there was then no common peril in respect of which a general average sacrifice could be made. The abandonment of the voyage was after the cargo was discharged and surveyed, and the common peril was then at an end:

Walthew v. *Mavrojani*, 22 L. T. Rep. 310; 3 Mar. Law Cas. O. S. 382; L. Rep. 5 Ex. 116.

A general average sacrifice must be a sacrifice made voluntarily in the hour of peril for the common preservation of ship and cargo:

Svensden v. *Wallace*, 50 L. T. Rep. 799; 5 Asp. Mar. Law Cas. 232, 453; 13 Q. B. Div. 69, 84.

Carver, Q.C. in reply.—The master made for Buenos Ayres in order to secure the general safety, and any consequence of so doing was a sacrifice; the abandonment of the voyage was a consequence of that act.

Cur. adv. vult.

July 3.—SMITH, L.J. read the judgment of the court as follows:—This is an action by shipowners upon a policy of marine insurance by which the defendants underwrote for the plaintiffs the chartered freight of coals, valued at 1650*l.*, upon a voyage from Cardiff to Esquimault in the plaintiffs' ship *Lodore*, and the perils insured against were "loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight." It is not disputed by the defendants that the chartered freight was lost by reason of the perils insured against within the meaning of the policy (*The Knight of St. Michael*, 78 L. T. Rep. 90; 8 Asp. Mar. Law Cas. 360; (1898) P. 30), and that for this loss the defendants are liable to the plaintiffs. But the defendants contend that upon the facts of this case there has been a general average loss which is the subject of a general average contribution payable by the plaintiffs, and that for the amount of this contribution the defendants are entitled to have credit given to them when they pay to the plaintiffs the amount recoverable under the policy. The question argued before us is whether as regards the coal, upon the delivery of which at Esquimault the freight would have become payable, there has been a general average sacrifice which would form the subject of a general average contribution, and, as this was the only point taken or argued, I pass on without observing upon the form in which the question is raised. My brother Bigham has held that the defendants' contention is ill-founded, and they appeal. It has long since been established that to constitute a general average loss so as to be the subject of a general average contribution two things at least must co-exist—(*a*) there must be an intentional sacrifice of part of the ship or cargo, or a voluntary expenditure for the benefit of the ship and cargo; (*b*) that such sacrifice or expenditure must be made at the time when a common danger to ship and cargo existed, for when the common danger has ceased there can be no sacrifice or expenditure that can be the subject of a general average contribution. Bowen, L.J. in *Svensden* v. *Wallace* (50 L. T. Rep. 799; 5 Asp. Mar. Law Cas. 237; 13 Q. B. Div. 69, 84) thus expresses himself as to what constitutes a general average sacrifice. He says: "It is essential at the outset to bear in mind two things—the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. . . . The sacrifice" must be "made for the common safety in a time of danger." What the learned Lord Justice here says about a general average sacrifice is only what will be found laid down in many cases and stated in the text-books of authority, though clothed in different language. We have nothing in this case to do with any expenditure, for it is not suggested that there has been any. What we have to consider is whether there has been a general average sacrifice of cargo, so as to be the subject of a general average contribution by the owner of ship and freight. It is said by the defendants that there was a general average sacrifice of the coal when the ship turned off her course and bore up to the River Plate, followed, as it was, by an abandonment of the voyage after the ship arrived at Buenos Ayres. To appreciate this argument it seems to me important to consider—first, the position of matters and what took place when the captain of the ship determined to bear up for the River Plate; and, secondly, what took place after the ship's arrival there. The admitted facts are that upon the 26th May 1897, when the ship was on her voyage from Cardiff to Esquimault, the coals began to heat and the master decided "for the safety of the ship, freight, and cargo to bear up for the River Plate." I leave out of consideration the forty tons of cargo which were jettisoned, for no question now arises thereon. I do not doubt that the bearing up under the circumstances above mentioned for the River Plate was a general average act, which would have given rise to a general average contribution if, in consequence of such act, any expenses or loss to the cargo were thereby occasioned. But no question of expenses arises, for none were incurred, and there was no loss to the cargo thereby occasioned. In these circumstances how can it be said that the bearing up for the River Plate was a general average sacrifice as regards the cargo, so as to be the subject of a general average contribution? No part of the cargo was in fact sacrificed, and *à fortiori* there was no general average sacrifice so as to be the subject of a general average contribution. Mr. Carver argued that the voyage was abandoned when the captain decided to bear up for the River Plate, but in my judgment it clearly was not. The master bore up for the River Plate and went into Buenos Ayres for the purpose, if possible, of continuing the voyage after he had got the cargo in order. He did not bear up for the River Plate for the purpose of abandoning the voyage. That was wholly foreign to his purpose. The bearing up for the River Plate was no abandonment of the voyage at all, and it is wholly erroneous to say that it was. Now, the ship with the coals on board—other than those jettisoned—arrived at Buenos Ayres on the 29th May 1897, and remained there till the 25th June 1897, on which day the coals were condemned and ultimately sold. The admission is that "when and while the ship was at Buenos Ayres the ship and her cargo were in safety." The sale of the cargo, which in my opinion constituted the abandonment of the voyage, was not a general average sacrifice which forms the subject of a general average contribution, for the common danger had ceased, and the ship and cargo had

then been in safety for about a month. The suggestion that the sale of the coal at Buenos Ayres was made for the common safety of ship and cargo to enable the vessel to bring her voyage and the common adventure to a successful issue will not assist the defendants, for, as was pointed out by Bowen, L.J. in *Svensden* v. *Wallace* (*ubi sup.*), a sacrifice for the safety of the common adventure does not constitute a general average sacrifice according to the law of England; nor, indeed, did Mr. Carver argue that it did. What he argued was that there had been a general average sacrifice of cargo when the ship bore up for Buenos Ayres, and at that time there was a common danger. I agree that then there was a common danger, but then there was no sacrifice of cargo. I am of opinion that there has been no general average sacrifice in this case, and consequently the right to a general average contribution never arose, and that this appeal must be dismissed. I agree with Bigham, J.'s inference of fact that at Buenos Ayres the coal was hopelessly lost.

Appeal dismissed.

Solicitors: for the appellants, *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool; for the respondents, *Rowcliffes, Rawle*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

June 29, *July* 3 *and* 18, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

MILBURN AND CO. *v.* JAMAICA FRUIT IMPORTING AND TRADING COMPANY OF LONDON. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

General average—Loss occasioned by default of master—Negligence clause—Right of shipowner to contribution.

If the charter-party or bill of lading under which goods are carried contains a clause excepting liability for negligence of the servants of the shipowner, the shipowner is entitled to contribution from the owner of the goods for general average expenses although they have been occasioned through the negligence of the master.

The Carron Park (63 *L. T. Rep.* 356; 6 *Asp. Mar. Law Cas.* 543; 15 *P. Div.* 203) *approved.*

THIS was an appeal by the defendants from the judgment of Mathew, J. at the trial of the action, without a jury, as a commercial cause.

By a charter-party, dated the 9th Oct. 1896, the plaintiffs agreed to let, and the defendants to hire, the steamship *Port Victor* for the term of thirty-six calendar months, the charterers to pay for the use and hire at the rate of 1025*l.* a month.

The charterers were to have the whole reach of the vessel's holds and usual places of loading, including passenger accommodation.

The captain, although appointed by the owners, was to follow the instructions of the charterers, who were to furnish him from time to time with the necessary sailing directions.

The captain was to sign bills of lading at any rate of freight the charterers or their agents might choose, without prejudice to the stipulations of the charter-party.

The charterers agreed to "indemnify the owners from any consequences which might arise from the captain following the charterers' instructions and signing bills of lading."

The charter-party contained clauses as follows:

Clause 22. The act of God . . . negligence, default, or error in judgment of the pilot, master, officers, engineers, refrigerating engineers, mariners, or other servants of the shipowners or charterers always mutually excepted. . . . In the event of breakdown of the steamer, or accident, all port charges, pilotages, and other expenses thereby occasioned to be for owners' account; and

Clause 25. Average (if any) to be regulated according to York-Antwerp Rules 1890.

By agreement between the charterers and the Government, certain Government stores were shipped on board the *Port Victor*, on a voyage from London to Jamaica, under bills of lading, signed by the captain in pursuance of the charterers' instructions, which contained no negligence clause.

While on the voyage the *Port Victor* came into collision with another vessel, and she was thereby compelled to put back to London, and certain general average losses and expenses were incurred by the owners.

The collision was caused by the negligent navigation of the *Port Victor*.

The plaintiffs applied to the Admiralty department for contribution in respect of the Government stores. The department refused to pay, upon the ground that the collision was due to the negligence of the master and crew, and the bills of lading contained no negligence clause. If the bills of lading had contained a negligence clause, the Government would have paid the contribution.

The plaintiffs brought this action against the defendants, the charterers, to recover in respect of the loss of such a contribution, under the indemnity clause in the charter-party.

The action was tried before Mathew, J. without a jury. The learned judge held, upon the authority of the decision in *The Carron Park* (63 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203), that the plaintiffs could have recovered contribution if there had been a negligence clause in the bills of lading, and that the plaintiffs were therefore entitled to be indemnified by the defendants.

The defendants appealed.

Carver, Q.C. and *Scrutton* for the appellants.—The judgment of Mathew, J. was wrong, for the shipowners are not entitled to the indemnity which they claim under the 10th clause of the charter-party. That clause does not contemplate any such consequence of signing bills of lading as an inability to recover general average contribution from the owners of cargo shipped under the bills of lading. Further, even if the bills of lading had contained a negligence clause, that clause would have made no difference as to the right of the shipowner to obtain a general average contribution from the owners of cargo. The law as to general average depends upon the law maritime, and not upon contract. Under the law as to general average a shipowner cannot claim any general average contribution in respect of any sacrifice, or expenses, which have been rendered necessary by the negligence of himself or his servants. When a loss has been caused by the negligence of the shipowner or his

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

servants, he is not entitled to any contribution, because the loss has been caused by his own fault:

Strang, Steel, and Co. v. *Scott and Co.*, 61 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601;
Schloss v. *Heriot*, 8 L. T. Rep. 246; 1 Mar. Law Cas. O. S. 335; 14 C. B. N. S. 59;
Schmidt v. *Royal Mail Steamship Company*, 45 L. J. 646, Q. B.;
Crooks v. *Allan*, 41 L. T. Rep. 800; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38;
Burton v. *English*, 49 L. T. Rep. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218;
The Ettrick, 44 L. T. Rep. 817; 4 Asp. Mar. Law Cas. 465; 6 P. Div. 127.

No clause in the contract of carriage can alter that legal position. The negligence clause in a contract of carriage only exempts the shipowner from a liability to which he would otherwise be subject under the contract of carriage. It is not intended to affect, and does not in any way affect, the general rule of law as to general average contribution by which the person who is at fault cannot recover contribution for loss caused by his fault. The decision of Sir James Hannen, in *The Carron Park* (63 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203), that, where there is a negligence clause, the shipowner can recover a general average contribution for loss caused by the negligence of his servants, was wrong, and ought to be overruled. The observations of Barnes, J., upon this point, in *The Mary Thomas* (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108, 117) were merely incidental, the question not having been argued before him. By the express terms of clause 22 of the charter-party, the expenses, in respect of which the plaintiffs now claim, are to fall upon the owners, and therefore they cannot claim contribution in respect of those expenses.

Joseph Walton, Q.C. and *Balloch* for the respondents.—The provisions of clause 10 of the charter-party clearly give the plaintiffs a right to the indemnity which they claim. It was in consequence of the master signing bills of lading, which did not contain a negligence clause, in accordance with the instructions of the charterers, that the shipowners were unable to obtain a general average contribution from the owners of cargo. From that consequence the charterers are bound by the express terms of the charter-party to indemnify the owners. If the bills of lading had contained a negligence clause, the owners would undoubtedly have been able to obtain contribution from the owners of cargo. That was so decided in *The Carron Park* (63 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203), and that case was rightly decided. A shipowner cannot obtain contribution for a sacrifice or expenses if he or his servants are in default—that is, if there has been some breach of duty. The duty of the shipowner is regulated by the contract of carriage, and if by that contract there is a mutual exception of negligence of the master and crew, the shipowner is not in default if there is such negligence:

Johnson v. *Chapman*, 19 C. B. N. S. 563;
Wright v. *Marwood*, 45 L. T. Rep. 297; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div. 62;
Strang, Steel, and Co. v. *Scott and Co.*, 61 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601.

When there is an exception of the negligence of master and crew, that negligence becomes a risk common to ship and cargo, and for loss or expenses occasioned by that common risk and made or incurred for the common interest the shipowner is entitled to contribution. The words at the end of clause 22 of the charter-party have no application to a general average sacrifice.

Carver, Q.C. replied.

Cur. adv. vult.

July 18.—The following judgments were read:—

SMITH, L.J.—This is an action by the owners of the steamship *Port Victor* against the charterers thereof upon an indemnity clause contained in the charter-party whereby the defendants agreed with the plaintiffs to indemnify them "from any consequences that might arise from the captain following the charterers' instructions and signing bills of lading." I agree with my brother Mathew that the scheme of the charter-party is that, while the ship was to be employed as a general ship, the owners were to be in the same position as if the goods put on board were the charterers' goods. By this charter-party it was provided that negligence or default of the master, officers, mariners, and other servants of the shipowners or charterers was to be always mutually excepted. The captain, following the directions of the charterers, signed bills of lading for certain Government stores shipped on board the *Port Victor* by the Government. In these bills of lading there was no exception as to negligence or default of master, officers, mariners, and other servants of the shipowners. During the voyage covered by the charter-party and bills of lading, by reason of the negligence of the master of the plaintiffs' ship, it came into collision with another vessel, and in consequence thereof it is not disputed that general average expenses were incurred in putting back to London, in payment of tug, pilot, and port dues, of wages, and victualling the crew, and of other matters. The plaintiffs thereupon demanded contribution for these general average expenses from the shippers of the Government stores, which was refused upon the ground that these expenses had arisen owing to the negligence of the plaintiffs' master, and it is not denied that, if the general average expenses were owing to such negligence, as the bills of lading contained no exception as to this negligence, the cargo owners—that is, the shippers of the Government stores—would not be liable to make general average contribution to the plaintiffs. Lord Watson, in *Strang, Steel, and Co.* v. *Scott and Co.* (61 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601), sums up the position as follows. He says: "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved. . . . In any question with them he is a wrongdoer. . . . He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act." The allegation of the plaintiffs, the shipowners, is that, if there had been inserted in the bills of lading an exception as to negligence of the master, which usually is the case, there would then, as between themselves and the cargo owners

have been no negligence or default of the master, for this would have then been excepted. Mr. Carver for the defendants, on the other hand, asserts that the introduction of such an exception into the bills of lading would have made no difference whatever, for he says that general average is not the creature of contract. In this I agree, for the foundation of a general average claim is ordinarily, not that of contract, but is founded upon a loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo in the time of peril, and which must be borne proportionately by all who are interested: (see per Lawrence, J. in *Birkley* v. *Presgrave* (1 East, 220, 228). Brett, M.R., in *Burton* v. *English* (49 L. T. Rep. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218, 221), says that the right to contribution comes "from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved." But, although general average is not the creature of contract, this does not settle the question in the present case, for what the contract of carriage is becomes an important factor when considering, not whether a general average claim for contribution has arisen, but in considering, assuming that such a claim has arisen, whether it can be taken away by the cargo owner showing that, as between him and the shipowner, the latter, to use Lord Watson's words, has been a wrongdoer. To create the shipowner a wrongdoer as regards the cargo owner there must be the breach of some duty, and if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence—in other words, that as between the two the negligence of the master shall be always excepted—it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all.

This appeal raises the question whether *The Carron Park* (63 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203), decided by Sir James Hannen in the year 1890, is good law. That very learned judge says: "The claim for contribution for general average cannot be maintained when it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it." Having cited Lord Watson's judgment in *Strang, Steel, and Co.* v. *Scott and Co.* (61 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601), Sir James Hannen proceeds: "Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract that the shipowner shall not be responsible for the negligence of his servants in the events which have happened." This decision of Sir James Hannen has been acted upon in practice in this country ever since it was given, and we are asked now to overrule it. It was expressly approved of by Barnes, J. in *The Mary Thomas* (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108, 117), and my brother Mathew does not doubt its accuracy in his judgment now appealed from, and in my opinion it correctly followed out that in the Privy Council delivered by Lord Watson in *Strang* v. *Scott* (*ubi sup.*). I believe *The Carron Park* (*ubi sup.*) is in accord with the law of England relating to general average in this country. It is said that *The Carron Park* is not in accord with what has been said in *Schmidt* v. *Royal Mail Steamship Company* (45 L. J. 646, Q. B.) and *Crooks* v. *Allan* (41 L. T. Rep. 800; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38, 40), cited by Bowen, L.J. in *Burton* v. *English* (49 L. T. Rep. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218, 222)—viz.: "The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average." When read, it will be seen that these cases do not deal with the question whether, where a general average expenditure has been incurred, the right to contribute thereto can be taken away by showing that the party incurring the expenditure was a wrongdoer as regards the person called upon to contribute. Whether he be such a wrongdoer must, as it seems to me, depend upon the contract which existed between the parties. This is not, as before stated, a case in which the question is whether a general average claim has arisen, for that in this case is not disputed, but the question is whether the shipowner has been a wrongdoer to the cargo owner. The shipowner says to the cargo owner: "A general average loss has occurred to which you must contribute, and you cannot show that I have been guilty of negligence so as to absolve you from contributing thereto, for by express contract between us negligence is excepted." That the contract may at times be looked to appears from what Willes, J. said in *Johnson* v. *Chapman* (19 C. B. N. S. 563, 583), when the question arose whether the owner of a deck cargo was entitled to claim general average in respect of such cargo jettisoned, and it was held that he was, for "when it is established," said Willes, J., "that the deck cargo was lawfully there by the contract of the parties it becomes subject to the rule of general average." Lord Watson, as will be seen, deals with the effect an exception as to negligence in a bill of lading may have upon a general average claim in *Strang* v. *Scott* (*ubi sup.*). In the present case it is clear that the plaintiffs have been unable to obtain a general average contribution from the shippers of the Government stores by reason of no clause excepting negligence having been inserted in the bills of lading, and in my judgment the charterers are therefore liable to the plaintiffs under the indemnity clause in the charter now sued on, by reason of bills of lading having been signed without the exception of negligence being contained therein. As to the second point—viz., as to the effect of the clause at the end of par. 22 of the charter-party—I have nothing to add to what my brother Mathew has said thereon, except to say that I agree with him. In my judgment, for the reasons given above, the appeal must be dismissed.

WILLIAMS, L.J.—In this case the charterers have agreed to give the shipowners an indemnity against any consequences that may arise from the captain following the charterers' instructions and signing bills of lading. The question is whether it is a consequence of the captain's signing the

bills of lading, which in fact he did sign, that the shipowners have lost a right of general average contribution which they would otherwise have had against the owners of part of the cargo shipped. The peril, in respect of which the expenses were incurred by the ship which form the basis of the claim for general average contribution, was a peril incurred by the negligence of the officers and crew of the ship, who under the charter-party continued to be the servants of the shipowners and in possession of the ship on their behalf. The charterers had nothing to do with the navigation of the ship. The cause of the peril was careless navigation, resulting in a collision with another ship. Now, it is clear law that the rule of contribution has no application in cases where the danger which led to the sacrifice was brought about by the fault of the person claiming contribution, and, if the right of contribution was thus excluded, it could not be said that the fact that the ship could make no claim for contribution was the consequence of the captain following the instructions of the charterers and signing the bills of lading, and the case would not fall within the scope of the contract of indemnity. In such circumstances, in the absence of some special contract, the right to contribution would never arise, and it would not be true to say that the exclusion of the right to contribution was due to anything but the negligence of the shipowners' servants. But it is said that, if the bill of lading had been in a different form from that in which it in fact was, and had contained, as undoubtedly is very usual, an exception of negligence of the master and crew, the right to contribution would have arisen. *The Carron Park* (63 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203) is relied on as an authority that such an exception in the contract of carriage would have this effect, and seems so to decide. Lord Hannen, speaking of such an exception in a contract of carriage, in that case a charter-party, says: "Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract" [constituted by the exception] "that the shipowner shall not be responsible for the negligence of his servants." Lord Hannen held on this ground that the shipowner was entitled to recover general average contribution, although the peril was caused by the negligence of the ship's officers. This conclusion of Lord Hannen was based upon a passage in the judgment of Lord Watson, in *Strang, Steel, and Co.* v. *Scott and Co.* (*ubi sup.*), in which he said: "The fault of the master being matter of admission, it seems clear upon authority that no contribution can be recovered by the owners of the ship unless the conditions ordinarily existing between parties standing in that relation had been varied by special contract between them and their skippers." I do not think that the judgment of Lord Watson justifies the decision in *The Carron Park* (*ubi sup.*), and the decision in *The Carron Park* does not bind this court, and it is our duty to consider whether that decision was right in principle. I think it was not. I think that the exceptions in the contract of carriage had nothing to do with the liability of the shipowner, under the law of general average contribution. The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law which, as part of the law maritime, has been incorporated in the municipal law of England. Lush, L.J., in *Schmidt* v. *Royal Mail Steamship Company* (45 L. J. 646, Q. B.), says: "The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average." This dictum of Lush, L.J. is affirmed emphatically by all the Lords Justices in *Burton* v. *English* (49 L. T. Rep. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218). It has been argued that there is no duty on the shipowner except that contained in the contract of carriage, in cases in which there is a contract of carriage, and it is said that this contract of carriage excludes the common law liability of carriers, excepting so far as it is expressly or impliedly incorporated in the contract of carriage. I agree, so far as regards the obligation to carry and deliver, the contract of carriage is exhaustive, and that the exception applies to every duty under that contract. But the rule of the Rhodian law, excluding the person through whose fault the peril arose from benefits of general average contribution, is based upon an obligation outside the contract of carriage. It is based upon that duty — which arises whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense, who did think, would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the others—to use ordinary care and skill to avoid such danger: (*Heaven* v. *Pender*, 49 L. T. Rep. 357; 11 Q. B. Div. 503). The charter-party leaves the ship in the possession of the shipowner, and its navigation in his control. This entails on the shipowner a duty to take due care in the navigation of his ship, because otherwise danger will arise for the person and property of others, both the persons and property on board his own ship and the ship he may meet and the persons and property therein, and, if he fails in the observance of this duty and peril is thereby caused to the person or goods on board his own ship, he is, in my judgment, at fault in such sense as to exclude him from the benefits of the maritime law of contribution. He has failed in his duty to his co-adventurers. He cannot claim contribution, because peril has been caused by his fault; and the fact remains that it was caused by his fault, notwithstanding the fact that it may be a term of the charter-party that the charterer shall relieve him from responsibility, so far as relates to the contract of carriage, for that fault of which he has been guilty. In my judgment, the only way in which a shipowner can be placed in a position to recover general average contribution, in a case where the peril has arisen from the negligence of the master or crew, is a case where the master and crew have ceased, by the terms of the charter-party or otherwise, to be the servants or agents of the shipowner. In my opinion, the exception in the charter-party has not this effect, and a similar exception in the bill of lading would not have had that effect. The exception in the bill of lading relieves the shipowner from all breaches of the contract of carriage brought about by the negligence of the master or crew,

but it does not relieve the shipowner from those legal duties which are by law cast upon him by reason of the fact that the ship is in the possession of his servants and navigated by him. If the peril is caused by the negligence of his servants in navigating the ship, he is a person at fault, within the meaning of the law of general average contribution, and, so long as the ship is navigated by his servants, the shipowner can no more get rid of responsibility for his legal duty by a contract which he makes with a third person than a man can get rid of a statutory, or any other positive, duty arising from his position by any contract which he makes with any person upon whom the duty is not by law cast. I think *The Carron Park* (*ubi sup.*) was wrongly decided. I think, therefore, that the plaintiffs cannot recover, and that the judgment of Mathew, J. ought to be reversed.

The case of *Johnson* v. *Chapman* (19 C. B. N. S 563) only comes to this. It was sought to say that deck cargo could not have the benefit of general average contribution. Willes, J. said there was no law making it unlawful to carry deck cargo, but that it was suggested there was a custom affecting the voyage, and that it was not necessary to consider this, as by the contract between the parties there was to be a deck cargo. It was not suggested that the carrying of the cargo made the ship unseaworthy, and Willes, J., under these circumstances, said that when you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average: (see p. 583). The case in no sense decides that the obligation of the co-adventurers on a voyage towards their fellows to take care not to bring them or their property into danger is the creature of contract, or that by contract between two of the co-adventurers the law of general average contribution can be so modified that it shall operate in favour of the guilty. Two adventurers may agree that they will make no claim on one another for general average contribution, and thus as between themselves exclude the Rhodian laws; or two may agree that, as between them, there shall be general average contribution notwithstanding the fact that the claimant by his negligence brought about the peril necessitating the sacrifice or general average act, but in such a case the right to contribution would in no sense depend on the law maritime incorporated in the municipal law of England, but will be entirely the creature and result of contract. In my judgment, the law of general average contribution cannot be applied in favour of a claimant through whose fault, whether personal or by his agents, the maritime peril was in fact brought about. Moreover, even if by special contract the right of contribution can be enforced against a party to the contract by the other party even though his fault, or negligence, or his omission, or his act of commission has brought about the peril, I do not think that such a special contract is to be found in the exception to the charter-party, or would arise from the introduction of such an exception into the bill of lading. What is the business meaning of the mutual exception in the charter-party (for the exception here is mutual) of the negligence of the master and crew? It means that shipowner and charterer must each insure their own interest against losses arising from the voyage from negligence of the master and crew. The exception does not mean that the one is to have a claim against the other, but merely that each, in respect of matters falling within the exception, is to be relieved from the liability which otherwise would fall upon him. That is, in the case of a charter-party, the liability from the letting or hiring of the use of the ship, or, in the case of a bill of lading, the liability of the carrier of goods by sea and of the consignor of such goods, but I cannot see how the exception from these liabilities can give the party excepted a claim which he would not otherwise have had, or render the party who had the benefit of the exception liable to a claim for which, but for the exception, he would not have been liable I do not think that the exception makes the charterers or cargo owners liable to the shipowners for contribution in respect of a sacrifice made to avert a danger brought about by their own negligence. The mutual exception, if it applied at all to general average contribution, would rather have the contrary effect.

ROMER, L.J.—I have come to the conclusion that this appeal should be dismissed. I can state my reasons briefly. On this charter-party, as between the shipowners and the charterers, I think that, for all purposes connected with the management of the ship during the existence of the charter, the negligence of the master and the crew was not to be treated as attributable solely to the shipowners. Between shipowners and charterers such negligence was to be "mutually excepted," so that both parties could be regarded as equally blameless in respect of it. Let me, then, first consider how the case would have stood between the parties to the charter-party if all the goods on board the vessel during a voyage had been the property of the charterers, and then by the master's negligence a condition arose necessitating a sacrifice at the expense of the shipowners for the common good, so that *primâ facie* a claim for general average contribution against the owners of the cargo had arisen. In my opinion, there would have been no answer to the claim. The charterers could not have brought themselves within the exception to general average claims which is so well known and was discussed by Lord Watson in the case cited in the judgments already delivered—*Strang, Steel, and Co.* v. *Scott and Co.* (*ubi sup.*). For the charterers could not have said as against the shipowners that the negligence of the master was to be attributed to the shipowners so as to place the latter in the position of persons who had brought about the peril necessitating the common sacrifice by their own wrong. There would have been no ground for treating the shipowners and the charterers as standing on a different footing at the moment when the common sacrifice became necessary. As between themselves they stood at that moment on a footing of equality. Neither the goods as against the ship, nor the ship as against the goods, had any claim by reason of any peril arising, or loss which might have resulted, from the master's negligence. And the position of equality is the very essence of the right to contribution. It would, in my opinion, be matter for regret if the opposite view were upheld, for the result would be that though, if loss ensued to the goods by the peril, the shipowners could not be made

responsible for that loss, yet if to avoid the peril a sacrifice is made at the expense of the ship there would be no right of contribution. These being, in my opinion, the relative rights of the shipowners and charterers in a case where the goods are the property of the latter, I will now consider how matters stand in a case where the charterers ship some third person's goods and not their own. Now, in respect of these goods, it appears to me that under this charter-party the charterers, as between themselves and the shipowers, were bound, if they wished to avoid any liability towards the shipowners, to ship the goods on the same terms as their own goods—that is to say, on the terms of the charter-party. But the charterers might by the bills of lading, as between themselves and the third person, have shipped the goods on terms different from those of the charter-party. In that case, if any loss arose to the shipowners in consequence of the contents of the bills of lading, then by the terms of the charter-party such loss would fall on the charterers. Now, considering the special circumstances of this case, it appears that the charterers did ship the Government goods on terms which (as shown by the bills of lading) materially differed from the terms of the charter-party, inasmuch as those bills of lading left the shipowners responsible for the negligence of the master, officers, and crew of the ship. The consequence has been that the shipowners have lost the right of contribution for general average which, in my opinion, they would have had as against the Government's goods if the latter had been shipped on the terms of the charter-party. That loss has, it appears to me, flowed directly from the bills of lading having been signed by the master by the directions of the charterers in a form which, as between the charterers and shipowners, should not have been adopted. That being so, I think the loss is a consequence of the signing of the bills of lading within the meaning of the charter-party, and is accordingly recoverable by the shipowners from the charterers. On these grounds I think the appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett,* and *Holman.*

Solicitors for the respondents, *Thomas Cooper* and *Co.*

Monday, July 23, 1900.

(Before SMITH and WILLIAMS, L.JJ.)

BUCKNALL BROTHERS *v.* TATEM AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Option of charterers to cancel on non-arrival of vessel by fixed date—Impossibility of arrival—Refusal to proceed—Injunction.

By a charter-party the shipowner agreed that his vessel should proceed to a named port and there load a cargo for the charterer, and it was provided that, if the vessel should not be at that port ready to load by a specified date, the charterer should be at liberty to cancel the charter-party.

The vessel was then at another port unloading, and was delayed in doing so for so long that it became impossible for her to arrive at the agreed port by the specified date. The charterer refused to extend the time for cancellation, or to promise to load the vessel if she proceeded to the agreed port, and said that if he did load, the rate of freight must be reduced, and he insisted on the vessel proceeding to the agreed port. The shipowner thereupon refused to send his vessel there.

Held, that an injunction ought not to be granted to restrain the shipowner from using the vessel for any purposes other than those of the charter-party.

De Mattos *v.* Gibson (28 *L. J.* 165, 498, *Ch.*) *and* Sevin *v.* Deslandes (30 *L. J.* 457, *Ch.*) *distinguished.*

THIS was an appeal by the plaintiffs from an order of Darling, J. at chambers, dissolving an interim injunction, which had been granted upon an *ex parte* application, by Bucknill, J.

The action was brought by the charterers of a vessel against the shipowners to obtain a declaration that the charterers were entitled to require that vessel to proceed to Bussorah, and an injunction restraining the shipowners from using the vessel for any other purposes than the purposes of the charter-party.

The charter-party was made on the 8th May 1900, and it was thereby agreed that the vessel should proceed to Bussorah and there load a a cargo for the charterers, and it was further provided that the charterers should be at liberty to cancel the charter-party if the vessel was not ready to load at Bussorah by the 18th June.

The vessel was at Delagoa Bay with a cargo, and there was so much delay in unloading that cargo that it became impossible for her to proceed and arrive at Bussorah by the 18th June.

The shipowners thereupon asked the charterers to extend the time for the exercise of their option to cancel the charter-party for a sufficient time to enable the vessel to get to Bussorah by the altered date.

The charterers refused to extend the time, and refused to say whether they would or would not load the vessel when she reached Bussorah, and they said that if they did load the vessel at Bussorah they would only do so at a lower rate of freight than that fixed by the charter-party.

The shipowners thereupon refused to send the vessel to Bussorah at all, and the charterers commenced this action.

Upon an *ex parte* application by the plaintiffs, Bucknill, J. at chambers granted an injunction restraining the defendants until the trial of the action from using the vessel for purposes other than those of the charter-party.

Upon the application of the defendants this interim injunction was subsequently dissolved by Darling, J. at chambers.

The plaintiffs appealed.

Joseph Walton, Q.C. and *Bateson* for the appellants.—Under a charter-party like this the charterers have a right to demand that the vessel shall proceed to the place agreed, although it may be impossible for the vessel to get there before the time at which the charterers will have an option to cancel the charter-party. There is an absolute obligation on the defendants to send their vessel to Bussorah, which is in no way affected by the option of the charterers to cancel:

Shubrick v. *Salmond,* 3 Burr. 1637.

In that case it was expressly so decided, and the

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

obligation in the present case is precisely the same as in that case. Those being the rights and obligations of the charterers and the shipowners, the charterers are entitled to an injunction to restrain the shipowners from using their vessel for any other purpose than that of performing their obligation under this charter-party:

De Mattos v. *Gibson*, 28 L. J. 165, 498, Ch.;
Sevin v. *Deslandes*, 30 L. J. 457, Ch.

Those cases show that the charterer is entitled to an injunction unless he has done something which disentitles him to the assistance of a court of equity. Here the plaintiffs have only insisted upon their strict rights under the charter-party; and that is not such unreasonable conduct on their part as to take away their right to an injunction—that is, as to cause the court to refuse to enforce their rights by injunction. Nothing beyond insisting upon their strict rights has been done by the charterers, and that is no ground for refusing them an injunction. The peculiarity of the rights of the charterers, arising from the cancellation clause, makes it extremely difficult to estimate damages in this case, and that is an additional ground for granting an injunction.

Rufus Isaacs, Q.C. and *J. E. Bankes* for the respondents.—The judge at chambers was quite right in holding that this was not a case in which an injunction ought to be granted. In such a case as this the charterers are properly left to their remedy in damages. There is no authority for the granting of an injunction to restrain the use of a vessel for purposes other than those of a particular charter-party, unless the charterers intend to load the vessel when she has proceeded to the agreed port. Here the charterers have refused to say whether they will load the vessel or not if she proceeds to the agreed port, and the court will not under those circumstances grant an injunction which will have the effect of compelling the vessel to go to the agreed port, where the charterers may decline to use her at all. This is not a *bonâ fide* application for an injunction in order that the charterers may secure the use of the vessel which they have selected, but an injunction is asked for in order to extort a reduced rate of freight.

Joseph Walton, Q.C. replied.

SMITH, L.J.—This is an appeal from an order of Darling, J. at chambers, dissolving an interim injunction obtained by the plaintiffs. Upon the facts of the case I have come to the conclusion that the order of Darling, J. was right. The charter-party between the plaintiffs and the defendants was made on the 7th May, and the vessel was then at Delagoa Bay. The vessel was to proceed to Bussorah, and it was provided that the charterers should be at liberty to cancel the charter-party if the vessel was not there by the 18th June. The vessel was detained at Delagoa Bay unloading cargo until it was impossible for her to get to Bussorah by the 18th June. This is not a case in which the vessel is going upon another voyage under another charter-party; it was simply impossible for her to get to Bussorah by the time stated. I agree that the shipowners were bound to send the vessel to Bussorah, and that, if they do not send her there, they must pay damages. It may perhaps be difficult to assess the damages, but they can be assessed. Naturally, under the circumstances, the shipowners asked the charterers for an extension of the time for cancellation of the charter, as it was impossible for them to perform their agreement to have the vessel at Bussorah by the 18th June. The charterers refused, and declined to say whether they would or would not load the vessel when she got to Bussorah, but said that, if they did so, the shipowners would have to accept a reduced rate of freight. It seems to me to be most unreasonable for the charterers, under those circumstances, to come to the court and ask for an injunction, as of right, to prevent the shipowners from sending their vessel upon any voyage except a voyage to Bussorah under this charter-party. I think, therefore, that Darling, J. was quite right in not letting the charterers have an interim injunction. The matter of an injunction of this kind was thoroughly thrashed out in the cases of *De Mattos* v. *Gibson* (28 L. J. 165, 498, Ch.) and *Sevin* v. *Deslandes* (30 L. J. 457, Ch), and I agree that, where there is a legal right, ordinarily the person having that right can come to a court of equity and obtain an injunction. That rule is, however, subject to this qualification, that the plaintiff must not have done anything which may disentitle him to come to a court of equity to ask for an injunction. In this case I think that the plaintiffs have so acted as to disentitle them to an injunction. This appeal therefore fails, and must be dismissed.

WILLIAMS, L.J.—I agree. The charterers come here and pretend that they want the assistance of the court to compel the defendants to send their vessel to Bussorah. They really come in a cynical frame of mind, and say that they wish to screw a reduction of the rate of freight out of the shipowners. They are not content with the ordinary claim for damages, though sufficient to satisfy any loss which they may sustain. They say that they want something more, and they ask for the assistance of the equitable jurisdiction of the court to get that something more. I think that they cannot have the assistance of the court in such a transaction. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors: for the appellants, *Ince, Colt*, and *Ince*; for the respondents, *Riddell* and *Co.*

July 10 *and Aug.* 2, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

LYLE SHIPPING COMPANY *v.* CARDIFF CORPORATION. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Demurrage — Discharge "with all despatch as customary"—Discharge into railway wagons—Delay owing to difficulty of procuring wagons—Obligation of charterers.

By a charter-party it was agreed that the vessel should be discharged "with all despatch as customary." The rule or custom at the port of discharge was that cargo should be delivered into railway wagons and in no other way.

The charterers made the usual arrangements with a railway company for the supply of wagons to receive the cargo at the ship's side. Owing to

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great pressure of work at the port when the vessel arrived there was great difficulty in procuring sufficient wagons, and the discharge of the cargo was thereby delayed for many days. The charterers were not guilty of any negligence, but did their best to procure sufficient wagons, and used the wagons with proper despatch when they had obtained them.

Held (affirming the judgment of Bigham, J.), that the obligation of the charterers was to use all reasonable diligence under the existing circumstances in procuring the discharge of the cargo within a reasonable time, and that they had fulfilled that obligation and were not liable for the delay.

THIS was an appeal by the plaintiffs from the judgment of Bigham, J. at the trial of the action, as a commercial cause, without a jury.

The plaintiffs were the owners of the vessel *Cape Wrath*, and they brought this action to recover from the defendants demurrage, or damages for detention of the ship at Cardiff, the port of discharge.

The defendants were the indorsees of a bill of lading for a cargo of Jarrah wood. The bill of lading incorporated the terms and conditions of a charter-party, which provided that the vessel was to be discharged "with all despatch as customary."

The vessel with her cargo of Jarrah wood arrived at Cardiff and was berthed on the 2nd Oct., and the discharge began on the following day.

The discharge occupied forty-five working days. The plaintiffs alleged that the discharge ought to have been completed within twenty-three days, and claimed damages for the detention at the rate of 24*l.* a day.

The usual mode of discharging at the docks at Cardiff was into railway wagons, and cargo could not be discharged upon the quay.

The defendants had, in accordance with the usual practice, made arrangements with a railway company for a supply of wagons to take the cargo from the ship's side.

There was at that time a great pressure of work at Cardiff, and in consequence there was much difficulty in procuring railway wagons.

The delay in the discharge of the cargo was owing to the insufficiency of railway wagons at the time, and was not due to any fault or delay of the defendants themselves.

The learned judge at the trial found that the defendants had done their best to procure railway wagons, and had used them with proper despatch when they had obtained them.

The action was tried before Bigham, J., without a jury, as a commercial cause.

Joseph Walton, Q.C. and *D. C. Leck* for the plaintiffs.

Rufus Isaacs, Q.C. and *Bailhache* for the defendants.

Dec. 5, 1899.—BIGHAM, J.—This action is brought by the shipowners, the owners of the *Cape Wrath*, against the defendants, who are the indorsees of a bill of lading for the cargo of the ship, in which bill of lading are incorporated the terms of the charter-party, so that the defendants are liable to the plaintiffs for the performance of the conditions of the charter-party. The action is brought to recover demurrage at the port of discharge, or damages for detention (it does not matter which), and the terms of the charter-party are that the cargo is "to be discharged with all despatch as customary." That is all that need be said about the contract. The defendants are charged with a breach of the contract, by which they are bound to discharge the vessel "with all despatch as customary." Now the facts of the case were these: The ship was loaded at Freemantle with a cargo of Jarrah wood. There was considerable delay at Freemantle, and a large claim arose at that port for demurrage. She arrived on the 2nd Oct. at Cardiff, and her discharge commenced on the 3rd. The discharge did not finish until the 23rd Nov., and it occupied a period of forty-five working days. It is alleged that that number of days was in excess of the time permitted by the charter-party, and that is the question in the case. Was it? Now, I am satisfied that the defendants were not personally guilty of any neglect at all in taking discharge of the cargo. They did their best to get the appliances which were available at the port at the time and which were customarily used for the purpose of discharging vessels, and, having done their best to get those appliances, in my opinion they made the best possible use of them, and therefore no blame of any kind can, in my opinion, be imputed to them. I have carefully considered the evidence, and particularly the letters and documents which have been read to me, and I see plainly that, when that vessel arrived, there was a great stress of work and difficulties that had to be contended with in taking discharge of this cargo, which was no doubt of an exceptional character. But I repeat that, in my opinion, the defendants did their best to deal with those difficulties, and took delivery of this cargo as quickly as it was practicably possible for them to do. It is, however, said by the counsel for the plaintiffs that the ship could have been discharged in much quicker time—in a much shorter time—if the defendants had furnished the vessel with a larger number of wagons, and that the fact that they were not able to get a larger number of wagons is a misfortune of which the defendants and not the plaintiffs must bear the brunt. Now, in order to see if that is so, it is necessary to consider the meaning of the contract, "to be discharged with all despatch as customary," and, in order to assist me to ascertain what those very few English words mean, a number of authorities have been referred to. The first in order of date is *Wright* v. *New Zealand Shipping Company* (40 L. T. Rep. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165). In that case the contract in the charter-party was simply that the charterers should deliver into lighters. The discharge of the ship was delayed by reason of insufficiency of lighters, and the charterers, in the action against them for damages for that delay or for demurrage, whichever it was, alleged that they had done their best to get the only lighters which were available at the port, and, if they had not succeeded in getting more than were necessary for the purpose or than were sufficient for the necessities of the case, they were not to be blamed for it. Now, as I understand it, the decision in that case was this: It was in accordance with the ordinary common law rule that, if a man will undertake to do a thing in a particular way, he must do it, or answer for the consequences. That seems to

be the effect of that case; but when the case is explained in later decisions it seems to me that the real effect of it is this, that all that the charterer is required to do is to do his best, and that in that case he did not do his best, and therefore he was held responsible. I say, and I repeat, that I do not think that is the meaning of the judgment of the learned judges in that case. Lord Herschell, in the case of *Hick* v. *Raymond and Reid* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22), decided in the House of Lords in 1892, in dealing with that case, says this: "The learned judge who tried the case, in summing up, told the jury that they were to take into consideration the circumstance that the port was full of vessels; but he did not directly tell them not to consider the deficiency of lighters caused by the large number of ships, so far as that state of things had been produced by the defendants themselves, nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time, nor that they were bound to allot the lighters proportionately among the vessels, or to use the lighters for them in the order in which they arrived. The jury found in favour of the defendants, and the appeal was against the judgment of the Queen's Bench Division making absolute a rule for a new trial. It will thus be seen that the circumstances which prevented the vessel from being discharged within the ordinary time were not beyond the control of the defendants. It was not shown that they could not by reasonable precautions or exertions have procured the necessary lighters else where or earlier, and so have avoided the delay which took place. Under these circumstances, I think the decision was perfectly right and a new trial properly granted." I do not think the judgment in *Wright* v. *New Zealand Shipping Company* (*ubi sup.*) proceeded upon those grounds at all, but Lord Herschell evidently thinks, when he is delivering the judgment in *Hick* v. *Raymond and Reid* (*ubi sup.*), that that judgment can only be justified on those grounds. His view of the case, in my opinion, is that there were circumstances to show, and which did show, that the defendants had not taken proper care to use them in a business-like way; and upon these grounds he thinks that the decision of the Court of Appeal directing a new trial was a right decision. Now, the next case in order of date is that of *Postlethwaite* v. *Freeland* (42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599). *Postlethwaite* v. *Freeland* is different in this sense, that the wording of the charter-party introduces the expression "as customary." In *Postlethwaite* v. *Freeland* itself, and in other cases, judges have intimated a doubt as to whether he introduction of those words in a charter-party really makes any difference. For my part, I should have thought that the introduction of the words did make a difference, and did make all the difference; but I cannot help seeing that Lord Herschell and many other judges have read the case of *Wright* v. *New Zealand Shipping Company* (*ubi sup.*) as being a case in which there would not have been any difference at all even if the words "as customary" had been introduced—that is to say, that in these charter-parties, where the undertaking is to deliver with due dispatch, the introduction of the words "as customary" adds nothing to, or takes nothing from, the obligation of the charterer. I confess, for my own part, that I think the introduction of those words is of importance. Now, what does "as customary" mean? I think it means that attention must be given to the rules of the port which affect the discharge of vessels—rules which affect the place where the vessel is to go, and rules which affect the time during which a vessel may work. I think the words, moreover, mean that the practice as to the kind of appliances to be used in the discharge must be taken into account; and I think, further, that the words mean that the practice as to the source from which those appliances are to be obtained must be taken into account. Applying those considerations to this particular case, I observe that the rule of the port at Cardiff in this particular case was that the goods should be delivered into wagons, and in no other way. The practice was to deliver into wagons, and the course of business was for the consignees to obtain those wagons from specific railway companies. That was, I find in this case, the custom of the port. So, in *Postlethwaite* v. *Freeland* (*ubi sup.*), the custom was to discharge into lighters—specific lighters, no doubt—belonging to one company. The custom was for those lighters to be warped across the bar by one rope. Those were the appliances, and, the words in *Postlethwaite* v. *Freeland* being in effect the same as the words in the present case, the House of Lords were of opinion that the charterers had performed their duty, their part of the contract under the charter-party, when they had taken diligent and proper steps to obtain the services of the appliances which were customarily used, and when, having obtained the services of those appliances, they utilised those appliances with proper and business-like despatch. I confess, for my own part, that I can see no difference in principle between *Postlethwaite* v. *Freeland* and this case. Now, there is also a Scotch case, which was decided, I think, before the case of *Postlethwaite* v. *Freeland*, to which my attention has been called. I mean the case of *Wyllie* v. *Harrison and Co.* (13 Court Sess. Cas., 4th series, 92), which was decided in 1885. I will first say a word or two about that case, because it appears to be nearly on all fours with the case before the court at present. In that case the cargo, which I think was a cargo of iron, was to be discharged as fast as the steamer could deliver after being berthed as customary. The custom of the port there was to deliver by steam cranes into wagons brought alongside, and a further custom was that no pig-iron should be put upon the quay. One of the railway companies failed to supply sufficient trucks or wagons and thereby delay was caused. It was held by the court that for such delay the charterers were not liable, and I will read one or two passages in the judgment to show the grounds on which the judgment proceeded. The Lord Justice-Clerk said, at the beginning of his judgment: "Under it (the charter-party) the cargo was to be delivered as customary—that is, subject to the custom of the port. Now, from the nature of the cargo and the plan of delivery, the goods could not be delivered except into trucks. Under the general rules regulating maritime carriage the charterer is responsible for the goods to be conveyed until loading is complete. After loading is complete, and till the vessel arrives at its desti-

nation, the owners are responsible. When the vessel has arrived, the duty of taking delivery is on the charterer. But, when delivery is to be taken at a port subject to regulations not in the power of either charterers or owners, there may occur difficulties, and there may be entailed delay for which neither party is responsible to the other. They both contracted subject to the regulations of the port of discharge." In my opinion, every word of that sentence applies to the parcular circumstances of this case. He then goes on to say: "Now, one of the rules of the port of discharge selected, Glasgow General Terminus, was that no cargo should be laid down on the quay, but that all cargo should be delivered into trucks. That being so, and there being no trucks available, or not sufficient trucks available, I think a delay occurred for which neither party was responsible to the other." Now, it is to be observed that the Lord Justice-Clerk there relies upon the words in the charter-party, "as customary." When I look at Lord Young's judgment, I cannot help seeing that his decision would have been the same if the words "as customary" had not been there; for he says: "The charter-party happens to add 'as customary,' but the addition is a superfluity, for, unless the contrary is expressed, 'as customary' is implied." That is to say, he takes the view which apparently many English judges have taken, that these words "as customary" are to be implied, and ought to have been implied in the case of *Wright* v. *New Zealand Shipping Company* (*ubi sup.*). He says further: "Delivery into trucks furnished by the railway companies and brought to the ship's side was by the custom of the place the recognised method of delivery. The trucks, we must take it, were only those of the railway companies, and all that the charterers could do was, as the sheriff says, 'to give notice that trucks were wanted, and, then if necessary, hurry and stir up the railway companies to provide them.' This the sheriff and I think they did—that is, they have committed no breach of their duty to take delivery as fast as it could be taken at that place." Now I say, having regard to these authorities, that the whole obligation in this case upon the charterer is to do his best to procure the appliances that are customarily used at this port for the purpose of discharging such vessels. I say that the appliances used were, in my opinion, the wagons of certain specified railway companies and no others. I find as a fact that they did use their best exertions to get the services of those appliances. Their contractual obligation, however, goes further than the mere obligation to obtain the appliances; it goes thus far, that, having obtained them, they must use them with proper dispatch. I find as a fact in this case that they did use them with proper dispatch, and I think, under these circumstances, on this part of the case my judgment must be for the defendants. I think I ought to add to what I have been saying that, in my opinion, the view I take of this case is amply supported by the observations of Lord Selborne in the case of *Postlethwaite* v. *Freeland* (*ubi sup.*). I do not need to read it because the observations have been already read in the course of the arguments.

Judgment for the defendants.

The plaintiffs appealed.

Joseph Walton, Q.C. and *D. C. Leck* for the appellants.—The learned judge at the trial was wrong in holding that the only obligation of the defendants was to procure the discharge within a reasonable time under the existing circumstances. There was an absolute duty upon the owners of the cargo to be prepared to receive the cargo. They were bound to have ready a sufficient supply of wagons to receive the cargo without any delay. They were bound to discharge with all dispatch with the customary appliances of the port. Wagons were not appliances of the port, but only a mode of carrying away the cargo when discharged, and failure to procure wagons cannot be any excuse for delay. Though the charterer may be bound only to use reasonable care and diligence in effecting the actual discharge of the cargo, he is absolutely bound to have ready, when the vessel arrives in port, all the appliances for discharge that can be used at the port, and all the men necessary to effect the discharge. There was no limit to the number of railway wagons which could be brought to the dock, and the cargo owners were bound to procure a sufficient number:

Wright v. *New Zealand Shipping Company*, 40 L. T. Rep. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165;
Good v. *Isaacs*, 67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555;
Tharsis Sulphur and Copper Company v. *Morel Brothers and Co.*, 65 L. T. Rep. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647.

The case of *Postlethwaite* v *Freeland* (42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599), upon which the defendants rely, was a case of the same kind as those cases where there are appliances belonging to a quay or port which have to be used for unloading, and must be taken in turn by vessels discharging. The wagons in the present case were not appliances of that kind; they could be procured from anywhere.

Rufus Isaacs, Q.C. and *Bailhache* for the respondents. — The judgment of Bigham, J. was correct. There are several authorities which are absolutely in point in favour of the respondents:

Wyllie v. *Harrison*, 13 Ct. Sess. Cas. 4th series, 92;
Good v. *Isaacs*, 67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q B. 555;
Castlegate Steamship Company v. *Dempsey*, 66 L. T. Rep. 742; 7 Asp. Mar. Law Cas. 108; (1892) 1 Q. B. 854.

Those cases show that, where no time is fixed for the discharge of a ship, the discharge must be within a reasonable time having regard to the existing circumstances, and that the cargo owner is not liable for delay if he has done his best to get the vessel discharged in the customary manner under the existing circumstances. That principle is laid down in other cases:

Postlethwaite v. *Freeland*, 42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599;
Ford v. *Cotesworth*, 23 L. T. Rep. 165; 3 Mar. Law Cas. O. S. 190, 468; L. Rep. 4 Q. B. 127; 5 Q. B. 544;
Hick v. *Raymond and Reid*, 68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22.

In the present case the customary method of discharge was into railway wagons, and the learned

judge has found as a fact that the defendants did their best to procure a sufficient supply of wagons and used the wagons when obtained with proper dispatch, and that they were not negligent. The defendants, therefore, fulfilled the obligation which was upon them to discharge in a reasonable time in the customary manner.

Joseph Walton, Q.C., in reply, referred to

Kruuse v. *Dryman and Co.*, 18 Ct. Sess. Cas., 4th series, 1110.

Cur. adv. vult.

Aug. 2.—The following judgments were read:—

SMITH, L.J.—This is an action by shipowners against the receivers of cargo under a bill of lading for demurrage or damages for detention—it matters not which it is called—of the plaintiffs' ship at Cardiff, which was the port of discharge, the allegation being that the ship was detained by the defendants in unloading for forty-five instead of twenty-three working days, and the plaintiffs claim for this the sum of 382*l.* The real question is, What is the contract the plaintiffs have with the defendants as to the discharge by them of the plaintiffs' ship? By the terms of the charter-party, which were incorporated into the bills of lading and by which the defendants are bound, the cargo was "to be discharged with all despatch as customary." It will be noticed that the plaintiffs have taken no contract from the defendants, as they might have done if they had desired to do so, that the cargo should be discharged in any fixed period of time, in which case beyond question the obligation to discharge undertaken by the cargo owners would have been absolute, and no matter what unforeseen circumstances might have arisen or how diligent they might have been in their endeavours to discharge the ship within the contracted time, if they did not do so, they would have broken their contract and must have paid damages to the shipowners for the breach. But this is not the contract which the plaintiffs have taken from the defendants, for the only contract, as before stated, is that the cargo should be "discharged with all dispatch as customary." I think it is important to state at the outset the findings of my brother Bigham, for, considering the arguments addressed to us on behalf of the appellant shipowners, the findings are very important in this case. The learned judge finds that the rule or custom of the port of Cardiff, as applicable to the plaintiffs' ship, was that the cargo was to be delivered into wagons (railway wagons) and in no other way; that the appliances customarily used at the port of Cardiff were the wagons of certain specified railway companies and no others; that the defendants were not personally guilty of any negligence at all in taking discharge of the cargo, and that they did their best to get the appliances which were available at the port at the time, and which were customarily used for the purpose of discharging vessels; that when the plaintiffs' ship arrived there was a great stress of work, and difficulties had to be contended with, and that it was a record month, and that the defendants did their best to deal with the difficulties, and took delivery of the cargo as quickly as it was practical for them to do. The findings were really not contested before us, and there is evidence to support them. Now, these being the facts as found by the learned judge, the question arises, Have the plaintiffs proved that the defendants have broken their contract with the plaintiffs that the cargo should be discharged with all dispatch as customary? That the plaintiffs have no absolute contract with the defendants that the latter will discharge the plaintiffs' ship in any given time is clear, nor have they, in my judgment, an absolute contract that the defendants will have railway wagons down upon the quay ready to take delivery of the cargo at Cardiff, which is the only way delivery can there be taken, for, as Lord Blackburn says in the House of Lords in *Postlethwaite* v. *Freeland* (42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599, 620): "If the obtaining of lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring of a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. . . . But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo." This appears to me to meet the last suggestion made in the reply of Mr. Joseph Walton that there was an absolute duty on the goods owner to prepare himself to take the cargo. In my judgment his duty is not absolute, but to do his best.

Now, the contract which the plaintiffs have in this case with the defendants for the discharge of the cargo, as will be seen from the latest authority upon the subject in the House of Lords—no fixed time being stipulated for the discharge—is that the defendants will discharge the cargo within a reasonable time under existing circumstances, or, in other words, with all due diligence having regard to all the existing circumstances, and in my opinion there is no limit as to what are existing circumstances, as argued by Mr. Joseph Walton—namely, the limit of the user of the port appliances. The case to which I allude is that of *Hick* v. *Raymond and Reid* in the House of Lords (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22), and, when what is therein laid down is understood, it will be seen that the defendants' contract is what I have said it is. In *Hick* v. *Raymond and Reid* (*ubi sup.*) the terms of the contract were that the cargo was to be delivered at the port of London, and that it was to be applied for within twenty-four hours of the ship's arrival, but no time was specified within which the discharge of the cargo was to be completed. It was held by the House of Lords, in a considered judgment, that when a bill of lading is silent as to the time within which the consignee is to discharge the cargo, his obligation is to discharge it within a reasonable time, and that he performs his obligation if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming those circumstances, so far as they involve delay, are not caused or contributed to by him. Lord Herschell, then Lord Chancellor, in his judgment in that case, in clear and unambiguous language states the law applicable to a bill of lading which contains no fixed time for unloading. I am myself inclined to think that it matters not in this case whether the words "as customary" are in the

contract or not, for if not they would be implied. The Lord Chancellor (Lord Herschell) said (at p. 28 of the Law Reports) that the bills of lading in that case contained no stipulation that the discharge should be effected in a particular number of days, "and therefore in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, Has the appellant (the shipowner) proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied." Lord Herschell then states the rival contentions of the shipowner and cargo owner, the shipowner contending that the cargo owner was liable if the discharge of the vessel was delayed beyond the time required to discharge her under ordinary circumstances, the cargo owner, on the other hand, contending that he was not liable if he only occupied the necessary time under existing circumstances. Lord Herschell then continued—and here is the principle to be applied to the present case—"The only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable dispatch under those circumstances, I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." It will be seen, Lord Herschell says, that reasonable time should depend on the circumstances which actually exist. What circumstances? Why, all the circumstances which have relation to the discharge of the cargo. The judgment of Lord Watson, though shorter, in no way differs from that of the Lord Chancellor, and Lord Ashbourne's judgment is valuable for bringing together previous decisions, especially that of Blackburn, J. in *Ford* v. *Cotesworth* (23 L. T. Rep. 165; 3 Mar. Law Cas. O. S. 190, 468; L. Rep. 4 Q. B. 127; 5 Q. B. 544), in which that learned judge held that reasonable time must be a reasonable time under the circumstances, and the judgment of Lord Selborne, when Lord Chancellor, in *Postlethwaite* v. *Freeland* (42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599, 608), which was delivered some twelve years before Lord Herschell delivered his judgment in *Hick* v. *Raymond and Reid*, above referred to. Lord Selborne said the same as Lord Herschell subsequently said, though in different language. He said: "There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charter-party, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there be no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time—that is, as was said by Blackburn, J. in *Ford* v. *Cotesworth*, 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought, I think, to be taken into consideration." These judgments of two Lord Chancellors in the House of Lords on the point I have now to consider, coupled with the facts found by the learned judge in this case, to my mind are amply sufficient to show that the judgment of Bigham, J. is correct, and cover all the points taken by Mr. Joseph Walton in argument. It appears to me simply waste of time to discuss in detail other authorities cited in argument, such as *Good and Co.* v. *Isaacs* (67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555), *Castlegate Steamship Company* v. *Dempsey* (66 L. T. Rep. 742; 7 Asp. Mar. Law Cas. 108; (1892) 1 Q. B. 854), and *Wyllie* v. *Harrison* (13 Ct. Sess. Cas. 4th series, 92), which are all consistent with the judgments in *Postlethwaite* v. *Freeland* and in *Hick* v. *Raymond and Reid* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22); and, with the exception of *Wright* v. *New Zealand Shipping Company* (40 L. T. Rep. 413; 4 Asp. Mar. Law Cas. 118; 4 Ex. Div. 165), decided in 1879, before *Postlethwaite* v. *Freeland* in the House of Lords, there is not a single case in this country in the plaintiffs' favour. As regards the case of *Wright* v. *New Zealand Shipping Company* (*ubi sup*), in my judgment it is not now law, dissented from and discussed as it has been on different occasions, and especially by Lord Blackburn in *Postlethwaite* v. *Freeland* (*ubi sup.*), and inconsistent, as it is, with the two cases in the House of Lords. If, however, the case of *Wright* v. *New Zealand Shipping Company* is to be upheld upon the ground suggested by Lord Herschell in *Hick* v. *Raymond and Reid* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22, 32)—viz., that it was not shown in that case that the cargo owner could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place—then, if that be the ground of the decision, the case is not hostile to the defendants, for the findings in this case are that they had taken all reasonable precautions and exertions and done their best as regards the discharge of the cargo, and the case has therefore no application to the present. In my opinion the present case upon the facts found is amply covered by the highest authority, and all Mr. Joseph Walton's points are equally covered. This appeal must be dismissed.

WILLIAMS, L.J.—I agree. The learned judge has found such facts in this case as to put the charterers out of court, whether or not one treats *Wright* v. *New Zealand Shipping Company* (*ubi sup.*), and the law as laid down by Bramwell, Cotton, and Thesiger, L.JJ., as overruled by the House of Lords and the judgments in the House of Lords to which my brethren have referred. I think I should have arrived at the conclusion in

fact in this case, taking all the evidence as to the practice of the port of Cardiff, that the defendants took upon themselves to supply all the appliances ordinarily required for the discharge of a ship in that port, including, therefore, trucks. I see nothing in the evidence to show that the discharging at Cardiff was to be into appliances to be provided or determined by the port. It is true that the discharge was to be into railway trucks, but there is nothing to show that the defendants might not have provided trucks from any source they chose and used the railway to introduce their trucks on the quay to take discharge, or that the railway was blocked. But for the finding of the learned judge, I should have thought there was an obligation on the defendants to provide the trucks and have them ready, and that this obligation was not affected by the fact that no time was fixed by contract for taking delivery.

ROMER, L.J.—The first question we have to consider is as to the meaning of the not uncommon provision in a charter-party as to the ship being discharged "with all despatch as customary." I think it is now settled that such a provision means that the discharge shall take place with all reasonable despatch, and that in considering what is reasonable you must have regard, not to a hypothetical state of things (that is, to what would be reasonable in an ordinary state of circumstances), but to the actual state of things at the time of the discharge, and in particular to the customs of the port of discharge. So that a charterer is not liable for delay, if he has (under the circumstances) used all reasonable diligence in procuring the discharge, and, in considering what is reasonable diligence, you must have regard (*inter alia*) to the appliances for discharge customary at the port. That principle, to my mind, is established finally by *Postlethwaite* v. *Freeland* (*ubi sup.*). Before that case some doubt existed on the subject, chiefly by reason of some observations which had been made by Bramwell and Cotton, L.JJ. in *Wright* v. *New Zealand Shipping Company* (*ubi sup.*), and which have been dissented from by Lord Herschell. But that the principle I have mentioned was established by *Postlethwaite* v. *Freeland* (*ubi sup.*) is, I think, clear from the addresses of the noble Lords in that case and especially from the observations of Lord Selborne and of Lord Blackburn, and in particular the remarks of Lord Blackburn as to the distinction between the obligation of loading and the obligation of discharging the ship. This view of *Postlethwaite* v. *Freeland* (*ubi sup.*) has been generally adopted, as, for example, by the judges who decided *Castlegate Steamship Company* v. *Dempsey* (*ubi sup.*) in the Court of Appeal, and by those who decided *Wyllie* v. *Harrison*. I think we ought to follow *Postlethwaite* v. *Freeland* (*ubi sup.*) in this case, for I do not think this case can be distinguished in principle, having regard to Bigham, J.'s findings of fact, which appear to me to be supported by the evidence. From these findings it is clear that, by the custom of the port, the discharge of the ship could only be into wagons to be supplied by the railway companies who had access to the Cardiff Docks, and, further, that, though they used all reasonable diligence, the charterers could not get wagons to receive the discharge according to the custom, so that the delay was not caused by any default on their part. It follows from the above view of the law, as settled by the House of Lords, and of the facts of this case that the present appeal must, in my opinion, be dismissed.

But, before parting with the case, I desire to say something with reference to an ingenious argument of Mr. Joseph Walton. He suggests the following view with regard to the law as laid down in *Postlethwaite* v. *Freeland* (*ubi sup.*), that, though the charterer is only bound to use reasonable care and diligence in effecting the actual discharge of the ship, he is still absolutely bound to have ready at the moment the ship arrives in port all the appliances for discharge, such as lighters, that can be used at the port, and all the men necessary to effect the discharge. I cannot find any judgment supporting such a view of the law, or drawing a distinction between the duty of a charterer in regard to circumstances up to the time the discharge begins and his duty in respect to the actual discharge after it has commenced. It does not appear to me reasonable to make such a distinction. To use an example, I cannot see on principle why a charterer should not be liable if he uses reasonable care and diligence in keeping his men to work after the discharge has begun, and yet should be liable for not getting his men together ready for discharge though he has used all reasonable care and diligence to procure them. Such a distinction appears to me an unjustifiable refinement of the law as laid down in *Postlethwaite* v. *Freeland* (*ubi sup.*), and one not supported by any observation of any of the noble Lords who decided that case, or by any clear expression of opinion of any judge in any other case.

Appeal dismissed.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondents, *Riddell, Vaizey,* and *Smith,* for *Wheatley,* Cardiff.

Aug. 3 *and* 4, 1900.

(Before the LORD CHANCELLOR (Halsbury), SMITH and WILLIAMS, L.JJ.)

FORRESTT AND SON LIMITED *v.* ARAMAYO. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Contract—Contract to make and deliver chattel by certain date—Buyer to provide ship to receive—Concurrent obligations—Delay in making chattel—Obligation of buyer to provide ship.

The plaintiffs agreed to construct and deliver, f.o.b. at the port of London, for the defendants a steam launch by a fixed date. The vessel on board of which the launch was to be delivered was to be found by the defendants. The launch was not in fact ready to be delivered until three months after the agreed date, but the defendants did not during that time notify to the plaintiffs that there was any vessel at the port of London on board of which they required the launch to be delivered.

Held (affirming the judgment of Bucknill, J.), that, as the defendants were not ready and willing to take delivery before the plaintiffs were ready and willing to deliver, the defendants were not entitled to deduct from the price the agreed damages for delay in delivery.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

THIS was an appeal by the defendants from the judgment of Bucknill, J. at the trial of the action without a jury.

The plaintiffs brought this action to recover from the defendants the sum of 976*l.*, being the balance of the contract price and extras in respect of the construction of a steam launch.

By a contract, dated the 7th Sept. 1898, between the plaintiffs and the defendants it was agreed that the plaintiffs should construct, and deliver f.o.b. at the port of London, within four months, a steam launch which was intended for the Bolivian Government.

It was agreed that for any delay in delivery of the launch the defendants should be at liberty to deduct from the price, as liquidated damages, the sum of 5*l.* a day.

The vessel on board of which the launch was to be delivered at the port of London was to be found by the defendants.

The launch was not in fact completed and ready for delivery, and was not delivered, until April 1899.

On the 12th Dec. 1898 the defendants wrote saying that they wished the launch to be shipped by a steamer leaving Liverpool on the 29th Dec. and Hamburg on the 6th Jan.; and they subsequently intimated that unless the launch could go by that steamer, there would not be a steamer upon which she could be shipped until April.

The defendants were informed that the launch would not be completed in time to be delivered on board the steamer leaving on the 29th Dec.

In March the defendants wrote saying they would require the launch to be delivered on board the steamer sailing from London on the 17th April.

There was no vessel sailing from the port of London, upon which the launch could have been delivered by the plaintiffs, except the one sailing upon the 17th April. The defendants did not name any vessel to the plaintiffs, except that which sailed from Liverpool on the 29th Dec., before the one which sailed from London on the 17th April, upon which the launch was in fact delivered.

The plaintiffs claimed to be paid a sum of 976*l.* for the balance of the contract price and for extras. The defendants claimed to deduct the sum of 500*l.* for one hundred days delay in delivering the launch, and paid the balance of 476*l.* into court.

The action was tried before Bucknill, J. without a jury.

T. Terrell, Q.C. and *H. Tindal Atkinson* for the plaintiffs.

A. T. Lawrence, Q.C. and *C. C. Scott* for the defendants.

Jan. 16.—BUCKNILL, J.—I do not propose to give a long judgment, and it will be understood that I purposely omit to state fully that which the pleadings set out in the case because substantially the question here is whether the defendants, Messrs. Avelino Aramayo and Co., are entitled to deduct from the sum, which would otherwise be agreed as owing by them to the plaintiffs, for the reason that the plaintiffs were in default, and were alone in default, in the delivery of this launch. Putting the story quite shortly, it is this: A launch was to be built by Messrs. Forrestt and Son Limited, the plaintiffs, for a certain specified sum, I think 2650*l.*, to which has to be added certain extras amounting to 117*l.* 16*s.*, making the amount payable to them in the event of their having performed their contract 2767*l.* 16*s.*, of which a sum of 1791*l.* has been paid on account, leaving a balance claimed of 976*l.* 16*s.* In order to be entitled to defend this action, 476*l.* 16*s.* was paid into court, and the question remains in dispute whether the defendants are entitled to be credited with 500*l.* by way of liquidated damages, and therefore have paid sufficient. In one event they would be entitled, of course, to my judgment, and in the other event they would not. Now, let me first of all state as clearly as I can that which is manifest—that is to say, that this launch in fact was not ready to leave Wyvenhoe, where Messrs. Forrestt carry on their business, until April 1899, and she was only finished in just sufficient time for her to be taken round to London and put by them on board a ship provided by the defendants, which sailed on the 17th April. That is clear, and I find that as a fact, and I need therefore say no more about that part of the case, except that such delay does not appear to me to have been the fault of Messrs. Forrestt and Son, but through some difficulty and trouble which they had with some contractors; and for some reason or another it is a fact that the launch was not completed until the month of April. I have not got the contract before me for the moment, but I am stating the effect of it from memory. The contract was that this launch was to be made, equipped, tried, completed, and delivered f.o.b. in the port of London. That is clearly all that had to be done by the plaintiffs; all that was their duty. The defendants' duty was to provide a ship on which this launch could be delivered f.o.b., and to pay the amount which they had contracted to pay for it. Now, it is a fact, and I find it to be a fact, that no available ship was found by, or could have been found by, the defendants to take this launch except a vessel which left Liverpool on or about the 29th Dec. 1898, and left Hamburg on the 6th of the following January. There was no available ship between that ship and the vessel which was to have left London on or about the 12th April, but which in point of fact did not leave until some week or ten days later. If this launch had in point of fact been completed, ready to be delivered free on board, there was no means by which the defendants could themselves have taken such delivery as was contemplated between the parties. How did it arise? It arose in this way: On the 12th Dec. 1898 the defendants, by their manager, wrote to Sir Edward Reed, whose position was that he was the defendants' agent in the matter to look after the building of this launch, and, in a certain event, which has not taken place, an arbitrator to say between the parties what was to be paid by the plaintiffs to the defendants, or to deduct from the contract price in a certain event. That was not done; he was the person who might have been called upon to do it if the parties had chosen to go to him instead of coming here. That letter was as follows: "We are in receipt of yours of the 9th inst., and in reply beg to point out that this boat appears to be very far behind, and we must ask you to be continually 'at' the builders and engineers so as to keep them up to their

time. We wish this boat to be shipped by the steamer leaving Liverpool on the 29th Dec. and Hamburg on the 6th Jan. next, and if this is not done we fear there will be considerable delay. The name of this boat is to be *Alonzo*." It is only necessary to make this observation on that letter, that there is nothing to show that the defendants were aware at that time that the plaintiffs could not complete the boat up to time. That letter is answered by Sir Edward Reed on the 13th Dec.: "I am obliged by your favour of yesterday. I do not regard this launch as 'very far behind,' although the contractors have experienced great difficulty in getting quick delivery of materials, especially in the engine work, and the very wet weather has somewhat retarded the hull work. I have put exceptional pressure on them (both shipbuilders and engineers) to keep to time. Am continuing the pressure, and will do so to the end. But they will most certainly not be able to finish the work in time for the steamer you name, to do which would mean that the boat must be furnished, tried, and finally completed in nearly a fortnight less than the contract time, which I regard as an impossibility. Working continuously day and night up to Christmas would not accomplish this, and at Christmas time the men will not work for 'love or money.' I note that the boat is to be named *Alonzo*." Then, on the 14th, a letter came from the defendants to Sir Edward Reed: "We are favoured by yours of the 13th, contents of which are noted. In ours of the 12th we advised you that the boat by which we required the launch shipped left Hamburg on the 6th Jan. By Messrs. Forrestt and Son's contract they are to have the launch finished and delivered in the port of London four months from the date of signing contract—viz., the 7th Sept.—therefore the boat should be delivered in London on the 7th Jan. entirely finished, trial trip and all inspection and so on over. We therefore do not see that we are asking them to finish in a fortnight less than contract time. The shipping company advise us that unless the launch can go by the boat mentioned, there will be no opportunity of shipping her until April on account of the boats sailing up to that time not having sufficient deck space; this to us is a serious matter." On the 15th Dec. Sir Edward Reed writes again in reply: "I had not overlooked the possible alternative of shipping the launch at Hamburg on the 6th Jan., but, in view of the immense difficulties of transport by rail and otherwise during the Christmas season (which I think you will appreciate), I regarded and still regard her completion before Christmas as essential to her shipment either from Liverpool on the 29th inst. or from Hamburg on the 6th Jan., and I do not think my estimate of a shortening of the contract time by 'nearly a fortnight' an exaggerated one in either case in view of the Christmas week difficulties." I am quite clear Sir Edward Reed did not make a mistake when he used the expression "a fortnight earlier than the contract time" in his first letter, because he explains it in his subsequent letter as meaning that if the boat were required by the defendants to be put on board at Liverpool on the 29th Dec. or to be put on board at Hamburg on the 6th Jan. or thereabouts, it would mean—looking at the difficulties of transport and the slowness in expedition in this country when you put a thing on a railway, and the uncertainty of its arriving at its destination—that they, the plaintiffs, in order to catch the boat at Liverpool or at Hamburg would have to complete, equip, and try the launch about a fortnight before the contract time. So it is quite clear, in my view, that Sir Edward Reed made no mistake whatever. Those letters were communicated by Sir Edward Reed to the plaintiffs. The next important letter is that of the 10th March 1899 from the defendants to Sir Edward Reed. I need not read it all. It says: "On the 8th Feb. we wrote you inquiring whether the launch would be ready for shipment by the 12th April, and in that letter we endeavoured to impress upon you the absolute necessity of having thoroughly reliable information upon this point, and your reply of the same date was most complete, as you went so far as to add at the end of your letter, 'In fact some weeks before that date.' On the strength of this reply we engaged freights, and have consequently incurred liability of 650*l.* or 700*l.*, for which we must hold someone responsible." I read that letter to show when it was that the defendants made arrangements for the ship on which the launch was in point of fact put. Those are the only letters to which it is necessary for me to draw attention on the question which I have to decide. I find as a fact—as already stated—that this launch was not completed under the contract until about the middle of April. I find as a fact that the defendants decided on or about the 12th Dec. that this boat should be delivered at either Liverpool or Hamburg, and that it was so understood by Sir Edward Reed, and it was so understood by the makers; and I find as a fact that, whether the boat had been completed up to contract time or not, there was no ship on board of which the defendants could by any possibility have taken delivery except the ship indicated in the letter which I have just read, dated the 10th March. That being so, the next question I have to consider is that of damages. It is said that the defendants are entitled, notwithstanding these facts, to a deduction of this 500*l.* by way of liquidated damages. Let me say what I find about these damages. I hold them, on the language of the contract, to be liquidated damages and not penalties, following the cases which have been cited to me. I hold as a matter of law, on the facts which I have found (seeing that the defendants indicated before the time arrived for completion of the contract—*i.e.*, before the 7th Jan.—that they had no ship on board of which they could take the launch after the 6th Jan. at Hamburg, and that the plaintiffs were clearly not bound so to deliver, because they were bound to deliver not a day before the 7th Jan., and then not at Hamburg, but in the port of London) that the defendants are not entitled to deduct anything by way of liquidated damages here. The law with regard to liquidated damages is, as I understand it, quite clear: If the parties agree that in a certain event, that is to say, in the event of a default by one, the other shall receive something by way of liquidated damages so as to save the trouble of the parties thereafter ascertaining what those damages are, the matter is then as clear as it can be. If it is not by way of penalty, and is by way of liquidated damages, the person in default who has caused damage to the other shall pay to the other a

certain sum which they themselves have fixed and agreed upon. I do not, however, assent to the proposition that when two persons have to do something, one person to deliver and another to accept, and the person whose duty it is to accept fails in the performance of that duty and is not in a position to accept, and so states to the other side that he is not in a position to accept, he is entitled, simply because the other has not been in a position to deliver, to any damages, whether liquidated or not. Here, seeing that in my opinion the defendants were themselves not in a position to accept, except on the 6th Jan., when the plaintiffs were not bound to deliver, and seeing that the time when they were next in a position to accept was on the 12th April, I find there was not a performance by them on their part, and that they therefore cannot claim liquidated damages, and there must be judgment for the plaintiffs for the amount claimed.

Judgment for the plaintiffs.

The defendants appealed.

A. T. Lawrence, Q.C. and *C. C. Scott* for the appellants.—The defendants were entitled to deduct from the price the agreed damages for delay in the completion of the launch. The defendants were not, and could not have been, ready to deliver the launch before the time at which they did in fact deliver it, and therefore it was unnecessary for the defendants to name any vessel on board of which the launch should be delivered earlier than the vessel in April which they did name.

T. Terrell, Q.C. and *H. Tindal Atkinson* for the respondents.—It was part of the obligation of the defendants to provide a vessel at the port of London to take delivery, and to notify to the plaintiffs that they had done so. The defendants cannot recover damages from the plaintiffs for delay in delivery unless they prove that they were always ready and willing to take delivery. There were concurrent obligations to deliver and to be ready to take delivery, and neither party can recover damages for breach of his obligation by the other party unless he was ready and willing to perform his part:

Morton v. *Lamb*, 7 T. R. 125; 4 R. R. 395;
Goodisson v. *Nunn*, 4 T. R. 761.

The defendants never had a vessel ready to take delivery at the port of London until April, and therefore they cannot claim damages for delay before that time.

A. T. Lawrence, Q.C. replied.

The LORD CHANCELLOR (Halsbury).—I am of opinion that the judgment of Bucknill, J. was right. The sole point which I intend to decide upon this appeal is that whenever there are concurrent obligations the party who seeks to recover against the other must show that he has always been ready and willing to perform the obligation upon him. It is immaterial whether the obligation is express or is implied; *expressio eorum quæ tacite nisunt nihil operatur*. In a contract for the sale or manufacture of a chattel, the one party must be ready and willing to deliver, and the other to accept delivery. The difference between the two acts is quite immaterial. The one party in this case is bound to build the launch, and the other to accept it when built; the one is bound to finish the launch, and the other to provide a vessel to receive it. It is common ground that neither party has performed that obligation. The law has been well ascertained and accepted for many years upon this subject. Whichever party is the actor, and is complaining of a breach of contract, he is bound to show, as a matter of law, that he has performed all that was incident to his part of the concurrent obligations. The averment that he was always ready and willing to perform his obligation is a necessary averment. Therefore in this case each party has failed to perform his obligation. It is said that the builders of the launch were not ready in time, but the plaintiffs did not give notice that they had a vessel ready. Therefore it seems to me that neither party can bring an action against the other for breach of contract, because neither party was ready and willing to do his part of the concurrent acts. That is the only question with which we need trouble ourselves. The party who brings the action must show that he was ready and willing to perform his part of the concurrent acts. The defendants have not shown that they were ready and willing to perform their part, and therefore their appeal fails and must be dismissed.

SMITH, L.J.—I agree. The defendants are suing the plaintiffs to recover liquidated damages because the plaintiffs did not deliver the launch until many days after the agreed date. The defendants, being the actor, must, in order to recover the damages, show that they were always ready and willing to perform their part of the contract by having a vessel ready to receive the launch on board, and that they gave notice to the plaintiffs that they had such a vessel. The breach of that obligation on the part of the defendants is clear. It is, therefore, clear that the defendants have not performed the condition precedent necessary to entitle them to recover liquidated damages under the contract. The defendants contend that they were excused from performing that obligation because they knew that the plaintiffs were not ready, and could not be ready by the appointed date; but the plaintiffs say, on the other hand, that they were excused from being ready by the agreed date because the defendants would not then be ready to receive the launch. There were conditions to be performed on either side, and, if excused, they were excused on both sides, and the defendants cannot rely on those conditions to support their claim. Therefore the defendants cannot recover, and this appeal must be dismissed.

WILLIAMS, L.J.—I entirely agree. It is plain that under this contract there was an obligation upon the defendants to name a vessel upon which they were prepared to take delivery of the launch, on the 7th Jan., in London, and it is also plain that before they can claim these damages they must show that they were ready and willing to take delivery, and that they gave notice to the plaintiffs of the name of the vessel. It is now admitted that in point of fact the defendants did not give such notice, and did not name any vessel which would be ready to take delivery, f.o.b., in London on the 7th Jan. On the contrary, the defendants gave notice to the plaintiffs that they would not be ready to take delivery on the 7th Jan. in London, because they said that they must have delivery in Liverpool or Hamburg,

and, if they could not have delivery in one of those places, they could not take delivery until April. The defendants cannot deny their obligation to perform the condition precedent, and cannot say that they were ready and willing to perform the concurrent condition, but they say that they were excused because by their conduct the plaintiffs informed them that it would be useless. In the first place it is not pretended that the plaintiffs gave any such notice in words, or even by any act, such as may be in a case where the chattel to be delivered is sold to someone else. But it is said that there was such notice because the defendants were aware of the fact that the plaintiffs could not be ready in time. That does not seem to me to amount to a waiver of the condition that notice of a vessel should be given. It is plain that in this case it did not in the circumstances amount to any such waiver. It therefore seems to me that the onus was on the defendants to give notice that they were able to take delivery on a vessel in London on the 7th Jan., and that they did not do so. I agree, therefore, that this appeal must be dismissed.

Appeal dismissed.

Solicitors: for the appellants, *Dale, Newman,* and *Hood*; for the respondents, *G. Terrell.*

Thursday, Nov. 1, 1900.

(Before the LORD CHANCELLOR (Halsbury), SMITH, M.R., and COLLINS, L.J.)

SEA INSURANCE COMPANY *v.* CARR. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Commercial cause—Entering cause in commercial list—Discretion of judge—Appeal to Court of Appeal.

If a judge directs a cause, which is not in fact a "commercial cause," to be entered in the commercial list, an appeal will lie to the Court of Appeal.

THIS was an appeal by the defendant from an order of Mathew, J., directing the action to be entered in the list of commercial causes.

The plaintiffs brought this action against the defendant to recover the amount which they had paid, under a policy of insurance, to the owners of certain goods which had been seized on board a vessel in the Persian Gulf by the defendant, who was in command of H.M.S. *Lapwing.*

The present plaintiffs had been sued upon the policy by the owners of these goods, and judgment had been given against them: (*Fracis, Times, and Co.* v. *Sea Insurance Company*, 8 Asp. Mar. Law Cas. 418; 3 Com. Cas. 229.)

In respect of other goods which had been seized on board the same vessel, the present defendant had been sued by the owners, and judgment had been given against him: (*Fracis, Times, and Co.* v. *Carr*, 82 L. T. Rep. 698.)

The defendant justified the seizure of the goods under a proclamation issued by the Sultan of Muscat and proceedings before a court of inquiry appointed by the Sultan.

Upon the application of the plaintiffs, Mathew, J., at chambers, made an order directing that the action should be transferred to the commercial list, that the plaintiffs should deliver points of claim in seven days, that the defendant should deliver points of defence in seven days, that the parties should exchange lists of documents in seven days and give inspection in three days afterwards, and that the action should be tried without a jury.

The Regulations made by the judges of the Queen's Bench Division for the despatch of commercial business, provide:

1. Commercial causes include causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages.

2. A separate list for summonses in commercial causes shall be kept at chambers. A separate list will also be kept for the entry of such causes for trial, but no cause shall be entered in such list which has not been dealt with by a judge charged with commercial business, upon application by either party for that purpose, or upon summons for directions or otherwise.

The defendant appealed.

Sir *R. B. Finlay* (A.-G.) and *R. B. D. Acland* for the appellant.—This action is not a "commercial cause" within the meaning of the regulations, and therefore the learned judge was wrong in ordering the action to be entered in the commercial list. The real question in this case is a serious question of international law. It is not an action "arising out of the ordinary transactions of merchants and traders," within the meaning of the regulations. The discretion of the learned judge to direct causes to be entered in the commercial list extends only to "commercial causes," and an appeal lies against an order which directs a cause, which is not a "commercial cause," to the entered in that list:

Barry v. *Peruvian Corporation*, 73 L. T. Rep. 678; (1896) 1 Q. B. 208.

The orders as to discovery, exchange of documents, &c., which are usually made in actions which have been entered in the commercial list, ought not to be made in an action like this.

Joseph Walton, Q.C., *F. W. Hollams*, and *Frank Phillips* for the respondents.—An appeal cannot be brought in a case of this kind. The question whether an action shall be put into a particular list, or be tried before a particular judge, in the Queen's Bench Division, is purely a matter of discretion. The judges have power for the convenience of business to arrange what actions shall be put into particular lists and be tried before particular judges. There can be no appeal in such matters. The rules of practice and evidence relating to actions entered in the commercial list are the same as those relating to any other actions. There is no "order," within the meaning of sect. 19 of the Judicature Act 1873, against which an appeal can be brought. This action is a "commercial cause" and the learned judge had therefore a discretion in the matter. There is no definition of "commercial cause" and it is entirely within the discretion of the judge to say what are and what are not commercial causes under these regulations, which are not orders and rules of the Supreme Court. The question whether there could be an appeal or not was not raised in *Barry* v. *Peruvian Corporation* (*ubi sup.*).

Sir *R. B. Finlay* (A.-G.) replied.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

The LORD CHANCELLOR (Halsbury).—So far as I am concerned, I am of opinion that upon the main point urged by counsel for the respondents we are bound by the decision of this court in *Barry* v. *Peruvian Corporation* (73 L. T. Rep. 678; (1896) 1 Q. B. 208). It was decided in that case that, when the judge directs an action to be entered in the list of commercial causes, it is an order, and, if it is an order, it is a matter of appeal. Although that case was not a decision upon this question, yet it was necessary to decide this question in order to decide the particular point in question in that case, and the court did in that sense decide it. I am, therefore, of opinion that the question is concluded in this court by that decision. With regard to the present case, it has not really been argued that this is a "commercial cause." It is true that there is no definition of a "commercial cause." It would not be easy to make a definition in accordance with the rules of logic, and I do not think that anyone would attempt such a definition. On the other hand, however, few business men would hesitate to say what was not a commercial cause in most instances. It seems to me that it would not be easy to find a case which is more plainly not within the examples of commercial causes given in the regulations. This case raises a grave question of international law as to whether the seizure of these goods was justified under a proclamation issued by the Sultan of Muscat. I am of opinion that the present case is not in any way a "commercial cause" within the meaning of the regulations. I do not intend to throw any kind of doubt upon the convenience and usefulness of the commercial court in cases which are properly entered in the list of commercial causes. I think that it is most useful to litigants, and I do not wish to say anything to interfere with its usefulness. I think that this order was wrong, and that this appeal must be allowed.

SMITH, M.R.—I agree, and have nothing to add.

COLLINS, L.J.—I agree. *Appeal allowed.*

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitors for the respondents, *Hollams, Sons, Coward,* and *Hawksley.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

July 20 *and Aug.* 11, 1900.

(Before BIGHAM, J.)

STEAMSHIP BALMORAL COMPANY LIMITED v. MARTEN. (a)

Marine insurance—General average and salvage expenses—Valued policy—Ship insured for value in policy—Ship of larger value at time of average statement — Proportion of general average and salvage charges to be paid by underwriters.

Where a general average loss occurs under a valued policy of marine insurance and the ship at the time the average statement is made up is of a larger value than the value stated in the policy, the underwriters who have insured the ship for the full value as stated in the policy are not bound to pay the owner the whole loss, but are bound to pay only the proportion which the value in the policy bears to the actual value on which the average statement has been made up, and the same principle applies equally in the adjusting, as between the owner and the underwriters, of a salvage claim which the owner has had to pay for salvage services.

A ship was insured for 33,000*l.* *and was valued in the policy at the same sum. During the currency of the policy a general average loss was sustained, and a salvage claim had to be paid by the owners under a salvage award for salvage services to the ship. The real value of the ship for the purpose of the salvage award and at the time of making up the average statement was taken to be, and was in fact,* 40,000*l.* *In adjusting the general average and salvage charges as between the underwriters and the owners of the ship:*

Held, that the underwriters, having insured upon the value of 33,000*l.* *as stated in the policy, were only liable under the policy to pay the owners thirty-three-fortieths as well of the salvage charges as of the general average charges, that being the proportion of the value in the policy to the actual value at the time of making up the average statement.*

ACTION tried before Bigham, J. in the Commercial Court.

The plaintiffs were a limited steamship company carrying on business at Glasgow, and the defendant was an underwriter at Lloyd's, and carried on business there.

The action was brought by the plaintiffs, as the owners of the steamship *Balmoral*, to recover a loss under a policy of marine insurance on the *Balmoral*, underwritten by the defendant; and the question in the case was how the claim for certain salvage services to the *Balmoral* should be adjusted as between the owners (the plaintiffs) and their underwriters, of whom the defendant was one, the owners contending that they were entitled to be reimbursed the total amount of salvage they had been condemned to pay in a salvage action, and the underwriters contending that as the vessel was valued in the salvage suit at 40,000*l.*, whilst she was only valued in the policies at 33,000*l.*, their proportion should be limited to thirty-three-fortieths, and that the owners should bear the remaining seven-fortieths.

The *Balmoral* was insured under her annual policies for twelve calendar months from the 5th Dec. 1898 to the 5th Dec. 1899, and the ship was, by agreement between the assured and the assurers, valued in the policy at 33,000*l.*

In June 1899, during the currency of this policy and while the ship was on a voyage from Philadelphia to London with a general cargo, salvage services were rendered to her by the *Amroth Castle*, and an action for the recovery of salvage was commenced on the 27th June by the salvors against the owners of the *Balmoral*, her cargo and freight. In this suit the owners of the *Balmoral* were condemned to pay 500*l.* for salvage services to the ship and her cargo with costs and interest (some 136*l.*).

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

In this salvage action the value of the *Balmoral* at the time the salvage services were rendered to her, was, in an affidavit filed on behalf of the owners, stated to be 40,000*l.*, and this value of 40,000*l.* was agreed upon as the value of the ship between the owners and the salvors, the amount being a compromise to save the expense of a valuation.

Also during the currency of the policy a general average loss was sustained and general average expenses were incurred.

In adjusting the general average and salvage charges (the contributory value of the ship being taken at 40,000*l.*), the average adjusters in Glasgow treated the general average and salvage charge by two different methods. They charged the whole of the salvage charges to the ship, but they treated the general average expenses (apart from the salvage charges) the other way by making the insurance for 33,000*l.* pay only thirty-three-fortieths of the total share of the general average falling on the ship; and upon objection being made by the underwriters as to the adjustment of the salvage charges, the adjusters gave as their reasons for not reducing the salvage in proportion to the insured value (1) that salvage is distinct from general average and is recoverable directly on the policy as a loss by perils of the sea: (*Aitchison* v. *Lohre*, 41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; L. Rep. 4 H. of L. 755), and that it is not a contribution; (2) that this direct claim is recoverable as particular average on a particular charge, and in the case of a valued policy it is recoverable in the proportion which the amount insured bears to the insured value (decision of Lindley, J. in *Dixon* v. *Whitworth*, 40 L. T. Rep. 718; 4 Asp. Mar. Law Cas. 327; 4 C. P. Div. 371; Gow on Marine Insurance (1896), p. 226).

The underwriters in London interested in the policies took objection to this mode of making out the statement, and said that in adjustments containing salvage charges these salvage charges were adjusted in precisely the same way as general average—namely, that the contributory value is taken as the basis of contribution and the amount of each individual policy is made to pay the proportion that attaches to it when compared with the contributory value, and though they did not dispute that salvage is distinct from general average, they did dispute that there was any existing decision that made them liable to pay salvage charges on a salved property in which they were not interested by their insurance, which contemplated only a value of 33,000*l.*, and that there was no decision that a policy must pay salvage charges according to the proportion between the amount of such policy and the value insured, where the salvage award—as in the present case—was based on a value higher than the value insured; and that, therefore, the underwriters were not liable to pay salvage charges on a value (namely, 40,000*l.*) which they did not insure.

After some correspondence on the matter the underwriters finally declined to admit liability for the whole of the ship's share of the salvage charges, and refused to give way over the point concerning the contributory value in its relation to the salvage charges, and they said that as the value of the steamer was put at 40,000*l.* for salvage services, the underwriters were only interested to the extent of thirty-three-fortieths, as she was only insured for 33,000*l.*

The present action was then brought against the defendant, the other underwriters agreeing to be bound by the result.

Mr. Danson, an average adjuster of many years' experience, gave evidence for the defendant to the effect that there was a well-known practice amongst English underwriters extending over a long time that when a vessel was insured for a sum less than the contributory value upon which general average was adjusted, or less than the amount at which the vessel was valued in a salvage action, the underwriters were only liable to pay in the proportion of the insured value to the contributory value or salvage value.

The plaintiffs contended that evidence as to the practice was not admissible, and that the practice contended for by the defendant was wrong in law and ought not to prevail.

Leck (*Joseph Walton*, Q.C. and *Denis O'Conor* with him) for the plaintiffs.

Pickford, Q.C. (*Scrutton* and *Mackinnon* with him) for the defendant.

Aug. 11.—Bigham, J. read the following judgment:—In this case the defendant and others underwrote a policy of marine insurance on the plaintiffs' ship for 33,000*l.*, the ship being valued in the policy at the same sum. While the policy was current a general average loss was sustained and a salvage claim had to be paid, and thereupon an average statement was made up. The real value of the ship at the time of the average statement was 40,000*l.*, and the rights of the different parties interested—namely, owners of ship, freight, and cargo respectively—were regulated *inter se* on that footing. The question is whether the defendant and the other underwriters must indemnify the plaintiffs against the whole of the average loss payable by them, or only against thirty-three-fortieths thereof. The question divides itself into two parts—viz., that relating to the general average loss, and that relating to the salvage claim. As to the general average loss, the evidence satisfies me that the practice in this country is for the underwriter on a valued policy to pay only the proportion which the value in the policy bears to the actual value on which the statement has been made up. Applying the rule of practice to the present case, the defendant will only be liable to make good to the plaintiffs thirty-three-fortieths of the general average loss. The plaintiffs say that this rule is inconsistent with the contract contained in the policy, because, as between themselves and the defendant, the ship is a fully insured ship. She is, they say, by agreement valued at 33,000*l.*, and she is insured for that same sum; and being fully insured they are entitled to a full indemnity against the general average claim. But I think it is the plaintiffs' contention, rather than the defendant's, which is inconsistent with the terms of the policy; for the defendant and the other underwriters have promised to be bound on the basis of the ship being worth 33,000*l.*, whereas the plaintiffs are asking them to pay on the footing of the ship being worth 40,000*l.* The plaintiffs have not satisfied me that their contention is right. The rule of practice to which I have referred has been in force for nearly a century. I am asked to disregard it. If I did so, I should unsettle the basis on

which existing policies for many millions of money have been made. I am not disposed to do this unless I see clear reasons for it. I see reasons rather the other way, and, therefore, on this part of the question I find for the defendant. As to the claim for salvage loss, the practice has been for more than a century to treat such claims precisely as claims for general average are treated. I think, therefore, the defendant must succeed on this part of the case also.

Judgment for the defendant with costs.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendant, *Waltons, Johnson, Bubb,* and *Whatton.*

Nov. 14 *and* 19, 1900.

(Before Mathew, J.)

Montgomery and Co. *v.* Indemnity Mutual Marine Assurance Company Limited. (*a*)

Marine insurance — General average — Assured owner of both ship and cargo—Insurance on cargo—Sacrifice of mast—Right of assured to recover under policy — Liability of underwriters on cargo.

The fact that the assured under a policy of marine insurance on cargo is owner of the ship as well as owner of the cargo does not prevent him from recovering under the policy from the underwriters on the cargo in respect of a general average loss, as a general average act does not depend on the consideration whether there can be any contribution or not as between the respective interests.

The Brigella (69 *L. T. Rep.* 834; 7 *Asp. Mar. Law Cas.* 403; (1893) *P.* 189) *not followed.*

A loss caused by the cutting away of the mast of a ship, which by the master's orders is cut away for the safety of the whole adventure, but which at the time it is cut away is not hopelessly lost and might be saved, is a general average sacrifice for which underwriters of a policy on cargo against perils of the seas are liable to the assured for general average contribution, and they are none the less liable because the assured are owners of both ship and cargo.

Shepherd *v.* Kottgen (37 *L. T. Rep.* 618; 3 *Asp. Mar. Law Cas.* 544; 2 *C. P. Div.* 585) *distinguished.*

Commercial cause tried before Mathew, J.

The action was brought by the plaintiffs, the owners of the ship *Airlie* and her cargo, to recover from the defendants a general average loss under a policy of marine insurance on cargo effected by the defendants; alternatively, to recover the defendants' proportion of suing and labouring expenses to avert a total loss of the insured cargo.

The policy was expressed to be on a cargo (in bags) of nitrate of soda in the ship *Airlie* at and from any ports or places on the West Coast of South America to any port of call and (or) discharge in the United Kingdom or on the continent of Europe (within certain limits) or in the United States.

The insurance was against perils of the seas and other losses of the same character, and the policy contained the ordinary sue and labour clause, and a provision that general average was payable as per foreign statement or York and Antwerp rules, if so made up.

During the voyage the ship encountered very bad weather; the main mast, which was of iron and hollow, had settled down. The mast, however, was secured and remained firm in its position.

As the ship continued to roll, the master, fearing that the mast would break, and so cause the loss of the vessel, ordered it to be cut away, and it was cut away and fell over the side.

The plaintiffs were owners of both the ship *Airlie* and her cargo, and they now sought to recover, under their policy on the cargo, a general average loss incurred by the cutting away of the mast, as they contended that the cutting away of the mast was under the circumstances, a general average sacrifice, rendered necessary by the perils of the seas insured against.

The defendants said that the cutting away of the mast was not a general average sacrifice, and gave rise to no general average claim; that, as the plaintiffs were owners of both ship and cargo, there could be no contribution to general average as between ship and cargo, and therefore the plaintiffs could not claim under the policy on cargo; and that the sue and labour clause did not apply.

Carver, Q.C. and *J. A. Hamilton* for the plaintiffs.—The first ground of defence is that the cutting away of the mast was not a general average sacrifice. With regard to that the cutting away of the mast was, under the circumstances, an act done for the safety of the whole adventure, the crew, cargo, and ship, and was therefore a general average sacrifice. The mast when cut away was not in any danger, but in the opinion of the master it was in such a condition as to endanger the whole adventure, and that is sufficient to establish the right to general average, according to the principles laid down in *Shepherd* v. *Kottgen* (37 L. T. Rep. 618; 3 Asp. Mar. Law Cas. 544; 2 C. P. Div. 578 and 585) and in *Iredale and another* v. *China Traders' Insurance Company* (81 L. T. Rep. 231; 8 Asp. Mar. Law Cas. 580; (1899) 2 Q. B. 356). In *Shepherd* v. *Kottgen* (*ubi sup.*), the mast when cut away was a wreck and was hopelessly lost, and upon that ground it was held that there was no general average sacrifice, and therefore no right to general average contribution. Here the evidence shows that the mast was not a wreck but was in fact safe, and could have been saved, and was cut away solely for the safety of the whole adventure. That being so, there is a right to a general average contribution. The second ground of defence is that the ship and cargo belonged to the same owners (the plaintiffs), and that, therefore, there can be no general average as there can be no contribution as between ship and cargo. A claim to general average does not depend on the right to contribution. The mast was sacrificed for the common good and for the safety of the whole adventure. That brings the loss within the definition given by Lawrence J. in *Birkley* v. *Presgrave* (1 East, 220, at p. 228): "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested"; and it brings it within

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

the principle in Arnould on Marine Insurance, p. 895. Underwriters in such cases are liable for their proportion of the loss falling on the interests insured by them, whether there is a joint ownership of such interests or not. That would show that the assured can recover irrespective of the joint ownership of interests. The defendants rely on the judgment of Barnes, J. in *The Brigella* (69 L. T. Rep. 834; 7 Asp. Mar. Law Cas. 403; (1893) P. 189). It is submitted that the decision in that case in so far as it touches the present point is erroneous, and also that it was not necessary for the decision of the case. The learned judge was wrong in thinking that the right to general average would depend upon the right to contribution, and that in such a case as this the right to recover would be under the sue and labour clause. The obligation of the underwriters to contribute to general average is not under the sue and labour clause, but under the law maritime (per Lord Blackburn in *Aitchison* v. *Lohre*, 41 L. T. Rep. 323, at p. 326; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755, at pp. 764-5); and in *Oppenheim* v. *Fry* (8 L. T. Rep. 385; 3 B. & S. 873, at p. 884) the same learned judge, then Blackburn, J., says: "I have a strong impression that, where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested . . . one in the hull and another in the machinery." The same principle is laid down in the two American cases—*Potter* v. *Ocean Insurance Company* (3 Sumner, 27) and *Greely* v. *Tremont Insurance Company* (9 Cushing, 415); and also in the text-books—Emerigon, c. 12, s. 39; Phillips on Insurance, ss. 1274, 1412; and Benecke on Marine Insurance, p. 473. Also the practice of average staters has always been to adjust general average irrespective of whether or not the different interests are owned by the same person.

Joseph Walton, Q.C. and *Loehnis* for the defendants.—With regard to the first point, the mast was a wreck and was valueless when it was cut away. When the master ordered it to be cut away he believed that it was a wreck, and the rigging was cut away in order to get rid of it in that way, as the master feared that it might fall on the ship and so cause the loss of the ship. That being so, the case comes within *Shepherd* v. *Kottgen* (*ubi sup.*), which shows that there was no general average sacrifice in this case. With regard to the second point, as the plaintiffs were owners of both ship and cargo, they cannot have any claim for a general average loss against the defendants, who were the underwriters on the cargo. The right to general average depends on the right to contribution as between the two interests, ship and cargo. Where these two interests are owned by the same person, as in this case, there can be no claim for general average. A general average loss is a loss incurred by one interest for the benefit of all the other interests, and that gives a right to contribution from the other interests. Consequently, where there is no right of contribution from the other interests, the loss is not a general average loss, but a particular average loss. The judgment of Barnes, J. in *The Brigella* (*ubi sup.*) is right, and concludes this case. That judgment shows that there being no contribution there is no general average loss; but if the plaintiffs "had insured all their interests in one policy, expenses properly incurred in averting a loss of those interests imperilled by a peril insured against would fall to be borne by the underwriters under the sue and labour clause": (per Barnes, J. in *The Brigella*, *ubi sup.*); but a general average loss cannot be recovered under the sue and labour clause:

Aitchison v. *Lohre* (*ubi sup.*).

They also referred to

Kidstone v. *Empire Marine Insurance Company*, 15 L. T. Rep. 12; 2 Mar. Law Cas. O. S. 468; L. Rep. 1 C. P. 535;
Xenos v. *Fox*, 19 L. T. Rep. 84; 3 Mar. Law Cas. O. S. 146; L. Rep. 3 C. P. 630;
Dickinson v. *Jardine*, 18 L. T. Rep. 717; 3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 639.

Carver, Q.C. in reply.

Cur. adv. vult.

Nov. 19.—Mathew, J. read the following judgment: This was an action on a policy on the cargo of the ship *Airlie* to recover a general average loss incurred by the cutting away of a mast. The ship sailed on the 29th March 1900 with a cargo of nitrate from Tocopilla, a port on the West Coast of South America, for Shields. On the 17th May, while in the latitude of the river Plate, the vessel encountered very bad weather with a heavy cross sea, and began to roll and lurch violently. About 9 a.m. it was noticed that the mainmast, which was an iron mast and hollow, had settled down. The rigging which had slackened was at once tightened by a process called "swiftering up," and the mast so secured remained firm in position. The ship continued to roll, and the master, after some time, fearing that the mast would break and fall on the deck and cause the loss of the vessel, thought it best to get rid of it. Accordingly the vessel was brought into position, the windward rigging was cut, and the mast fell over the side, carrying away portions of the other masts and rigging. The wreckage was promptly cut adrift. The vessel was brought home under jury rig, and reached her port of discharge in safety. The first point made by the defendants was that there was no general average sacrifice. The mast, it was said, was already hopelessly lost, and therefore was not sacrificed for the safety of crew, ship, and cargo. But I cannot agree with this contention. The mast was not in such a condition that it must have been lost, whether the rest of the adventure had been saved or not. It could not be said that the mast had no value, or that it was impossible to be saved. There was a chance of saving it, and that chance was thrown away for the safety of the whole adventure. The master would seem to have exercised his judgment reasonably, and it was not necessary that his view should be borne out by the facts when they came to be afterwards examined. It was found when the cargo was discharged that the mast had been in no greater peril than the rest of the adventure. It had broken across about 12in. from the keelson. The upper portion had crushed into the lower in telescope fashion and rested firmly and securely on the keelson. For the defendants reliance was placed on the case of *Shepherd* v. *Kottgen* (*ubi sup.*), where the mast was cut away but was held to be already lost. There it appeared that the rigging had been loosened in the storm, and that all that

was done was to anticipate by a few minutes an inevitable loss. The mast of the *Airlie* before the rigging was cut was firmly upheld, and could have stood and been saved if the master had not ordered it to be cut away. Upon the question of fact I am of opinion that was a general average sacrifice.

But the underwriters relied upon another defence which raises a question of great importance. It was said that the loss of the mast did not give rise to a general average claim because the ship and the cargo both belonged to the plaintiffs, and, as there could be no contribution in fact, there was no general average loss. The defendants relied on the case of *The Brigella* (*ubi sup.*) which was said to be a judgment in favour of their contention. It was pointed out, however, that the opinion of the learned judge was not necessary to his decision, and I was asked to hear the case argued and give my judgment upon the matter. I feel compelled to do so, though I have great reluctance to express an opinion on the matter which differs from that of Barnes, J. The duty has been probably imposed upon me in order that, if the case should go further, it nay be more readily dealt with when the different views which have been held on this subject have been formally stated. It seems to me that a general average act is not affected by the consideration whether there will be a contributor or not. The sacrifice is made for the safety of those on board as well as of the ship and cargo. But there is no contribution from those whose lives have been saved. Further, in such a a case it has never been held, or, so far as I know argued, that as between ship and freight there is no distribution of loss among the respective under writers, because both interests belong to the shipowner. It was not disputed that in the case of general average expenditure, as for instance, in the hire of a tug to extricate a ship from a dangerous position, there was a right to demand contribution from underwriters. The explanation offered on behalf of the defendants was that such expenditure was recoverable under the sue, labour, and travel clause. But that clause, it seems to me, stands clear of the insurance against general average sacrifice. Its object is explained by Lord Blackburn in *Aitchison* v. *Lohre* (*ubi sup.*). It was not intended that the clause should afford an additional remedy for what was already sufficiently protected. Again, what is sacrificed in general average ought, in my judgment, to be treated in principle as lost by the peril averted. In the present case the loss of the mast must be regarded as a loss by perils of the seas—a loss not altered in its character by reason of a voluntary act intended to prevent more disastrous consequences. Accordingly, it has been held that a loss by general average cannot be added to a loss to the full amount insured so as to cast a further liability on the underwriter: (see *Aitchison* v. *Lohre, ubi sup.*). One further consequence of the supposed rule would be that in a case of joint ownership a jettison of cargo would leave the underwriter on cargo liable for the whole amount, without any right of contribution; and the concealment of the fact that the owner of goods was also the owner of ship might be treated as an objection to the insurance on the ground of concealment of material fact. Here the policy of insurance is a policy against general average due to perils of the seas, and other losses of the same character; and if there were any question as to whether this loss was covered as general average, it is certainly a loss of the same character. Although the point has not been dealt with in any other case than that of *The Brigella* (*ubi sup.*) there is considerable authority for saying that the liability of the underwriter is not affected where insured interests are joint—*Oppenheim* v. *Fry* (*ubi sup.*), per Blackburn, J.; the two American cases, *Potter* v. *Ocean Insurance Company* (*ubi sup.*) and *Greely* v. *Tremont Insurance Company* (*ubi sup.*), and Phillips on Marine Insurance, ss. 1274 and 1412. A man of business desirous of keeping a strict account of his transactions would allocate such a loss as this to his interest in ship and cargo in proportion to their respective values. There seems no reason why his underwriter should not be placed in the same position. It was agreed that the figures should be settled between the parties when the question of principle was determined. I give judgment for the plaintiffs with costs.

Judgment for the plaintiffs for 227*l.* 17*s. with costs.*

Solicitors for the plaintiffs, *W. A. Crump* and *Son.*

Solicitors for the defendants, *Waltons, Johnson, Bubb,* and *Whatton.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 30 *and Nov.* 5, 1900.

(Before BARNES, J.)

THE HOLAR. (*a*)

Collision—Compulsory pilotage—Blyth harbour— 41 *Geo.* 3, *c. lxxxvi., s.* 6*—River Tyne Pilotage District.*

Sect. 6 *of* 41 *Geo.* 3, *c. lxxxvi., which made pilotage compulsory on foreign vessels coming in or out of the port of Newcastle-upon-Tyne, or any of the creeks or members thereof, applies to the port of Blyth, and is still unrepealed in respect of such vessels coming in or out of Blyth.*

THIS was a collision action brought by the owners of the steam-tug *George Peabody* against the Norwegian steamship *Holar*, which at the time of the collision was called the *Vadso.*

The collision occurred on the 15th Feb. 1896, at about 2 a.m., inside Blyth harbour. The *George Peabody* at the time was made fast close astern of the steamship *Volturno* and was helping to steer her as she entered the harbour. Whilst so doing the *Holar* was seen coming down the river, outward bound from Blyth to Bandholm. She passed the *Volturno* safely, but came into collision with the tug. The *Holar* at the time was in charge of a pilot of the Trinity House of Newcastle-upon-Tyne.

The case was tried before Barnes, J. on the 30th Oct., and, after hearing the evidence, he held that the collision was due to the negligence of the pilot on board the *Holar*, and reserved the question whether or not she was compulsorily in

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

charge of a duly qualified pilot for further consideration.

This question was argued before him on the 5th Nov. One of the Elder Brethren of the Trinity House of the port of Newcastle was called by the defendants, and produced the charter of James II. and other records to prove that the port of Blyth was a member of the port of Newcastle.

The plaintiffs also called a witness to prove that foreign vessels had been known to go in and out of the port of Blyth without taking a pilot.

The charter referred to was granted to the Trinity House of Newcastle by James II., and is dated the 26th July 1687 (Patent Roll, 2 James 2, part 7, No. 20). A copy of it is to be found set out in the appendix of Brand's History of Newcastle, vol. 2, p. 709.

The charter is granted to "the company, mistery, and brotherhood and society of shippmasters, pylots, and seamen within the town and port of Newcastle-upon-Tyne," and constitutes them a "body corporate by the name of Master Pylots and Seamen of the Trinity House of Newcastle-upon-Tyne," and gives them jurisdiction over "the river of Tyne, the creeks or members of the same (that is to say), Blyth, Sunderland, Hartlepoole, Whitby, and Steaths, and all other creeks and members belonging to the said port of Newcastle-upon-Tyne."

It then goes on to give the corporation power to appoint pilots, who shall have the exclusive right to pilot vessels, and provides that

All masters or owners of any strange ships which shall at any time or times hereafter resort or come into our said port of Newcastle-upon-Tyne or any the creeks or members of the same shall take in and receive on board the same pylotts. . . . And if such strangers or any of them shall refuse, denie, or neglect to take on board their said ships or vessels the said pylotts so to be appointed as aforesaid they shall nevertheless answer and pay . . . the several duties for pylotage hereinafter mentioned as if they had taken in such pylotts.

41 Geo. 3, c. lxxxvi., s. 6, is as follows:

And be it further enacted that the owners or masters of any foreign ships or vessels resorting to, or coming into, or departing from the said port of Newcastle-on-Tyne, or any of the creeks or members belonging thereto, shall, and they are hereby obliged and required respectively to receive, take on board, and employ in the piloting and conducting such their ships or vessels, such pilots to be licensed as aforesaid; and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally, nevertheless, answer and pay to the master, pilot, and seamen the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilots had been actually received and employed: Provided always that nothing in this Act contained shall extend, or be construed to extend, to oblige or compel the owners or masters of any British ships or other vessels to employ or make use of any pilot or pilots in piloting or conducting such ships or vessels, if they shall not respectively be aminded or desirous so to do.

By sect. 332 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104):

Every pilotage authority shall have power by bye-law made with the consent of Her Majesty in Council to exempt the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots, and to annex any terms or conditions to such exemptions, and to revise and extend any exemptions now existing by virtue of this Act or any other Act of Parliament, law, or charter, or by usage, upon such terms and conditions and in such manner as may appear desirable to such authority.

In 1883 a code of bye-laws relating to pilotage in the port (*inter alia*) of Blyth was made by Order in Council by virtue of the provisions of sect. 333 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

Aspinall, Q.C. (with him Dr. *Stubbs*) for the defendants.—Pilotage is compulsory on foreign vessels coming in and out of the port of Blyth. This compulsion, which had previously been contained in ancient charters, was provided for by sect. 6 of the Act 41 Geo. 3, c. lxxxvi. That section, so far as it is applicable to Blyth, has not been repealed.

Laing, Q.C. and *Balloch* for the plaintiffs.—Although pilotage was originally compulsory upon foreign vessels coming in or out of the port of Newcastle-upon-Tyne and its creeks and members, such compulsion has under the powers of the Merchant Shipping Acts been removed. In *The Johann Sverdrup* (56 L. T. Rep. 256; 6 Asp. Mar. Law Cas. 73; (1886) 12 P. Div. 43) it was held that compulsory pilotage had been abolished in the river Tyne by the Tyne Pilotage Order Confirmation Act 1865 (28 Vict. c. 44), which confirmed a provisional order which had been made. That Act transferred the powers of the Trinity House of Newcastle to the Tyne Pilotage Commissioners. The jurisdiction of the Newcastle Trinity House in regard to other places originally within its jurisdiction has also been taken away from time to time. So with regard to Blyth the new bye-laws made under the Order in Council of 1883 were meant to repeal the compulsion contained in 41 Geo. 3, c. lxxxvi. Such bye-laws contain provisions which are inconsistent with the idea of pilotage being compulsory at Blyth.

Aspinall, Q.C. in reply.—The bye-laws relied upon as relieving foreign ships from compulsory pilotage were made under the powers of sect. 333 of the Merchant Shipping Act. Had they been intended to abolish compulsory pilotage, the Order in Council would have referred to sect. 332, which is the section giving pilotage authorities power to exempt ships from compulsory pilotage, whereas it only refers to sect. 333.

Reference was also made to

The Maria (1839) 1 W. Rob. 95;
The Vesta (1882), 46 L. T. Rep. 492; 4 Asp. Mar. Law Cas. 515; 7 P. Div. 240.

BARNES, J.—In this case there was a collision between the steam-tug *George Peabody* and the steamship *Vadso* on the 15th Feb. 1896, and the question of the blame in connection with the case was tried before me lately. I held that the collision was caused by the fault or neglect of the pilot of the *Vadso*, which vessel is now called the *Holar*, and the question was reserved for consideration whether the pilot of the *Vadso* was employed by compulsion of law. If he were so employed it would mean that the defendants would not be held responsible for the collision; whereas if he were not compulsorily employed he would be treated in law as their servant, and they would be held responsible. Now, the defendants assert that the pilot was compulsorily employed

by virtue of the 6th section of 41 Geo. 3, c. lxxxvi. [His Lordship read it.] There are two matters to state in connection with that section. The first is that the *Vadso* was a foreign ship—she was a Norwegian steamship—and the second is that it has been proved that the port of Blyth, in which this accident happened, was at the time of this collision "one of the creeks or members of the port of Newcastle," within the meaning of the section to which I have referred. The plaintiffs, on the other hand, assert that pilotage is no longer compulsory in the port of Blyth, by reason of a change in the regulations affecting the port, which they contend has had the effect of abolishing compulsory pilotage in that port. The question, I think, would perhaps have been more accurately disposed of by me if I were to reserve my judgment and express it more closely and clearly, but at the same time I have formed a definite view about the point, and I do not think I should serve any useful purpose by considering the matter further. I propose to deal with it at once. The point made by the defendants may be shortly stated to be this, that there was originally by the Act of 1801 compulsory pilotage established over the Tyne and various creeks or members belonging to the port of Newcastle, and that nothing has since taken place to repeal or vary the section to which I have referred, so far as compulsory pilotage in Blyth is concerned, since the Act was passed. The case for the plaintiffs seems to be this, that what has since taken place is sufficient to repeal the section in question, so far as it relates to compulsory pilotage, and that now, therefore, pilotage is no longer compulsory. The point which is made on the part of the plaintiffs is that by virtue of sect. 333 of the Merchant Shipping Act 1854, repeated by another section in the Act of 1894, there has been a new code relating to pilotage established which has the effect of repealing sect. 6 and making pilotage no longer compulsory. There appears to be no doubt about this, that originally the port of Blyth formed part of the port of Newcastle so far as this matter of pilotage was concerned, and that from time to time in late years the Act of 1801 and the jurisdiction of the Trinity House at Newcastle-on-Tyne has been affected by taking out of that Act various ports, among others Newcastle itself, and constituting fresh authorities for the purpose of dealing with pilotage within the various ports. But that has not been done with regard to Blyth. Blyth remains as it was under the Act of 1801, unless it has been affected in the way the plaintiffs contend by the bye-laws made in 1883, pursuant to the 333rd section of the Merchant Shipping Act. There is another section which has been considered—namely, sect. 332, which gives power to pilotage authorities to make and extend exemptions from compulsory pilotage. It is to be noticed that the 333rd section, under which the bye-laws of 1833 were made, does not deal with the question of compulsory pilotage at all, but deals, among other things, with the power to alter and reduce the rates of pilotage. I think it is clear, when those bye-laws are considered, that there is nothing whatever in them which purports to deal with the rights conferred under sect. 332, although there is to a certain extent a change in the rates, for whereas under the Act of 1801 there was a difference between the rates on British and foreign ships, all are put upon the same footing by the bye-laws of 1883. Taking the matter, therefore, as it stands as affecting the port of Blyth, there is nothing but the Act of 1801 and these bye-laws, and I can find nothing in these bye-laws which in any way modifies the obligation to employ a pilot imposed upon a foreign vessel by the Act of 1801.

But Mr. Laing, for the plaintiffs, says that if the case is decided upon the same lines as the case of *The Johannes Sverdrup* (*ubi sup.*), it follows that compulsory pilotage has been abolished so far as the port of Blyth is concerned. Now, the case of *The Johannes Sverdrup* (*ubi sup.*) was a case of a vessel in the port of Newcastle, and that port—or, to use precise terms, the Tyne—has been taken out of the operation of the Act of 1801 by reason of a provisional order embodied in an Act of Parliament of 1865, which contains a complete code of regulations respecting pilotage in the river Tyne. That provisional order was made by virtue of sect. 39 of 25 & 26 Vict. c. 63, which enabled the Board of Trade, by provisional order, to, amongst other things, transfer pilotage jurisdiction and constitute new pilotage authorities, and to exempt from compulsory pilotage in any district, and so on. In 1865 there is to be found an Act of Parliament giving effect to a provisional order affecting the Tyne, which constitutes a body of commissioners for the Tyne, defines the pilotage district, transfers to the commissioners the jurisdiction vested in the Trinity House of Newcastle-on-Tyne, and provides for pilotage dues, and under sect. 16 provides that "Nothing in this order shall extend to oblige the master or owner of any vessel to employ . . . a pilot if he is not desirous so to do." It was held in the case of *The Johannes Sverdrup* (*ubi sup.*) that that provisional order contained a complete code of regulations respecting pilotage in the river Tyne, and that its provisions superseded those of 41 Geo. 3, c. lxxxvi.; and that, therefore, under sect. 16 of the schedule pilotage was not compulsory in the case of either British or foreign vessels in the Tyne. It seems to me that that case has no application to the matter before me, because it is dealing with the effect of an Act of Parliament confirming a provisional order, and is concerned solely with the effect and result of that provisional order and the Act confirming it. The present case appears to me to be entirely and totally different, because there is no provisional order, and no Act of Parliament varying the effect of the Act of 1801. There is only a set of bye-laws made by the pilotage authority still existing as far as the port of Blyth is concerned—the Trinity House of Newcastle-on-Tyne; and those bye-laws are made, and really only made, by reason of sect. 333 of the Merchant Shipping Act of 1854, now continued by the later Act of 1894. The only other points which I think it necessary to refer to are these: It is said that by the terms of the bye-laws of 1883 themselves there has been an abolition of compulsory pilotage, and Mr. Laing relied upon the latter part of the 13th clause, which says that "the pilotage dues shall be paid to the sub-commissioners or to the pilot performing such pilotage within five days after the performance thereof." He argued that as the pilotage dues are only to be paid to the sub-commissioners "after" the pilot has performed the pilotage duties they cannot possibly be paid where the

pilot has not performed the duty, and that that implies that the dues cannot be compulsorily imposed. The language is nothing more than a repetition of what is to be found in the latter part of sect. 7 of the Act of 1801, and it is impossible to construe that section as taking away the compulsion imposed by sect. 6, merely because it speaks of the pilotage dues being paid within five days after the pilotage duties have been performed. Moreover it appears to me on the evidence which has been given that there is nothing to show that there has been any custom or usage with regard to the matter. It has been said that there are cases in which foreign ships have not been asked to pay after coming in or going out of port. That does not, to my mind, affect the legal question whether it is compulsory in law or not, and the conclusion to which I have come on the reading of these Acts of Parliament, and the orders and bye-laws, is that there is nothing to be found which in any way abolishes the compulsion imposed by sect. 6 of the Act of 1801, though there is a reduction of the rates in accordance with the powers conferred by the Merchant Shipping Acts. For these reasons I must hold that the pilotage in this case was compulsory by law, and that the defendants are exonerated from responsibility.

Judgment for the defendants.

Solicitors for the plaintiffs, *Ince, Colt,* and *Ince* agents for *W. Charlton,* Blyth.

Solicitors for the defendants, *Stokes* and *Stokes.*

Monday, Nov. 5, 1900.

(Before BARNES, J.)

THE RUBY. (a)

Mortgage—Act of bankruptcy before mortgage—Merchant Shipping Act 1894, *s.* 36—*Bankruptcy Act* 1883, *ss.* 43, 44, 49.

Where a mortgage is granted on a ship after the mortgagor has committed an act of bankruptcy, in respect of which he is subsequently adjudicated a bankrupt, the mortgage is protected by sect. 49 *of the Bankruptcy Act if the mortgagee had no notice of the act of bankruptcy at the date of the mortgage, notwithstanding the fact that the ship remains in the possession of the mortgagor up to the date of the receiving order.* Lyon *v.* Weldon (1824) 2 *Bing.* 334) *followed.*

THIS was a motion on behalf of a mortgagee of a British ship for an order that he was entitled to have paid out of court to him the sum of 221*l.* 17*s.* 8*d.*, being the proceeds of the sale of the steamship *Ruby.*

The case is reported on other grounds in 78 L. T. Rep. 235 and 267; 8 Asp. Mar. Law Cas. 389 and 421; (1898) P. 52 and 59.

On the 1st Sept. 1897 the owner of the steamship *Ruby* mortgaged her to the plaintiff, and on the 2nd Sept. the mortgage was duly registered.

Shortly afterwards an action *in rem* was commenced in the Bow County Court against the owner of the *Ruby* by the owners of a skiff for damage by a collision, and on the 3rd Sept. the plaintiffs obtained judgment for 21*l.* 17*s.* 10*d.* debt and costs.

The owner of the *Ruby* having made default in payment a warrant of execution was issued, and the vessel was seized by the high bailiff of the Bow County Court.

The vessel was duly appraised and sold for 380*l.* on the 28th Oct., but the registrar of shipping at Newhaven refused to register the bill of sale except subject to the plaintiff's outstanding mortgage.

On the 23rd Nov. a receiving order was made against the mortgagor, the original owner, and the mortgagee exercised his power of sale under the mortgage.

The mortgagee having intervened in the collision action, in Jan. 1898 proceedings were taken before the President (Sir F. Jeune) (78 L. T. Rep. 267; 8 Asp. Mar. Law Cas. 389; (1898) P. 52), who ultimately set aside the sale by the mortgagee, upheld the sale by the bailiff, and ordered the proceeds to be brought into the High Court.

The mortgagee now claimed the balance of the fund in court as against the trustee in bankruptcy of the mortgagor. The act of bankruptcy on which the receiving order was made was committed on the 7th July, and it was proved that at the date of the mortgage the mortgagee had no notice of any act of bankruptcy committed by the owner of the *Ruby.*

By sect. 36 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

A registered mortgage of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor at the commencement of his bankruptcy had the ship or share in his possession, order, or disposition, or was reputed owner thereof, and the mortgage shall be preferred to any right, claim, or interest therein of the other creditors of the bankrupt or any trustee or assignee on their behalf.

By sect. 43 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52):

The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Sect. 44. The property of the bankrupt divisible amongst his creditors . . . shall comprise the following particulars: (i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge. (iii.) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

Sect. 49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoid-

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

ance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy (c) Any conveyance or assignment by the bankrupt for valuable consideration: Provided that both the following conditions are complied with—namely (1) the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and (2) the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

Laing, Q.C. for the mortgagee.—Sect. 49 is relied upon. This is not a case within sect. 44 (iii.) because at the commencement of the bankruptcy—viz., on the 7th July 1897—the bankrupt was not the apparent owner of the ship, but the real owner. Further, he could not be in possession of the ship with the consent of the mortgagee at the commencement of the bankruptcy since the mortgagee's title did not accrue until some time afterwards. Commencement of the bankruptcy means the date on which the act of bankruptcy was committed:

Lyon v. *Weldon* (1824) 2 Bing. 334.

Sect. 36 of the Merchant Shipping Act 1894 has reference only to acts of bankruptcy committed after the date of the mortgage, and refers only to properly registered mortgages. The effect of the section is to take registered mortgages out of subsect. (iii.) of sect. 44 of the Bankruptcy Act 1883.

Muir Mackenzie (*Herbert Reed*, Q.C. with him) for the trustee in bankruptcy.—The title of the trustee relates back to the act of bankruptcy, and the case does not come within sect. 36 of the Merchant Shipping Act 1894. Sect. 36 only protects a mortgagee where the act was committed after the mortgage, and not, as in the present case, before it was committed. The mortgagee, however, claims the protection of sect. 49 of the Bankruptcy Act 1883, and, that being so, if the case of *Lyon* v. *Weldon* (*ubi sup.*) is good law, the case of the trustee cannot be supported. That case has never been overruled, but has been subject to some criticism in Williams, L.J.'s book on Bankruptcy, 7th edit., p. 211.

BARNES, J.—If you cannot distinguish this case from the decision in *Lyon* v. *Weldon* (*ubi sup.*) I am bound to follow that authority. I think the money must be paid out to the mortgagee, and that there should be no costs—each party must bear their own costs.

Solicitors for the mortgagee, *J. A.* and *H. E. Fanfield.*

Solicitors for the trustee in bankruptcy, *Trinder* and *Capron.*

Nov. 5 *and* 6, 1900.

(Before BARNES, J. and TRINITY MASTERS.)

THE SANTIAGO. (a)

Salvage—Pilot—Services beyond ordinary scope of employment — Merchant Shipping Act 1894, *s.* 593.

Where a pilot in charge of a ship engaged in salving another performed services which could not reasonably be considered to come within the scope of his contract as pilot, he was held entitled to receive salvage from the owners of the salved vessel.

Akerblom *v.* Price (44 *L. T. Rep.* 837; 4 *Asp. Mar. Law Cas.* 441; 7 *Q. B. Div.* 129) *followed.*

THIS was an action originally brought by the owners, master, and crew of the steamship *Portia* for salvage services rendered to the steamship *Santiago*, her cargo and freight, in the North Sea on the 19th Oct. 1900.

The *Portia* was a steamship of 484 tons net and 773 tons gross register, and was on a voyage from Hamburg to London with a full general cargo, manned by a crew of seventeen hands all told, and carrying thirty-nine passengers.

About 7 a.m. on the 19th Oct., when about thirteen miles S.E. of Southwold lightship, she fell in with the *Santiago*, which was at anchor with her engines broken down.

The *Santiago* was a Spanish steamship of 2138 gross and 1360 tons net, and at the time was on a voyage from Bilbao to Newcastle-on Tyne with a cargo of ore, manned by a crew of thirty-six hands..

The agreed value of the ship was 13,000*l.*, of her cargo 7000*l.*, and of her freight 250*l.*

The weather at the time was a strong E.N.E. wind with a heavy sea, and the hawsers were with some difficulty made fast. Towing proceeded without event, and when inside the Shipwash the *Portia* was boarded by a pilot, Jonas Harrington.

In coming up the East Swin the plaintiffs' case was that the *Santiago* sheered badly, and on one occasion took a violent sheer and had to be turned round in order to be got on her course again.

When a little above the Nore a boat was let down by a rope to the *Santiago*, but, as it came alongside, the *Santiago* took a heavy sheer, causing the rope to slacken and foul the propeller of the *Portia*, and in consequence the boat was smashed, the engines of the *Portia* had to be stopped, and the *Santiago* overran her, causing the towing hawsers to get foul of her propeller.

At the trial leave was given to the pilot of the *Portia* to be added as a plaintiff for his alleged services in assisting to salve the *Santiago*.

The pilot also claimed extra pilotage for leading in a vessel which had not a qualified pilot on board under sect. 593 of the Merchant Shipping Act 1894.

The defendants admitted the pilot was entitled to extra pilotage, but not to salvage. It is on this question that the case is reported.

Sect. 593 of the Merchant Shipping Act 1894 is as follows:

If any boat or ship having on board a qualified pilot leads any ship which has not a qualified pilot on board

(a) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

when the last-mentioned ship cannot from particular circumstances be boarded, the pilot so leading the last-mentioned ship shall be entitled to the full pilotage rate for the distance run as if he had actually been on board and had charge of the ship.

Butler Aspinall, Q.C. and Dr. *Stubbs* for all the plaintiffs.—The pilot is entitled to something more than mere remuneration for pilotage. The *Santiago* was damaged and sheered badly, and there was great risk of her coming into collision with the *Portia*, if not other vessels. Here the services were attended with such risk that the pilot could not reasonably be expected to perform them for the ordinary pilot's fees:

Akerblom v. *Price*, 44 L. T. Rep. 837; 4 Asp. Mar. Law Cas. 441; 7 Q. B. Div. 129.

The pilot was under no contractual obligations to the defendants, and rendered services to their property which, under the circumstances, amounted to salvage. The case is not governed by sect. 593. The right to salvage depends upon benefit conferred. The defendants have had the advantage of the pilot's local knowledge and experience and ought to pay for them.

Laing, Q.C. and *Dawson Miller* for the defendants.—The pilot was bound to go on board the leading ship as pilot. He could not in any sense be called a volunteer. It is undesirable that pilots should be allowed to recover salvage:

The General Palmer (1828) 2 Hagg. 176;
The Enterprise, 2 Hagg. (note), 178.

In this case he did nothing more than he was obliged to do under his contract of pilotage. The only claim he can possibly have is for extra pilotage under sect. 593 of the Merchant Shipping Act 1894.

BARNES, J.—This is a claim for salvage made by the owners, master, and crew of the steamship *Portia*, and by a pilot who was on board of her, Mr. Jonas Harrington, for services rendered to the steamship *Santiago* off the east coast on the 19th Oct. last. The *Portia* is a screw steamship of 484 tons net and over 700 tons gross register, and she was bound from Hamburg to London with general cargo and a crew of seventeen hands all told, and thirty-nine passengers. About seven o'clock in the morning she fell in with the *Santiago* about thirteen miles to the S.E. of Southwold. The *Santiago* is a Spanish steamer of large size—that is to say, 2138 tons gross register. She was bound on a voyage from Bilbao to Newcastle-on-Tyne with a cargo of iron ore and a crew of thirty-six hands. It appears that shortly before she was found the cover of her cylinder broke and other parts of the engines were damaged, so that her engines became useless. Thereupon she was brought to an anchor, it being feared that she might go ashore. Two of her anchors—a large anchor and a kedge—were lost, but she had others, and finally she was brought up with two anchors. There she was lying at the time when she was sighted by those on board the *Portia*. The *Portia* was asked by signal to assist, and did take this vessel in tow, but there was certainly considerable difficulty in doing it, in the course of which the *Portia's* anchor fouled the anchor of the *Santiago*, and the *Portia's* anchor and chain were lost. The weather had moderated from the time when the vessel first broke down, and it does not seem to have been of any very serious force whilst one vessel was in tow of the other. There is no doubt that in the course of the towage which took place from that spot to Gravesend the *Santiago* was sheering heavily all the time, and on one occasion took such a violent sheer that it was necessary for the *Portia* to make a complete sweep round in order to get on to her course again. The pilot stated in his evidence that the sheering was such that in the passing traffic there were occasions on which the lights, which ought to be expected from his vessel, were changed; in other words, that his own vessel was forced out of position somewhat so as to show a green light to other vessels when it should show a red light. Whether that could be guarded against by prompt action on the part of the *Portia* I am not quite sure, but that is what the pilot says about it. They finally got into the Thames, and there again there was considerable difficulty, because in coming to an anchor at the Nore the rope, attached to a boat, which was being passed between the two vessels was caught and drawn by the *Portia's* propeller, and the boat was smashed up. The mate and men in the boat were in the water for some time. The *Portia* also got her propeller foul, and there was some difficulty in getting it clear. Afterwards the *Portia* left the *Santiago* at anchor in the same place and proceeded to Gravesend, and there sent a tug down to the *Santiago*. That tug took the *Santiago* to Gravesend, and is to be paid by the owners of the *Portia* the sum of 75*l*. The result of the services is that the *Santiago* was brought successfully into the port of London, a distance altogether of seventy miles. The *Portia* sustained some delay, and having on board thirty-nine passengers she was anxious to get into port. She also incurred expense by the loss of her cable and anchor, and boat, and is liable to pay 75*l*. to the tug. Now, the principal points to consider are, first of all, the values, which are as follows: *Santiago* 17,000*l*., her cargo 2000*l*., and freight 274*l*., making a total value of 19,274*l*.; *Portia* 13,000*l*., her cargo 7000*l*., and freight 250*l*., total 20,250*l*. The other matters are the position and risk from which the *Santiago* was rescued. As I have said, she was thirteen miles to the south-east of Southwold, and was lying there helpless. It was absolutely necessary she should be got into safety. At the moment she was lying securely anchored, but it was the month of October, and it was uncertain what class of weather she might meet with if she remained there. It is true she was in the traffic, but what did help her helped her effectively into the port of London. With regard to the risk to the plaintiffs, there were several occasions on which the *Portia* was in trouble in rendering these services, as I have already pointed out in my summary of the facts; and it must be remembered that the *Portia* was a vessel carrying passengers and desirous of getting rapidly into port. I think, taking all the facts into consideration, that a sum of 1000*l*. is the proper award to make in this case.

The apportionment of that gives rise to one small question, and that is with regard to the services of the pilot. He has been added as a party to this case, and is making a claim for salvage. He has, I understand, made a claim, and been paid, for leading this boat, the *Santiago*, in, under sect. 593 of the Merchant Shipping Act,

amounting to 13*l.* 9*s.* 6*d.* Whether he is entitled to make that claim or not I do not think it necessary for me to determine. He has had this money, and what I have to consider is whether he is entitled in the particular circumstances to make a claim for salvage remuneration. It is not necessary for me in this case to add anything to the judgment in *Akerblom* v. *Price* (*ubi sup.*). It is not at all desirable in general that a pilot taking charge of a vessel, even if she is in distress, coming into port, should be allowed to claim for salvage services, but that he can do so in some cases in pretty clear. I do not think either counsel has disputed this general proposition, which may be summarised from the question stated in *Akerblom* v. *Price*, and put into short form, namely, that if a pilot does render such services to a vessel in distress as no reasonable person, either owner or pilot, would consider ought to come within the scope of his contract, then there is no reason why he should not be paid some salvage reward, because he runs risk outside that which anybody has in contemplation. That does not show, at all, that in all cases where there is some risk he is to get salvage, because the circumstances may be covered by what is in contemplation; but the question comes to be this, Does he in any particular case run so much risk that he ought to receive some salvage in addition to what is considered to be pilotage reward? This is a peculiar case. The pilot was on board the towing ship and was engaged to assist her up the Thames. In doing so he had this other ship in tow, and I have asked the Elder Brethren whether they think, having regard to the facts, he ran more risk than anybody ought to consider is covered by the contract of pilotage, assuming there were one, which is not the case here—at least it is doubtful whether there is any contract. They think that to some extent the pilot did perform services entirely outside what it ought to be considered he ought to perform. I think that is pretty obvious, because it is not at all the case of a leading ship giving a guide to the other ship coming in, to which the 593rd section applies. It is a case where he is in charge of a leading ship which is fast to the other ship, and where it is shown that the leading ship is exposed to very considerable risk and danger with the traffic in the Thames—to risk of collision with that traffic. I think that having regard to the facts of this particular case the pilot is entitled to receive something beyond the money which he has been paid. I apportion the award in this way: I think the owners should receive the sum of 720*l.*, the master 80*l.*, the pilot 40*l.*, and the crew 160*l.* according to their ratings, with this qualification, that the mate and two men who performed the boat service, and who at that critical moment were nearly drowned, should receive treble shares. The claim of the owners of the *Portia* must not be enforced unless they produce the receipt for the amount of 75*l.* paid to the tug.

Solicitors for the plaintiffs, *Stokes* and *Stokes*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

Wednesday, Nov. 14, 1900.

(Before BARNES, J. and TRINITY MASTERS.)

THE ROMANCE. (*a*)

Salvage—Tug towing vessel up to her anchor—Lights—Regulations for Preventing Collisions at Sea 1897—*Preliminary definition—Arts.* 3, 5, 11.

Tugs towing a vessel, which has her anchor on the ground, up to her anchor are steam vessels towing another vessel within the meaning of art. 3 *of the Regulations for Preventing Collisions at Sea, and must carry their side lights and their towing lights.*

Semble, *a vessel, which is held by her anchor, in the course of being towed up to it by steam tugs, is not a vessel being towed within the meaning of art.* 5 *of the Regulations for Preventing Collisions at Sea, but is a vessel at anchor, and must exhibit only her anchor light.*

THIS was a salvage action arising out of services rendered by the plaintiff's steam-tug *Knight of the Cross* to the defendants' barque *Romance*, in the river Mersey, on the 13th Aug. 1900.

The facts of the case were as follows:—

The *Romance* was a barque of 596 tons, belonging to the port of Fredrikstad, in Norway, and at the time of the matters in question was on a voyage from Canada to Garston, in the river Mersey, laden with a cargo of timber. She was lying at anchor in the river, and the plaintiff's tug had been engaged to dock her. The tide at the time was flood running about six knots an hour, high tide being at 1.15 a.m. on the 14th.

At about 11.45 p.m. on the 13th the *Knight of the Cross* was towing the *Romance* up to her anchor, preparatory to docking her. She was fast on her port bow; another tug was fast on her starboard bow. The *Romance* was showing her anchor lights, but both the tugs had up their towing and under-way lights. While the tugs were so engaged the steamship *Javary* was carried by the tide across the bows of the *Romance*, and did her considerable damage. Both the tugs slipped their hawsers to avoid the *Javary*, and the *Romance* fell back upon her cable, which parted, and the salvage service, in respect of which this action was brought, was then rendered by the *Knight of the Cross* and other vessels. The service consisted in taking the *Romance* to some buoys, and subsequently into dock. The salvage service was not disputed by the defendants, but in their defence they pleaded as follows:

Par. 4. . . . The steamship *Javary*, of Liverpool, whilst proceeding up the Mersey, collided with the *Romance*, the two tugs (one being the *Knight of the Cross*) having slipped their ropes immediately before the collision to avoid danger of collision with the *Javary*. The said collision was caused by the negligence of those on board the said tugs in improperly exhibiting their under-way lights, and thereby misleading those on board the *Javary*.

Par. 9. As to the claim on behalf of the owners, master, and crew of the tug *Knight of the Cross*, the defendants say that the said collision and damage and subsequent salvage services arose and were caused by reason of the negligence and misconduct of the plaintiffs or their servants in charge of the *Knight of the Cross* as

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

alleged in par. 4 hereof, and by reason of such misconduct the plaintiffs are not entitled to salvage remuneration.

By the Regulations for Preventing Collisions at Sea 1897:

Preliminary Definition.—A vessel is "under way" within the meaning of these rules when she is not at anchor or made fast to the ground, or ashore.

Art. 3. A steam vessel when towing another vessel shall, in addition to her side lights, carry two bright white lights in a vertical line, one over the other, not less than 6ft. apart. . . .

Art. 5. A sailing vessel under way, and any vessel being towed, shall carry the same lights as are prescribed by art. 2 for a steam vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

Aspinall, Q.C. and *Hope* for the plaintiffs.—The *Knight of the Cross* was a steam vessel towing another vessel, and was therefore bound to carry her side lights as well as her towing lights. The *Romance* was a vessel under way, as her anchor was not holding her. The tug was not made fast to the ground or ashore. See the preliminary definition in the Regulations for Preventing Collisions at Sea 1897:

The Esk, 20 L. T. Rep. 587; L. Rep. 2 A. & E. 350.

Pickford, Q.C. and *Miller*, *contrà*. — The *Romance* was at anchor; that is, she was controlled by her anchor as is shown by her falling back upon it and parting her cable when the tugs slipped. Since she was at anchor the tugs were at anchor also, as a tug and tow are one. The object of having prescribed lights is to inform other vessels of the condition of the vessel showing them; the side lights carried by the tugs were misleading. They referred to Marsden's Collisions at Sea, 4th edit., p. 424.

Aspinall, Q.C. in reply.

BARNES, J. (after dealing with the facts, proceeded):—The salvage services are not disputed, except upon one ground, and that ground is that the collision between the *Javary* and the *Romance* was caused by the negligence of the people on board the tugs. Of course, for the purposes of this action, it means the negligence of the people on the *Knight of the Cross* in improperly exhibiting their under-way lights. As I understand the facts, both tugs which were made fast to the sides of the *Romance* had their towing lights, and their side lights up, and the *Romance* herself had her anchor lights up at the time, and the point really made is one of law—at least, the principal point is—namely, whether the tugs had their wrong lights up in the circumstances, and therefore may be said to have contributed to the collision, by possibly deceiving, or, in fact, deceiving the *Javary* into treating the vessels as being really in motion, and able to move into the adjoining docks. Now, this point turns upon the construction of the rules with regard to lights. The facts are what I have stated. The tugs and the ship, having the lights which I have stated, had moved by the propelling power of the tugs up to a point nearly over the anchor of the *Romance*. I think it is not at all clear, because we have not had the people from the *Romance* called, whether the anchor of the *Romance* was actually holding or not. I think it is not necessary to find that fact specifically. I rather incline to the view that the anchor was still holding the ship, because when the jerk came afterwards which broke the cable the anchor must have been in the ground still. It is not quite clear on the facts whether the anchor was sufficiently free, but it is said in a sense not to have been holding the ship. I rather think it was, and therefore the ship for the purpose of the point I am going to decide the case upon was, still, within the meaning of the decision in *The Esk* (*ubi sup.*), at anchor.

Then it is said that the tugs ought not to have had towing lights and side lights, but only to have had anchor lights up. I cannot agree with that view of the case presented by Mr. Pickford. The object of the rules, so far as these lights are concerned, is to indicate to approaching vessels what those who are exhibiting the lights are doing; and it seems to me as a matter of fact that in this case the lights exhibited showed exactly what they were in fact doing, namely, that the ship was still at anchor, and the tugs were towing her up to get her anchor. Moreover, the Elder Brethren advise me that it is the practice for tugs, when towing a ship up to her anchor to get it, to exhibit towing lights, while the ship would still have her anchor lights up. Then it is said, although that be so, yet according to the rules there is blame to be attributed to the tugs. The point in substance is this, that the tugs were at anchor and not under way, and should have had anchor lights up. Mr. Pickford says that the 3rd rule is not applicable, but that in effect the 11th rule is applicable; that is to say, the anchor lights article. His contention is that the tugs ought to have carried the lights referred to in that article; that they were not under way but were at anchor, having regard to the definitions in the preliminary article of the Rules and Regulations for the Prevention of Collisions at Sea. The other view, taken by Mr. Aspinall, is that the 3rd article applies, namely, that the tugs ought to have carried, as they were doing, the towing lights provided by art. 3, and that they were under way within the meaning of the rules. It seems to me that upon the true construction of the rules the tug in this case was, in the circumstances, towing the sailing ship, the *Romance*, and was under way within the meaning of the rules. In this case the question of what lights the ship herself should have had has not been argued—the question has been what lights the tugs should have had—but it is perhaps necessary to consider all the rules which relate to this question of lights in order to arrive at a clear conclusion upon it. My present impression is that the ship—though it is not necessary for me to decide it—had the right lights, and that art. 5 was not applicable to her; that is to say, she was not a vessel being towed within the meaning of that article, because she was not, strictly speaking, under way. But I do not think it follows at all from that that the tugs may not have been towing her, and under the 3rd article. In fact, I think the tugs were towing her, and were under way. It seems to me that only by the most violent construction of the last paragraph of the preliminary clause can Mr. Pickford's contention be maintained. That paragraph is "a vessel is 'under way' within the meaning of these rules when she is not at anchor or made fast to the shore, or aground." It has to be said that the

tug in this case was at anchor. It is said so because, if the ship was at anchor, as the tug was attached to her, the tug is to be treated as using the ship's anchor as her own anchor, and therefore at anchor too, and should have had anchor lights up. It seems to me that that can only be arrived at by a most violent construction of that preliminary section. The tug in this case was not at her own anchor; but was she under control of the ship's anchor? I think not. She was in fact moving the ship up to her own anchor, and was under way for that purpose just as much as if she had been made fast ahead and was towing her, only connected by a towing hawser. I think it would be straining the interpretation of these rules and doing violence to the practice of the rule if I were to uphold that contention. It seems to me that the proper construction to place upon the rules is that the tug in this case was carrying proper lights, and that being so the defence upon that part of the case entirely fails. I cannot myself see, nor can the Elder Brethren, how it can be said that the carrying of these lights in any way contributed to the collision. What really seems to have been the case is that the other vessel was coming up on an extremely strong flood tide without sufficient allowance for the position of these vessels. [His Lordship then dealt with the merits of the salvage service, and awarded the sum of 175*l.*]

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Miller* and *Son*, Liverpool.

Solicitors for the defendants, *Weightman, Pedder*, and *Weightman*, Liverpool.

Nov. 13 *and* 20, 1900.

(Before BARNES, J. and TRINITY MASTERS.)

THE CAMPANIA. (*a*)

Collision—Fog—Speed—Regulations for Preventing Collisions at Sea 1897, *art.* 16.

A passenger steamship, fitted with twin screws, which was proceeding at the rate of nine and a half knots an hour in a dense fog, was held not to be going at a moderate speed, and to have committed a breach of art. 16 *of the Regulations for Preventing Collisions at Sea, although it was proved that her engines were so constructed that she could not go slower.*

That article is imperative, and therefore although such consequences as loss of handiness and the risk of loss of position may result from proceeding at a lower rate of speed, which may be attained by occasionally stopping her engines, considerations of that nature do not justify a vessel in proceeding at more than a moderate speed. As a general rule, speed such that another vessel cannot be avoided after being seen is excessive.(*b*)

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

(*b*) This is the first case decided under art. 16 of the Regulations for Preventing Collisions at Sea 1897 as to the meaning of "moderate speed." The corresponding article (art. 13) of the 1884 Regulations was as follows: "Every ship, whether a sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed."—ED.

THIS was an action for damages arising out of a collision between the plaintiffs' barque *Embleton* and the defendants' steamship *Campania*. The facts are fully stated in the judgment of the learned judge, those material to the principal question for decision being shortly as follows:—

The collision occured at about 8.30 a.m. on the 21st July 1900 about twenty-six miles north-east of the Tuskar light in the Irish Channel. The weather at the time was a dense fog. The *Campania*, which was a large Cunard passenger steamship fitted with twin screws, ran through and sank the *Embleton*. She was proceeding up the Irish Channel on her voyage to Liverpool from New York at a speed of 9·23 knots an hour with her engines working at dead slow. The plaintiffs charged the defendants with proceeding at too high a rate of speed in breach of art. 16 of the Regulations for Preventing Collisions at Sea 1897, and the main question in the action was whether in the circumstances that speed was a breach of the regulation.

By the Regulations for Preventing Collisions at Sea 1897, art. 16:

Every vessel shall in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Joseph Walton, Q.C. (with him *Laing*, Q.C. and *Bateson*), for the plaintiffs, contended that nine and a half knots an hour was not a moderate speed as required by art. 16, and that, even though, as contended by the defendants, it might have been safer for the *Campania* that she should not proceed at a lower rate, yet that argument, being in face of the wording of the article, could not prevail.

Pickford, Q.C. (with him *Butler Aspinall*, Q.C. and *Batten*) for the defendants.—The *Campania* had a duty to proceed at moderate speed, but, in determining what is moderate, regard must be had not only to the safety of other vessels, but also to her own safety, and in the case of a vessel like the *Campania*, which carried about 1600 people, a master's first duty is to consider the safety of his own ship. It is submitted that, as the collision occurred in the open sea and the *Campania* could, from a speed of nine and a half knots, bring herself to a standstill in a little more than her own length, her speed was in fact moderate; but, if not absolutely moderate, it is submitted that it was moderate having regard to existing circumstances and conditions. The *Campania* will not steer well at a lower rate of speed. If her engines are stopped from time to time, as was suggested, there is danger of her losing her position, which should not be run seeing the number of lives she carries.

Walton, Q.C. in reply.

The following cases were referred to:

The Resolution, 60 L. T. Rep. 430; 6 Asp. Mar. Law Cas. 363;

The Pennsylvania, 22 L. T. Rep. 55; 3 Mar. Law Cas. O. S. 477;

The Irrawaddy, Marsden on Collisions, 4th edit., p. 439.

Cur. adv. vult.

Nov. 20.—BARNES, J.—This case arises out of a disastrous collision which occurred about half-past eight on the morning of the 21st July last, about twenty-six miles N E. of Tuskar, between the barque *Embleton* and the steamship *Campania*, and resulted in the total loss of the *Embleton* and the loss of the lives of eleven of her crew. The *Embleton* was a barque of 1196 tons register, and at the time of the collision was proceeding down St. George's Channel on a voyage from Liverpool to New Zealand, laden with a general cargo, and manned by a crew of eighteen hands all told. The *Campania* is a twin-screw steamship of 12,950 tons gross and 4974 tons net register. She was bound from New York to Liverpool with a large number of passengers, mails and general cargo, and manned by a crew of 417 hands all told. The weather at the time was a dense fog. The barque was sailing close-hauled on the starboard tack, under reduced sail, heading about S. ½ E. by compass, or about S.S.E. true, making about two knots an hour through the water, and her witnesses stated that her fog-horn was being regularly sounded one short blast in accordance with the regulations. According to the account of these witnesses the whistle of the *Campania* was heard a long way off, broad on the starboard side, and each time it was heard it was answered by the fog-horn. The *Embleton* was kept on her course and the *Campania* drew nearer until she came into sight, distant about half the length of the barque, right abeam, and almost instantaneously struck the barque nearly at right angles, went right through her, and sank her, the master and ten of the crew being drowned, while the rest were saved by the boats of the *Campania*. The steamer's witnesses stated that she was proceeding with her engines working at slow, making between nine and ten knots an hour on a course of N. 35 E. true. Her whistle was being continuously sounded a long blast every minute. Her master, Capt. Walker, who has been in the Cunard service for thirty-three years, and has crossed the Atlantic 124 times in her, without any previous accident, was on the bridge with the first officer and extra second officer. There was an A. B. on the look-out in the crow's nest on the foremast, who had been at sea for seven or eight years, and had made three voyages in the *Campania*, and a man on the forecastle head who had been shipped through the shipping office for seamen in New York, but had not been at sea before, though Capt. Walker stated that the shipping office guarantees to the company that the men shipped are seamen or firemen, as required. While thus proceeding, those on board the *Campania* made out the loom of the barque about 150ft. from the steamer's bows. The look-out-men reported her, and she was seen almost at the same time from the bridge. The engines were at once reversed full speed astern, and the helm put hard a-starboard, but the collision happened almost immediately. The boats of the *Campania* were in the water in less than three minutes, and those of the barque's crew who were rescued were picked up by them. No sound of the barque's fog-horn was heard by anyone on board the *Campania*, neither before nor after the barque came in sight, though the witnesses for the barque stated that it was being regularly sounded, and that from the moment of the *Campania's* coming into sight it was sounded continuously. The only charge made by the defendants against the barque was that her fog-horn was either not being sounded at all or not efficiently sounded. The fog-horn on the barque was a mechanical fog-horn of the kind known as "Norwegian" fog-horns. One similar to it was produced in court. It had been surveyed and passed in London about Nov. 1898 by Capt. Rice, Board of Trade surveyor, and appears from the evidence to have been kept, and to have been at the time of the collision, in good working order. The Elder Brethren advise me that this class of fog-horn is efficient, as required by art. 15. I find that there was nothing the matter with the fog-horn, and further, after seeing the plaintiffs' witnesses and hearing their evidence, I am satisfied that it was being duly and properly sounded as required by the regulations. It is said by the defendants that this cannot have been the case, because no one on the *Campania* heard it, though those on duty on board her were fully on the alert. But the fact that the sound of the fog-horn does not appear to have reached the ears of those on board the *Campania* is not sufficient to override the positive evidence of the witnesses from the barque that it was properly sounded. The Elder Brethren advise me that, as a matter of experience, sound signals in a fog are not always to be heard as they might be expected to be, and especially by persons on steamers approaching at considerable speed, and sounding their own fog whistles, and that this makes it all the more necessary that the speed of vessels in a fog should be moderate, as provided by the 16th article. I am of opinion that the *Embleton* is not to blame for this collision.

The case made against the *Campania* is that she was guilty of a breach of art. 16 in that her speed was excessive in the circumstances. No other point was suggested against her, and I think it is clear that, apart from this question of speed, no precautions were neglected on board her to insure the safety of the large number of persons and valuable property intrusted to the care of her experienced commander. The 16th article is one of the Regulations for Preventing Collisions at Sea, which apply everywhere at sea to British vessels and the vessels of all the principal maritime nations. This article is as follows: [His Lordship read the article.] What is a moderate speed depends on the existing circumstances and conditions in each case. In this case the fog was very dense, and there is no dispute about the speed of the *Campania*. It is pleaded by the defendants at from nine to ten knots. Capt. Walker said that calculated from the revolutions of the engines the speed worked out at 9·23 knots. It seems to have been somewhere between nine and ten knots at the time. The engines were working at slow. The contention on the part of the defendants was that for the *Campania* this speed was a moderate speed in the existing circumstances and conditions. The evidence of Capt. Watson, the general superintendent of the company, was to the effect that at sea the *Campania* could not be safely navigated at less speed, for that if she were she would not steer properly and there would be uncertainty about her course and the distance run; and, further, that being a twin-screw steamer she could be brought to a standstill in a very short distance by reversing her engines full speed astern. Three methods of reducing her speed still further were suggested by the plaintiffs. First, that she could

be worked with one engine; to which it was answered that in that case her helm would have to be kept hard over against the screw which was working, and that she could only keep her course then with the engine working full speed, which would give her about thirteen or fourteen knots an hour; and that if the one engine were worked slowly her course could not be relied on. Secondly, that her vacuum could be cut off in a manner explained by the witnesses and stated to be done when she is engaged in docking. To this it was said that it would not be practicable at sea, as it would prevent her from properly reversing her engines in an emergency, and her steering would be affected if the speed were below nine knots. Thirdly, that she could work her engines at slow and stop from time to time, so that her speed could be kept down to a very low rate. The objection made to this course was that in a run of any distance in a fog, for instance from Tuskar to the Skerries, where she would be crossing the tide, it would not be possible to ascertain with reasonable certainty the distance the vessel had run, nor the course which she had actually made, and that, therefore, her safety and that of those on board of her would be imperilled. I do not think it is necessary to criticise the first two suggestions and the objections thereto. The third is sufficient for the purpose of my judgment. Moreover, it is one of general application, and has formed the subject of consideration in previous decided cases. In the case of *The Irrawaddy* (*ubi sup.*), in 1887, where a collision occurred in the channel between the Mull of Galloway and Port Patrick, in a thick fog, this vessel was going at 6·5 knots an hour, and was condemned under the rule which corresponded to the present 16th article. Lord Hannen, in the course of his judgment, said: "I should add that, so far as I am able to form an opinion on this matter, it seems to me quite untenable to argue that a vessel is justified in going at the lowest rate she is constructed to go at, if that is not a moderate speed. It appears to me that if a vessel is so constructed that she cannot go at a moderate pace, she must take the consequences. I quite accept the view that there is great difficulty in dealing with a vessel by checking her speed from time to time—that is, by stopping and taking the way off her, and that it has a tendency to throw a vessel out of her course and leads to difficulties. Yet I have to deal with the matter as a lawyer, and I have to say what is a moderate speed; and I say if it be necessary to reduce the speed of a vessel below that which is its lowest speed, though it may cause inconvenience, yet it must be done in what appears to be the only practical way of doing it—namely, by stopping from time to time." Again, in the case of *The Resolution*, in the year 1889 (*ubi sup.*), the *Sesostris*, going against a two and a half knot current in the Straits of Gibraltar at a speed of five knots an hour, in a dense fog, was held to blame for excessive speed by Sir Charles Butt, who made the following remarks in part of his judgment: "I know it is said, and nearly always said in these cases, that large steamers cannot go below a certain rate, because, apart from the question of steerage way, the revolutions would be so slow that the engines would stop on the centre. . . . But if a vessel cannot reduce her speed sufficiently with the continuous action of her engines, and therefore cannot go at what would be a reasonable speed in a fog without occasionally stopping her engines, it is her duty to occasionally stop them. Masters can always carry out the manœuvre in that way, and I will not yield to what I know is the strong disinclination of the masters of these large vessels to stop their engines. They hate and abhor the very idea, but it is to my mind their duty to do so if they cannot otherwise reduce their speed sufficiently." The following observations made by Lord Romilly in delivering the judgment of the Privy Council in the case of *The Pennsylvania* in the year 1870 (*ubi sup.*), where a collision occurred about 200 miles east of Sandy Hook between a barque and the steamship *Pennsylvania*, which was going at seven knots an hour in a thick fog, and whose master alleged that no less a speed than that would have enabled him to keep the vessel under command, are also in point: "Their Lordships do not mean to lay down what rate of speed would have been proper under these particular circumstances; in some cases four knots an hour and in others three and a half knots an hour have been held to be an improper rate of speed; it always must have reference to the peculiar circumstances of the case. But their Lordships are of opinion that in a thick fog in the Atlantic Ocean, in the direct line to New York, about 200 miles to the east of Sandy Hook, where frequently there must be a great number of vessels congregated, seven knots an hour was too great a speed at which to proceed. It was argued that if their Lordships held that seven knots an hour was too great a speed at which to proceed in a thick fog in that position, it would paralyse all the efforts of mercantile transactions, and that neither passengers nor goods could be properly conveyed across the Atlantic with a due regard to business and trade. Their Lordships do not concur in that argument, and are of opinion that the lives of passengers and the safety of goods must be protected in the first place. Their Lordships are of opinion that, even if these fogs should last longer than they are said to do, still the steamers must abate their speed, and that if they do not they must take all the consequences of a collision." I have expressed myself much to the same effect in the case of *The Germanic*, reported in the *Times* of the 22nd Feb. 1896. Now the Elder Brethren are of opinion, and I agree with them, that a speed of nine knots an hour in such a fog as that which prevailed on the present occasion is a greatly excessive speed for any steamer to proceed at. At such a speed it is practically impossible to take effective steps to avoid doing damage to another vessel after she is seen only 150ft. off, ahead; and as a general rule speed such that another vessel cannot be avoided after being seen is excessive. See the *City of Brooklyn* (34 L. T. Rep. 932; 3 Asp. Mar. Law Cas. 230; 1 P. Div. 276). The impact of a steamer, especially a large one, proceeding at a speed of anything approaching nine knots an hour upon another vessel is terrible. In the present case the *Campania* went right through the barque, cutting her in two, although the barque was fully laden, and part of her cargo consisted of pig-iron and bar-iron and felt, stowed in the part where she was struck. The advantages to be gained by a very slow speed as compared with greater speed are clear. One of the most important

is that those on board a vessel proceeding at very slow speed have more opportunities, while traversing a given space, of hearing the sound signals of an approaching vessel than if their vessel were going faster. For instance, if a steamer proceeding at ten knots an hour had half a knot to traverse before reaching the spot where her course and that of an approaching sailing vessel would intersect, those on board of her would only have the chance of hearing about three sound signals from the sailing vessel, for the steamer would cover the half knot in three minutes, and the sound signals on the sailing vessel ought to be given at intervals of not more than one minute. If, however, the steamer were only proceeding at five knots an hour those on board her would have the chance of hearing six sound signals while covering the half knot distance. Moreover, it is obvious that at the slower speed more time is given to act for an approaching vessel when her signals are heard or she is seen, and that the way of a steamer is much more quickly taken off by reversing when she is going at slow than at a fast speed; and, even if a collision is not avoided, its consequences may be much less disastrous if the speed is very slow. The greater proportion of ordinary cargo boats—probably most of them—cannot attain a greater speed than from nine to ten knots when going at full speed. Such a steamer would be condemned for excessive speed if she ran at full speed into a vessel in a dense fog. These vessels, by working their engines at slow, can usually reduce their speed to about three knots an hour without any difficulty. The contention for the defendants comes to this, that as their vessel cannot, as they allege, go with safety to her navigation at less speed than about nine knots an hour, she is justified in keeping on at that speed in a dense fog. Possibly a similar contention would be made on behalf of a considerable number of the large and fast passenger boats of the day. The 16th article is imperative, and I believe it would be most dangerous, having regard to the traffic to be met with everywhere, especially near to the coasts, in crowded waters, if this contention were to be upheld. It is based on the supposed necessity of the *Campania* to keep the speed at which she was going for the safety of her own navigation. But I am advised that this basis is unsound. Capt. Watson himself stated that a fog may be so dense that it is not possible to see across the ship, and that in that case she would probably have to stop her engines. A special signal is provided by art. 15 (*b*) for such a case. The vessel's position afterwards would have to be ascertained by estimation, and soundings if possible. If the fog be not so dense as to require the vessel to stop, she can go at a moderate speed within the rules by going slowly ahead, and stopping her engines from time to time. The objection to this by the defendants is that she cannot then steer properly and ensure a good course and certainty as to the distance run; but the Elder Brethren advise me that unless there is something exceptional in the circumstances all that this might involve would be delay, and the taking of proper precautions to haul out from the coast, if approaching it, and for verifying her position, and that there was nothing in the circumstances or conditions of the present case to prevent the *Campania* from proceeding in this manner, and yet keeping sufficient steerage way. The court fully appreciates the anxiety of the defendants to ensure the safety of their vessels, passengers, and crews, and the desirability of completing the voyages without unnecessary delay, but the risk of collision between their vessels and others which they may meet with on their passages can be best averted by a strict adhesion to the Regulations for Preventing Collisions at Sea, even though this may cause some inconvenience. Other dangers of navigation can be guarded against by proper precautions, even though there may be some delay caused by carrying them out. I am of opinion that the *Campania* was guilty of a breach of the said 16th article, and must be held solely to blame for the collision. I may add that I have made a search for decisions of foreign courts upon the subject under consideration, but with the time and means at my disposal I have been unable to find the reports of such decisions except some of those in the United States. I have referred to a number of cases decided in that country, and they appear to me to be in practical accordance with those of our courts. See especially the decisions of the experienced judge, Brown, J., of New York, in the *Federal Reporter*. Some of these cases are collected in Mr. Marsden's Book on Collisions at Sea (4th edit, pp. 434 *et seq.*), to which may be added *The Martello* (34 Fed. Rep. 71).

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Batesons, Warr*, and *Wimshurst*, Liverpool.

Solicitors for the defendants, *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Friday, Dec. 21, 1900.

(Before BARNES, J. and TRINITY MASTERS.)

THE WHITLIEBURN. (*a*)

Collision — Narrow channel — Vessel turning round—Regulations for Preventing Collisions at Sea, art. 25.

Art. 25 *of the Regulations for Preventing Collisions at Sea is not infringed by a vessel turning round in a narrow channel whereby some portion of her length must necessarily during the process fail to remain on that side of the fairway or mid-channel which lies on her starboard side.*

THIS was an action arising out of a collision which occurred on the 10th Aug. 1898 between the plaintiffs' steamship *Fernlands* and the defendants' sailing vessel *Whitlieburn*.

The following were the facts:—

The collision occurred in the river Scheldt, about 3.40 p.m., a little below the entrance to the Kattendyk Dock which is on the east side of the river. The *Fernlands* was a screw steamer of 2042 tons gross register, fitted with engines of 120 horse-power nominal, and was manned by a crew of twenty-one hands all told. She was on a voyage from Antwerp to Alexandria with a general cargo and was in charge of a duly licensed pilot. She had just come out of dock stern first and had straightened down the river on the east side. The *Whitlieburn*, which was a sailing

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

vessel of 1874 tons register, manned by a crew of twenty-eight hands all told, was on a voyage from Tacoma to Antwerp with a cargo of wheat. She had been coming up the river in charge of a duly licensed pilot in tow of a tug, and when a little below the dock entrance had begun to turn round. Her precise position was a matter of conflict between the parties, but while she was more or less athwart in the process of turning, her head being to the westward, the *Fernlands*, which was above her in the river with her engines stopped, came ahead and attempted to pass her. The stern of the *Whitlieburn* at this time was to the east of mid-channel. The forward part of the *Fernlands* cleared the stern of the *Whitlieburn*, but her port side, about 25ft. forward of the poop bulkhead, collided with the *Whitlieburn's* port counter, and the *Fernlands* then scraped along and sustained damage to some 60ft. of her plating. The *Whitlieburn* also sustained damage for which her owners counter-claimed in this action.

The plaintiffs charged the defendants with (*inter alia*) failing to keep to that side of the channel which lay on her starboard hand in breach of art. 25 of the Regulations for Preventing Collisions at Sea, and it is upon the application of that article that this case is reported.

By art. 25 of the Regulations for Preventing Collisions at Sea:

> In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Laing, Q.C. and *Roche* for the plaintiffs.

Aspinall, Q.C. and *Bateson* for the defendants.

BARNES, J. (after dealing with the facts and the other points in the case) said:—Then it is said that there was a breach of a statutory rule, in that the *Whitlieburn* was guilty of a breach of art. 25 of the Sea Rules. I do not consider that that rule is at all applicable to this case. The vessel was swinging, and, in order to swing in a narrow place like this, she must turn round in the way she was turning round. The rule is not applicable to such circumstances. Several reasons might be given to make this clear; but it is enough to say that the Elder Brethren think it was not practicable to act upon it, and that it cannot, as a matter of seamanship, be applied to such a situation. The fact that the vessel may have been somewhat over to the east side is accounted for by the fact that the tide was setting her there, which would naturally occur in the course of the swing she was obliged to perform. The conclusion to which I have come is that the collision was due to the fault of the steamer alone, and that the *Whitlieburn* must be freed from blame. *Judgment for the defendants.*

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Downing, Bolam, and Co.*, agents for *Downing* and *Handcock*, Cardiff.

Jan. 15 *and* 16, 1901.

(Before Sir F. JEUNE, President, and TRINITY MASTERS.)

THE MOURNE. (*a*)

Collision—Vessel acting under continuous starboard helm—Course authorised or required by rules—Duty to sound helm signal—Regulations for Preventing Collisions at Sea, art. 28.

Art. 28 *of the Regulations for Preventing Collisions at Sea is limited in its application, and only applies where a vessel is taking a course in order to give effect to the Regulations for Preventing Collisions at Sea; hence where a vessel leaving dock under starboard helm sighted another vessel on her port bow and continued on her starboard helm, she was held not bound under art.* 28 *to give a two-blast signal.*

THIS was an action arising out of a collision between the plaintiffs' steam flat the *Bengal* and the defendants' steamship the *Mourne*, which occurred at about 6.5 a.m. on the 17th Oct. 1900, on the eastern side of the river Mersey, between the entrances to the Salisbury and Clarence Docks. The plaintiffs' case was that the *Bengal*, which was a steam flat of 117 tons register, manned by a crew of three hands all told, and fitted with engines of 20 horse-power nominal, was proceeding from the north entrance to the Salisbury Dock with the intention of bringing up alongside the wall which runs to the Clarence Dock. The wind was light from about S.E., there was a slight haze, and the tide was high water slack, but with a drain of ebb running down the river wall. The *Bengal* left the dock under easy starboard helm, and when in the entrance saw the masthead and green lights of the *Mourne* and momentarily a glimpse of her red about two points on her port bow, distant about 400 yards, and at the same time heard a two-blast signal from her. The *Mourne* then shut in her red light, and the *Bengal*, swinging under her starboard helm, brought the *Mourne's* green light on to her starboard bow, so that the vessels were then in a position to pass starboard to starboard, but the *Mourne* suddenly reopened her red light broad on the *Bengal's* starboard bow and close to her. The engines of the *Bengal* were then put full speed ahead, but the collision occurred at about a right angle (as was found by the learned judge), the stem of the *Mourne* striking the starboard side of the *Bengal* with the result that the latter sank.

The plaintiffs charged the defendants (*inter alia*) with improperly navigating the *Mourne* too fast, and, in the circumstances, too close into the dock entrances.

The defendants' case, which agreed with that of the plaintiffs as to the weather, wind, and tide, was that the *Mourne*, which was a steamship of 228 tons gross, having a crew of eight hands and fitted with engines of 45 horse-power nominal, was outward bound from Garston. She was heading straight down the river, keeping to the east side of the channel, and was making about seven knots an hour through the water. When she was about half a mile above the entrance to the Salisbury Dock the masthead and red lights of the *Bengal* were seen leaving the Salisbury Dock, bearing

(*a*) Reported by BUTLER ASPINALL, Esq., Q.C., and SUTTON TIMMIS, Esq., Barrister-at-Law

nearly right ahead and about half a mile distant. Very shortly afterwards the *Bengal* opened her green light and shut in her red. The helm of the *Mourne* was then starboarded a little and her whistle was sounded two short blasts, but, when the *Bengal* had been brought about half a point on her starboard bow, the red light of the *Bengal* was again opened. The helm of the *Mourne* was thereon immediately ported and one short blast was sounded on her whistle and her engines were slowed, and, when the red light of the *Bengal* had been brought well clear on her port bow, her helm was steadied. The vessels were then in a position to pass clear, port side to port side, but, when only a short distance off, the *Bengal* again suddenly opened her green light. The engines of the *Mourne* were then reversed and her helm was put hard-aport, but the collision occurred.

The defendants in their defence charged the plaintiffs (*inter alia*) with improperly failing to indicate the course of the *Bengal* by means of her steam whistle, in breach of arts. 28 and 29 of the Regulations for Preventing Collisions at Sea.

In the course of the argument the defendants also charged the plaintiffs with a breach of art. 23 of the said regulations.

By the Regulations for Preventing Collisions at Sea:

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another shall, on approaching her, if necessary, slacken her speed or stop and reverse.

Art. 28. . . . When vessels are in sight of one another, a steam vessel under way in taking any course authorised or required by these rules shall indicate that course by the following signals on her whistle or syren—viz, . . . two short blasts to mean "I am directing my course to port."

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

Aspinall, Q.C. and *Bateson* for the plaintiffs.—The *Mourne* was to blame for (*inter alia*) proceeding down the river too close to the dock wall. It was high water at the time, when vessels were likely to be leaving the docks; she also failed to ease her speed or reverse her engines when the circumstances required it. The *Bengal* was not to blame for failing to sound the two short blasts. Art. 28 of the regulations is not applicable to the circumstances of this case. That article only applies when a vessel is adopting some course "authorised or required" by the Regulations for Preventing Collisions at Sea, whereas the *Bengal* was starboarding in the course of her voyage, and not for the purpose of avoiding the *Mourne*. When her helm was first starboarded she had not even seen the *Mourne*. After she had seen the *Mourne*, her starboarding was in reality a continuation of her course. In any event, the failure to sound the two-blast signal could not have contributed to the collision.

Baden-Powell, Q.C. and *Miller* for the defendants.—The *Bengal* is to blame for not giving the two-blast signal. In continuing under starboard helm, she was a vessel keeping her course under art. 21 of the regulations, and was therefore taking a course authorised or required by the regulations. If she was not keeping her course, then it was bad seamanship on the part of those navigating her not to indicate to the *Bengal* the course she was in fact adopting, and she must be held to blame under art. 29.

Aspinall, Q.C. in reply.

Sir F. JEUNE.—There is, I think, in this case a broad question of fact which substantially governs the whole matter. According to the account of the *Bengal* her action was an extremely simple one, and perfectly consistent with all that she wished to do. It is quite clear that her object was to come out of dock, and, making a turn as sharp as possible under the action of her starboard helm, to get to the place whither she wished to go. That is all she did. But the story told by the *Mourne* attributes to her, to my mind, a totally different course of action, because the case of the *Mourne* is that the *Bengal* got further out into the river and got herself into a position of being practically end on, and then was seen first on one bow and then on the other, backwards and forwards, under the influence perhaps of bad steering. That is a broad issue of fact. Which story is true? I have no doubt whatever that the story told by the *Bengal* is the true story. It appears to me that it is a mere question of evidence. In the first place the story told by the *Mourne* of the change of lights, backwards and forwards, is wholly impossible, having regard to the very short time at the disposal of the *Bengal*. But, on the other hand, when one looks at the conduct of the *Mourne* there are several things which appear to me to render her conduct open to a good deal of criticism. In the first place I accept the view of the dockmaster that the *Mourne* was coming down a great deal too near to the wall. I am not going to make that a substantial charge against her, that she was too much on her right side of the river, but what I think is to be emphasised is this, that if a vessel chooses, for purposes of her own, to come down so close to the dock wall as she did, and at the speed which she had on her, she renders it incumbent upon those on board her to keep an extremely vigilant look-out, especially as it is well known that vessels are in the habit of leaving the dock at that time of tide. It is sufficient to say that she seems to have thought it right to keep the mate on the look-out until she had passed the landing-stage, and then to have taken him off the look-out to assist in clearing up the deck forward. Although, no doubt, the captain on the bridge would be in a position to see, and did see, a good deal of what was going on ahead, still it appears to me that she was not being navigated with that extreme care which was incumbent upon a vessel which had voluntarily placed herself in that position. The question of speed is only important as emphasising the necessity of taking care. I believe, as I have said, the story of the *Bengal* to be true. On the other hand I think the *Mourne*, coming down the river outside her and having her on the starboard bow, for some reason or other, having before starboarded and blown a two-blast signal, just before the collision ported and perhaps gave a single blast, with the result that she ran into the *Bengal*, striking her on the starboard bow, practically a right-angle blow. It is not easy to see why the *Mourne* adopted this very much mistaken course; but that it was a

much mistaken course appears to all of us to be the case, for if she had not struck the *Bengal* she would probably have run into the pier or dock wall. Therefore it is quite clear that her action in porting in the way she did was altogether a mistaken one. Having got so far, it is not necessary to speculate as to what the exact reason for her action was. It may be that having at first thought starboarding was the proper course to take, so as give the *Bengal* room to pass green to green, afterwards she may have thought that the *Bengal* was really going to cross the river into her proper water, across the bows of the *Mourne*, and so go up river. In those circumstances the *Mourne* may have made the mistake, by not watching very carefully to see what the action of the *Bengal* really was. The fact appears to be clear that when the vessels were green to green the *Mourne* thought proper to port her helm and to port into the green light of the *Bengal*. I have no doubt that was what happened, and she must be held to blame for it, although I am not able to say what her real motive was in so doing. That, to my mind, really determines the case. There is nothing else which is material. I am not going into the question whether the *Mourne* should have stopped sooner than she did. Her own story shows that at an earlier time than she did stop there was risk of collision which rendered it imperative to stop. But I do not dwell upon that because I cannot accept her story, I do not believe the lights were seen first on one bow and then on the other.

I must consider the charges made against the *Bengal*, apart from the main facts of the case. It is said she ought to have stopped and not gone on in the way she did, because when the collision became imminent she went on at full speed. That is undoubted. It is also said she ought to have given a two-blast signal at some time after altering her helm. With regard to going on at full speed instead of stopping, that is a matter of navigation upon which I have had an opportunity of consulting the Elder Brethren. The obligation is not now the same as it used to be. The obligation now is to stop if necessary or right to do so. Now, I am advised by the Elder Brethren that the action of the *Bengal* was on the whole the best in the circumstances that could have been taken. Placed in a position of great difficulty, and near to the wall on the one side, and with this vessel coming down upon her on the other, her only chance of safety, it appears to me, was to go ahead as fast as she could. There was a chance of her being able to avoid the collision if she could get across the bows of the *Mourne*, and that she nearly did so is clear, because she was struck a considerable distance from her stem. I do not think any substantial blame is to be attached to those on the *Bengal* for taking what appears to us to be their only practical chance of safety. The other point is somewhat more difficult, because it turns upon the construction of art. 28, but I think when one realises what the facts are, that is clear. Under art. 28, when vessels are in sight of one another, a steam vessel under way in taking any course authorised or required by these rules shall indicate that course by the following signals on her whistle or syren—viz., two short blasts to mean "I am directing my course to port," &c. Now, it is said that the *Bengal*, when she was in sight of the *Mourne*, was a steam vessel under way in sight of another, and in taking the course she did ought to have indicated that course by two blasts. But when one considers the wording of this rule I am of opinion that it does not apply to the circumstances of this case. In the first place, the view which I take of the facts is that the starboard action of the helm of the *Bengal* had begun at some earlier time, before she left the entrance, and, as is said in the pleadings, she was coming out under easy starboard helm. That appears to me consistent with the short voyage she was on and the object which she had in view, and therefore I do not think circumstances ever arose in this case which would have compelled her to give the blasts indicated by this rule. I doubt very much whether when she started her course, so to speak, the vessels were in sight of one another; but certainly it does not appear to me to come within the rules because she was not, in so starboarding, taking a course authorised or required by the rules. She was taking a course for the purposes of her own voyage, and which had nothing on earth to do with the vessel approaching, and her action in starboarding as she did was not in any way taking a course authorised or required by the rules. Therefore it does not appear to me that this rule applies. Where it does apply is where a vessel, having a course and being on a course, is found varying it or making some alteration of it authorised or required by the rules. For example, if vessels are meeting end on and you port your helm in order to comply with the requirements of the rule then applicable; or, to take another case, where a vessel sees another on her starboard bow, and under the circumstances is required to keep out of the way; or, to take yet other cases, where the following vessel has to keep out of the way of the overtaken ship, or where a steamship has to give way to a sailing vessel. In all those cases the course is authorised by the rules, and if in so doing the vessel alters her course by the action of her helm she is required to give notice to the other vessel. Those are the sort of illustrations to be given to show that this rule does not apply where a vessel which is on any circular course, which she has adopted before, in order to reach the place she desires to reach, is keeping on on that course, acting the whole time under a starboard helm. I think that in such circumstances a state of things does not arise in which she is required to give notice to the other vessel by signals. That appears to me to be decisive of that point, and I need not pursue the further proposition, whether the absence of compliance with that rule contributed, or could have contributed, to the collision. I very much doubt whether it could have done so, because the real cause of the collision was the mistake made by the *Mourne* in porting her helm under the circumstances. In the circumstances of this case, which are of importance, there was no such obligation placed upon the *Bengal* to give the two-blast signal, as to render her liable for not giving it, and in those circumstances I have to hold the *Mourne* entirely to blame.

Solicitors: for the plaintiffs, *Pritchard* and *Sons*, agents for *Batesons*, *Warr*, and *Wimshurst*, Liverpool; for the defendants, *Thomas Cooper* and *Co.*

Jan. 31, *Feb.* 1, 4, 5, *and* 6, 1901.

(Before Sir F. JEUNE and TRINITY MASTERS.)

THE DEVONIAN. (*a*)

Collision—Tug and tow—Improper lights on tug—Liability of tow—Regulations for Preventing Collisions at Sea 1897, *Preliminary Definition, art.* 3—*Rules for the Navigation of the River Mersey made by Order in Council the* 17*th Sept.* 1900, *art.* 4 (*a*)—*Merchant Shipping Act* 1894, *s.* 419 (4).

A steam-tug made fast to a vessel at anchor in the river Mersey ready to assist her if required is a steam vessel towing or attached for the purpose of towing or manœuvring her, and must at night exhibit the lights required by art. 4 (*a*) *of the Mersey Rules.*

In such circumstances the tow is responsible for the lights of the tug, and will be deemed to be in fault if the tug exhibit other lights, and the breach of the rule may have contributed to a collision between the tow and another vessel.

THIS was an action arising out of a collision between the plaintiffs' steamship the *Veritas* and the defendants' steamship the *Devonian*, which occurred at about 10.45 p.m. on the 12th Oct. 1900 in the river Mersey.

The facts of the case were shortly as follows:—

The *Veritas* was a Norwegian steamship, and had in the course of her voyage put into the river Mersey owing to her engines having broken down.

At the time of the collision she was lying to her anchor, having a tug named the *Prairie Cock* fast on her starboard side ready to assist her if required. The weather was fine and clear, and the tide was half flood, running about two knots an hour.

The *Veritas* was exhibiting two anchor lights in accordance with the special rules for the navigation of the Mersey—that is to say, a white light forward and a white light at the stern. The *Prairie Cock* was carrying the lights for a steamship under way—that is, her side-lights and masthead light.

In these circumstances the *Devonian*, which was coming up the river in charge of a compulsory pilot and with a steam-tug fast ahead of her, ran into and sank the *Veritas*.

It was alleged on behalf of the *Devonian* that the *Veritas* was not exhibiting any or any proper or visible anchor lights, and that the under-way lights exhibited by the *Prairie Cock* were misleading; and that, if any fault was to be attributed to any person on board the *Devonian*, that person was the compulsory pilot.

The evidence showed that there had been a difference of opinion between the pilot and the master of the *Devonian* upon some questions of the navigation of the vessel, and that in some particulars, at any rate, the master had overridden the pilot.

The following were among the charges made by the defendants in their defence:

Par. 5. The *Veritas* was not exhibiting any anchor lights or any proper or visible anchor lights properly carried and showing as required by the regulations.

Par. 7. Those on board the *Prairie Cock* improperly exhibited wrong and misleading lights.

Par. 8. Those on board the *Prairie Cock* failed to obey arts. 4 and 6 of the Mersey Rules.

The learned judge found that the *Veritas* was exhibiting proper anchor lights and that they were burning sufficiently brightly, and that the *Devonian* was to blame for not having seen them. He also found that the pilot had not been properly assisted, and that the plea of compulsory pilotage did not avail the defendants.

The point on which this case is reported is whether the *Veritas* was liable for the improper exhibition of lights by those on board the *Prairie Cock*.

By the Regulations for Preventing Collisions at Sea:

Art. 3. A steam vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than 6ft. apart. . . . Each of these lights shall be of the same construction and character and shall be carried in the same position as the white light mentioned in art. 2 (*a*), except the additional light, which may be carried at a height of not less than 14ft. above the hull. . . .

By the Rules for the Navigation of the River Mersey made by an Order in Council dated the 17th Sept. 1900:

Art. 4 (*a*). A steam vessel when towing another vessel or vessels, or when attached for the purpose of towing or manœuvring such vessel or vessels, shall carry the compulsory lights prescribed by art. 3 of the General Regulations.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 419.—(1) All owners and masters of ships shall obey the collision regulations, and shall not carry or exhibit any other lights or use any other fog signals than such as are required by those regulations.

(4) Where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

Laing, K.C. and *Stubbs* for the plaintiffs.—It is submitted that the *Prairie Cock* does not come within art. 4 (*a*) of the Mersey Rules. She was right in exhibiting the lights for a vessel under way; she was not at anchor (see the Preliminary Definition to the Regulations for Preventing Collisions at Sea); she was not towing, but she was under way:

The Romance, 83 L. T. Rep. 488; (1901) P. 15.

If the lights of the *Prairie Cock* were improper, the *Veritas* is not liable for the negligence of her tug in the circumstances of this case. The relationship of master and servant did not exist. Even if the *Veritas* is responsible for the *Prairie Cock's* lights, the Mersey Rules have not the statutory sanction of the Regulations for Preventing Collisions at Sea, and, if they have that sanction, then it is submitted that the wrongful exhibition of under-way lights by the *Prairie Cock* could not possibly have contributed to the collision. A tow is not to be deemed to be in fault because her tug exhibits wrong lights.

Joseph Walton, K.C., *Aspinall*, K.C., and *Glynn* for the defendants.—The *Prairie Cock* was the servant of the *Veritas*, and the latter is liable for her default. The *Prairie Cock* should have been

(*a*) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

carrying anchor lights or towing lights, and her failure to do so is a breach of a statutory rule for which the *Veritas* must be held to blame: (Merchant Shipping Act 1894, s. 419). It cannot be successfully argued that the *Prairie Cock* was not attached for the purpose of towing or manœuvring, and, if she was not, then she was moored to the *Veritas*, just as a vessel is moored to a buoy, and should have exhibited anchor lights. *The Romance* (*ubi sup.*) was decided before the Mersey Rules applicable to this case came into force. The question, then, is, Could these improper lights possibly have contributed to the collision?

The Fanny M. Carvill, 32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565; L. Rep. 4 A. & E. 417.

[Sir F. JEUNE.—If the *Veritas* was carrying proper lights, is it material what lights the *Prairie Cock* was exhibiting?] It is submitted that the extra light might even then have been of importance and have influenced the navigation of the *Devonian*: (*The Gannet*, 82 L. T. Rep. 329; 9 Asp. Mar. Law Cas. 43). [Sir F. JEUNE referred to *The Breadalbane* (46 L. T. Rep. 204; 4 Asp. Mar. Law Cas. 505; 7 P. Div. 186).]

Laing, K.C., in reply, referred to

The Argo, 82 L. T. Rep. 602; 9 Asp. Mar. Law Cas. 74.

The following cases were also cited:

The Cleadon, 4 L. T. Rep. 157; 1 Mar. Law Cas. O. S. 41;
The American and Syria, 31 L. T. Rep. 42; L. Rep. 6 P. C. 127;
The Niobe, 65 L. T. Rep. 502; 7 Asp. Mar. Law Cas. 89; L. Rep. 13 P. 55;
The Quickstep, 63 L. T. Rep. 713; 6 Asp. Mar. Law Cas. 603; L. Rep. 15 P. 196;
The Mary Hounsell, 40 L. T. Rep. 368; L. Rep. 4 P. 204;
The E. A. Packer, 22 Fed. Rep. 668;
The Philadelphian, 82 L. T. Rep. 601; 9 Asp. Mar. Law Cas. 72; (1900) P. 262.

The PRESIDENT. — This case raises one material question of fact, and one—perhaps two—questions of law, and I propose to give judgment upon all of them, although the question of law might perhaps be more elaborated, but the question of fact, which is really the governing and the main question, is one, as far as the statement of it is concerned, which is extremely simple. [His Lordship dealt with the facts and found that the *Veritas* was exhibiting proper anchor lights and that the *Devonian* was to blame for not making them out. He then proceeded:] One easily sees the reason, now that one knows what was going on on board the *Devonian*, why there should have been a failing in that respect, because I am afraid it must be said that the condition of things on board the *Devonian* was to some extent deplorable. She had a pilot on board, and it is clear there was a wrangle going on between the pilot and the captain. The rights and wrongs I should have thought were sufficiently clear, because it appears to me to be quite clear, when the pilot is on board, that it is his duty to take charge and give orders, and it is the duty of the captain and everybody else to obey those orders; and when the law recognises the freedom from liability of a vessel which has a compulsory pilot on board, it appears to me to imply not only that the pilot shall be there compulsorily, but in authority, because if he is not in authority and if it is a case of merely making suggestions which the captain may or may not follow, it appears to me the whole basis of compulsory pilotage disappears—that being the foundation of the English law which exempts vessels from liability if they have a compulsory pilot on board. Therefore I think in this case the pilot was altogether in the right and the captain of the *Devonian* in the wrong. But I need not trouble to deal with that matter. The pilot desired to turn the vessel at an earlier period than the captain thought right. The captain thought it was his duty to give orders and he did not desire it done, and the pilot gave way, and afterwards the pilot seems to have been inclined to put it on record in the document he made that he did not give orders but made suggestions, and one of those suggestions was of a very material kind—as to the action of the *Hornby* towing to the westward, which was not obeyed, but she went to the eastward, because she said she could not go to the west. Under those circumstances I need not go further into it. As we know, the lights of the tug of the *Veritas* were first made out just about the time the *Hornby* was attaching herself to the *Devonian*, and it may be that in the operation of getting attached, and by reason of the smoke of the *Hornby*, that some obstacle was presented to seeing the lights which may not have attracted so much attention as the green and red lights of the tug would be likely to do. Without going further into the matter, there are abundant reasons for thinking that there may have been causes operating upon the *Devonian* or upon those on board of her which prevented them from seeing the lights of the *Veritas*, which they certainly should have done. Therefore, my view is that the account of the *Veritas* ought to be accepted.

Now comes the further question, which is mainly a question of law (or perhaps there are two questions of law), and which is by no means so simple. The lights exhibited by the tug *Prairie Cock* on this occasion were the lights of a vessel under way—the masthead and side-lights—and the position of things was this: She was attached to the starboard side of the *Veritas* fore and aft by a 7in. hawser. It is said, and quite truly no doubt, that at the time she was not towing the *Veritas*; she was engaged rather to stand by her and be ready, and was paid a comparatively small sum for the purpose, than to actually assist her at the moment. The *Veritas* was riding to a single anchor. There may have been some reason for doubting whether she was holding the ground sufficiently. Under these circumstances the captain of the *Veritas* was anxious to engage the services of the tug in case anything went wrong with the anchor and the vessel required holding up, or perhaps to ease the strain on the anchor. I do not lay more stress upon the 7in. hawser than this, because it was a rope sufficiently strong to serve as a towing hawser if necessary, and under those circumstances she was lashed alongside the *Veritas*. Now was she within the rule of the Mersey, which I think has the statutory authority of one of the general regulations? I pause for a moment in passing to say I do not think that it is necessary to do more than to say that that is so. So far as I have looked into the question, the 4th rule of the Mersey is a rule which has the force of the general regulations—

I mean the same force, imposing a statutory liability upon the person who does not comply with the regulation. For this purpose I assume that is the case. Then I find the rule says: "A steam vessel when towing another vessel or vessels, or when attached for the purpose of towing or manœuvring such vessel or vessels, shall carry the compulsory lights prescribed by art. 3 of the general regulations." That is the two towing lights. Now was this vessel, the *Prairie Cock*, attached to the *Veritas* for the purpose of towing or manœuvring her? That is the first question which I have to decide. I have taken the opinion of the Elder Brethren upon it, and they think she was attached for the purpose of towing or manœuvring. I entirely agree with that view. She certainly was attached. I do not say there was any strain on the hawser, but she was there. What for? It is admitted for the purpose of rendering assistance if necessary. What assistance? Why, assistance in towing, in holding her up to her anchor and against the tide, supposing the vessel dragged; and therefore she was there, it appears to me clearly, not actually towing, not attached for towing, but attached for the purpose of towing if and when it was desired by the tow that she should do so. Therefore I cannot think that this article does not apply. I think it does, and therefore I think that the *Prairie Cock* ought to have exhibited her two towing lights.

Now there is a further question about which there has been a good deal of interesting discussion, as to whether this omission on the part of the tug might not possibly have contributed to the collision. That is a matter to which I have given a good deal of consideration. One has to start with the hypothesis that the *Veritas* was in fact exhibiting her proper lights, and therefore the question is, supposing the *Veritas* to be exhibiting her proper lights, but those not to have been seen by the persons on board the *Devonian*, can it be said, or ought it to be said, that the absence or failure to exhibit the two towing lights on the tug could have contributed to the collision in question? Now, for myself, I confess I do not think it can. I mean that the *Veritas* had sufficient indication in my opinion to have protected her from collision with another vessel. She was exhibiting the lights necessary for her to exhibit, and they ought to have been, and would have been, I think —if there had been a proper look-out on board the *Devonian*—sufficient protection to her from the *Devonian* coming into collision with her. Therefore I assume it may be said that no additional light was necessary, and I think it is sound to say that if sufficient lights are exhibited it is immaterial whether more lights are exhibited than would have been sufficient. It is not necessary to go elaborately into the authorities to establish that proposition, because there is authority for saying that if sufficient lights were exhibited it matters not whether another light is exhibited, which, although it ought to have been, could only have been somewhat superfluous, and was something which was not necessary. If authority is to be given for that, I should refer to the case of *The Breadalbane* (*ubi sup.*), which appears to me, and always has appeared to me to be perfectly good aw, and perfectly sound, and, so far as I am able to judge, it has been upheld by a recent decision of the Court of Appeal in the case of *The Argo* (*ubi sup.*), which was an appeal from myself. I hope I am dealing correctly with that report. I have not been able to see the judgment, and have not read it, but I know what I decided myself, and as the Court of Appeal held the same view I know what they must have thought, because in the case of *The Argo* I was very much influenced by the case of *The Breadalbane*, which was a case where no stern light was exhibited, but where there was a binnacle light which perhaps did not have the same range as a proper stern light; and therefore, if the question had been whether the vessel came within the range of the light, there might have been a doubt. But the following vessel ought to have seen, and I have no doubt did see, and had every opportunity of seeing, the binnacle light, and the view taken, as I understand in that case, was that there being a light exhibited, which the steam tug ought to have seen, although it was not precisely at the same place as directed by the regulations, even if the stern light had been properly exhibited it could have made no conceivable difference. That was substantially the view I took, and in the case of *The Argo* I think that was the case in which there were two things: First of all there was a light to be seen on part of the vessel as she came out of the harbour, though not a proper light, and there was another light which was visible and ought to have been seen, and was not seen, by the on-coming vessel. Therefore the conclusion I came to was it showed such a clear absence of look-out on the part of those responsible that even if the proper lights had been exhibited, in all human probability they would have been no more seen than the light the failure to see which brought about the collision. So far as the direct effect of the lights of the tug were concerned, I think it might well be said that if the *Devonian* failed to see the anchor light of the *Veritas*, it might be that an additional towing light of the *Prairie Cock* would not have afforded more than an extra light and a supererogative advantage. But that does not, I think, quite exhaust the case, and a consideration has impressed itself upon the minds of the Trinity Masters and myself which to my mind is very material. The lights exhibited by the *Prairie Cock* were those of a vessel under way, and no doubt they impressed, and would impress, upon the minds of those on board the *Devonian* that she was a vessel unattached, under way, coming down the river in the ordinary way. I do not lay any stress upon the consideration that probably she would be moving. I do not lay any stress upon the consideration that the lights of the *Prairie Cock* were seen in different ways and at different times, or that those on the *Devonian* saw at one time the red and at another time the green light, because I think it is extremely probable that the seeing of those lights at different times and in different ways arose from the action of the *Devonian's* own helm, and not from any motion of the *Prairie Cock*, which indeed appears to me to be negatived by the evidence. But there is this very important consideration, that she saw the lights on a vessel under way, and they would and could suggest nothing except that a vessel under way was coming down the river by herself. First of all, if the towing lights had been exhibited would the *Devonian* probably or might she have

seen them? I think she would. It is not a case like that of *The Argo* or *The Breadalbane*, where the look-out was so completely deficient that practically nothing was seen, because probably if another light had been exhibited it would not have been seen any more than those that were exhibited were not seen, but it is clear that the *Devonian* did see both the green, red. and masthead lights on board the tug, and it is of course quite possible, indeed my own view is that it is the case, that it was because she did see the lights of the tug, and concentrated her attention upon them, that she failed to see the neighbouring and perhaps dimmer—I dare say they were dimmer—lights of the *Veritas*. It is the usual operation of the human mind when you have your attention very strongly directed to one object to notice that, in exclusion to anything else; and seeing those one set of lights, they were the only ones that those on board her were able to regulate their conduct by. But if the two towing lights had been exhibited, I think in the first place they would probably have been seen. I think the *Devonian* would have seen two towing lights on the *Prairie Cock* as she did see the masthead light of that vessel. If they had been seen might they not possibly—because one need not go further than that—have caused those on board the *Devonian* to be more alert than they were to discover the neighbouring lights of the *Veritas?* I think they might. I do not say it would have been so, but I cannot help thinking that it is quite within the range of possibility that the *Devonian*, had they seen the two towing lights, would have said to themselves, "This is a vessel towing another," and therefore that other must necessarily be in close proximity. It is to be remarked that there was another vessel, the *Hildebrand*, exhibiting her anchor lights not very far off, and it may be that it was her lights also which to some extent prevented the lights of the *Veritas* attracting the attention which they would otherwise have attracted. But if those on board the *Devonian* had seen two towing lights on the tug, I think the natural condition of their minds would have been to be very alert to look out to see where was the tow which presumably the tug had in charge at that time. They would then have looked carefully between the lights of the *Hildebrand* and the lights of the tug. They would have scanned with glasses the whole of the space between them which might be occupied by the lights of a vessel in tow, and I cannot help thinking that it is not only possible, but even probable, because I will say that, with their attention sufficiently called to this matter, they would have had the use of their eyes and more probably the use of their glasses, and would have succeeded in making out the lights of the *Veritas*, and been in a position to avoid the collision which they unfortunately were not.

Therefore I think the proposition is made out, going by steps, that the tug *Prairie Cock* ought to have exhibited those towing lights, and that someone is responsible under the Merchant Shipping Act and the regulations for the collision which happened by reason of those lights not being exhibited. Under those circumstances was it the persons in control of the *Veritas?* That raises a question of great interest, and upon that there is a considerable amount of authority. The question is, Is the *Veritas* responsible for her tug exhibiting improper lights? I do not think that it can possibly be put on any broad common law doctrine. It cannot, I think, be said in a simple way that the relation between the two was the relation of master and servant, and therefore whatever the tug did wrong the tow was responsible for. In the case of principal and agent or master and servant where a servant is employed the master is responsible for his wrong acts by reason of the common law relation between them, but as has been pointed out in more than one case, especially in the case of *The Quickstep* (63 L. T. Rep. 713), this is not a relation which one can properly seek to impose in these cases. One cannot say it depends solely upon the common law position, because the tug holds rather the position of independent contractor, or rather the position of a person employed but independently employed. As in the common case as it is put in *The Quickstep* (*ubi sup.*) of taking a wherry on the river the man who takes the wherry is not responsible for all the mistakes made by the man whom he employs, or in the common case of a cab a man is not responsible for all the mistakes of his cabman because it is true he employs him as a servant, but he is an independent servant, and the master is not liable for the mistakes he makes under those circumstances. That is not a doctrine upon which to my mind reliance can be placed. But the doctrine upon which reliance can be placed is more that of the Admiralty law—namely, that under some circumstances the tug and tow must be considered to be a composite single body so created, the control being in the tow and not in the tug. In the first place, it is to be observed that although that is the Admiralty doctrine still there must be, I was going to say a flavour—I hardly know whether that term is right—of the common law about it. It compels one to say there must be a relation, in fact, of master and servant. Unless it can therefore be shown that the tow and tug really stood in the relation to one another of employer and employed, neither the Admiralty nor any other doctrine applies to make the tug liable. That of course is illustrated by the case of *The Quickstep*, where a good many barges were in tow of a single tug, and it is illustrated further by the way in which I believe the American courts have worked the matter out in cases where in their rivers there are a very large number of barges owned by many owners, and under the control of a single tug. In those cases it has been held that the relation of master and servant does not apply at all. In point of fact there are many masters and one servant responsible, and no one is master more than the other. Under those circumstances one might use Admiralty language and say there is no identification of the two, or you might put it upon the failure of the common law relation between master and servant. However it is put, the result is the same—that there is no such relation between them as would enable you to import either common or Admiralty law. That only applies where the question of who is master, or is there any master, can fairly be asked. A further principle which appears to me to be necessary for the due development of the Admiralty doctrine consists in the identification of tow and tug, and I quite agree with the view which has been put forward, that under those circumstances it is necessary to show more for

the proposition introducing the Admiralty doctrine than a mere employment. For example, if the tug were at a very considerable distance from the tow—I think I put in the course of the argument the case of a tow sending for the tug which is starting for her voyage to reach her, and perhaps being miles away from her—it is impossible to say that the tow would be liable for misconduct or neglect on the part of the tug in that case. Why? Because the circumstances would not arise which would give rise to a reasonable application of the Admiralty doctrine, and in order to make that doctrine apply it is necessary to show that in fact the circumstances were such that the two were identified, and that the control of the tug and the tow was a reasonable and practicable thing. If that breaks down, if you could show that there was no such control, and there could be no such control, then every foundation for the Admiralty doctrine vanishes. Now the question is, How is the line to be drawn; when is it to be said that a tug and tow are in such a relation in fact to one another as that the tow should he held liable for misfeasance or misconduct on the part of the tug? The point that was made by Mr. Laing suggests a line which it appears to me impossible to adopt. He says the true line which is to be drawn is: Is there actual towing going on; is the tow-rope tight—that is what it really comes to; is there a strain upon it? if so, one is towing the other, and in the operation of towing it is the duty of the tow when practicable to control the tug, and it becomes correspondingly responsible if the tug is badly managed. I am unable to draw the line at this point. In every case you must show circumstances in which the control is practicable and possible, but I do not know and I do not think that those circumstances are limited to the case of there being an actual strain for the moment on the hawser which connects the tow and the tug. In this case there was no such strain. The vessels, as I have said already, were lying alongside of one another connected by means of a hawser, the one being ready, if needed, to render assistance which — from the broken-down condition in which the *Veritas* was from the failure of her own steam power—was rendered peculiarly necessary. But I agree that there was no actual strain on the hawser, and the tug was not rendering any service beyond that of being ready, waiting to render any if necessary. But can that make any difference? I do not think it can. I think the true principle and the true line is, Were the two in such a position towards one another that the control of the tow and the tug was practicable and possible? That appears to me to be the true test, and I apply that to the authorities that have been mentioned, such as *The Niobe* (*ubi sup.*) and the other cases, and I should say that liability has been established, because the tow ought to have, and was in a position to, exercise control, and that control over the tug ought to have been applied. If you find those circumstances do not exist, then the tow cannot be held liable, and that appears to me to be a fair and good rule. In this case what real difference is there? What possible difference can it make whether the screw of the tug was turning at the moment or not? That is what it comes to. It is admitted that if the screw of the tug was turning and some strain was put upon the hawser to hold the ship up—of course, no possible distinction can be made between holding her to the tide and towing her forward, that is not suggested—that the rule would apply. To my mind, the distinction is a great deal too fine, and a broader view which I have suggested is the one which suggests itself to my mind. A further point is suggested, which perhaps arises rather from something which was passing in my own mind as to whether the tow would be liable for what we may call the internal economy of the tug, and I confess it is possible that somewhat nice questions might arise upon that point, but I do not think it necessary to go into them, partly because one or more of the authorities have dealt with the case where the tow would be liable for some failure of lights on the tug, and if she was liable for lights at all it appears to me she might be properly liable for lights in this case and also because I think it comes well within the principle which I have ventured to indicate. It appears to me the tow is responsible for the conduct of the tug so far at least as she can practically and reasonably exercise it. That at any time, to my mind, is the minimum of the obligation, and this case appears to me to fall within that minimum of obligation, which in this case is to have taken care that the tug exhibited proper lights. The tug was absolutely, in fact, connected with her, lying close beside her, and it appears to me impossible to say that the pilot on the *Veritas* might not perfectly well have interfered, and told the captain of the tug to put his proper towing lights up. I agree there might have been a difference of opinion between the two upon the subject, but the responsibility on the part of the pilot is to see that she had her proper lights up, and if we once make up our minds what the proper lights were, then it becomes the duty of the *Veritas* to see that the proper lights were put out. Therefore I think that the *Veritas* in this case was responsible under the circumstances for the *Prairie Cock* not exhibiting her two towing lights, and I have already said that in my judgment the absence of those two towing lights might have contributed to this collision. Under these circumstances I have to hold the *Devonian* to blame for bad look-out in not seeing the lights of the *Veritas*, and I am compelled also to hold the *Veritas* to blame on account of the improper lights which, in my judgment, the *Prairie Cock* was exhibiting.

Solicitors for the plaintiff, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Rowcliffes, Rawle*, and *Co.*, agents for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Friday, March 1, 1901.

(Before Sir F. JEUNE, President.)

THE TURRET COURT. (*a*)

Practice—Costs of shorthand-writer's notes—Time for application for—Power of court to vary its own order.

The ordinary order of judgment with costs does not include the cost of a transcript of the shorthand-writer's notes. Such costs must be applied

(*a*) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

for at the hearing. Where an order has been made for judgment with costs, and that order has been drawn up, the court has no power to alter its decree by subsequently allowing special costs.

THIS was a motion in a collision action which had occurred between the plaintiffs' steamship *Ramillies* and the defendants' steamship *Turret Court*.

The collision action was heard by the President and Trinity Masters, on the 27th, 28th, 29th, and 30th June, and the 5th and 12th July 1900, and resulted in judgment being entered for the plaintiffs with costs. The plaintiffs subsequently brought in their bill of costs for taxation before the Assistant Registrar of the Admiralty Court.

Among the items was a claim for the costs of a transcript of the shorthand-writer's notes and of copies of the same of evidence for the use of counsel which had been used at the trial. To this item the defendants objected, and it was disallowed. The plaintiffs appealed to the President, who made the following order.

Upon hearing both solicitors on the plaintiffs' application to review the taxation of their bill of costs, the President referred it back to the Assistant Registrar with directions to allow the costs of the shorthand-writer's notes of certain of the plaintiffs' evidence, and of copies thereof for the use of counsel, and that the defendants do have the costs of this application dated the 4th March 1901.

On the 5th March the President on the application by defendants' solicitors directed that the application be argued in court by way of motion on Monday, the 11th March. Upon the motion being called on:

D. Stephens, for the defendants, contended that these costs were special costs, and were not covered by the order for judgment with costs made by the President at the hearing of the action. The proper time for applying for such costs is at the conclusion of the hearing. The court has no power to alter its own order, and subsequently allow the costs of shorthand notes. He referred to

Kirkwood v. *Webster*, 9 Ch. Div. 239;
Ashworth v. *Outram*, 39 L. T. Rep. 441; 9 Ch. Div. 483;
De la Warr v. *Miles*, 45 L. T. Rep. 425; 19 Ch. Div. 80;
Ashworth v. *Tweedale*, 35 S. J. 191;
Hill and others v. *Metropolitan Asylums District Board*, 43 L. T. Rep. 462; 28 W. R. 664.

Batten, for the plaintiffs, contended that the court had discretion to vary its own order, and to allow the plaintiffs these costs. That no rule had ever been laid down to the effect that an order for the payment of special costs must be made at the hearing; and, further, that the original order for costs included all such costs as might eventually be found to have been properly incurred. He cited

Steed; Re Jay, 33 W. R. 80.

Stephens in reply.

The PRESIDENT.—I am obliged to decide this matter upon what I confess seems to me to be a somewhat narrow rule. I find it to be so, but I feel myself unable to alter it. If I am wrong, perhaps the Court of Appeal will be able to give a wider, and possibly a wiser, definition. It appears to me clear that the courts have held—not with regard to this division, but I desire to follow the analogy of other divisions on a matter of principle—that it is a long-standing and well-recognised rule that the costs of a shorthand-writer's notes shall not be allowed unless special directions have been given by the judge or court—that when the court gives costs it gives the ordinary costs, and these do not include the costs of a shorthand-writer's notes. I think it is a narrow view, because I should have thought that the wider view was the proper one, and that when the court gives costs it means to give all the costs which may hereafter be determined to have been necessary. The courts have held otherwise, however, and have held that an order for such special costs must be embodied in the judgment of the court. That is clearly the view of Jessel, M.R., in the case of *Earl De la Warr* v. *Miles* (*ubi sup.*). I do not think it is necessary to deal with any other case, because he is a great authority. The Master of the Rolls says: "The first objection is that according to the settled practice these costs are not to be allowed unless the judge or the court gives a special direction to that effect. That rule was laid down long ago, and I believe that it has been consistently followed since. It seems to me to be a right rule, and if it had not been laid down before I should have been disposed to lay it down now." Therefore, according to well-recognised law, unless there is a special direction by the court these particular costs cannot be allowed. It follows that the application for such costs must be made at the time of judgment, because if it is not and the order is drawn up, it cannot be disputed that the court has not afterwards power to alter its judgment, because, by an omission, it was not brought before the notice of the court. By those decisions I hold myself to be bound. I have made an order in the case giving the costs and not making any special direction, and under those circumstances I say—and I say it with regret, but I feel compelled to say it—that I cannot modify that order by giving the costs for the shorthand-writer's notes. I say with regret, because in the particular circumstances of the case, if I had been able to do so, I should have in all human probability allowed those costs. Therefore I refuse them, because I consider myself bound by the rule of practice to which I have referred.

Solicitors for the plaintiffs, *Pitchard* and *Sons*.

Solicitors for the defendants, *Botterell* and *Roche*.

March 7 and 23, 1901.

(Before Sir F. JEUNE, President.)

THE PORT VICTOR. (a)

Salvage—Government stores—Liability of charterers for proportion of salvage.

Where Government stores are being carried at the risk of charterers and such stores are salved from a danger for which the charterers were responsible, the charterers are liable to pay salvage. There is a personal liability to pay salvage apart from the liability of the res.

(a) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

THE plaintiffs in this action were the owners, masters, and crews of the steamship *Amelie* and of the tugs *Columbia* and *Shamrock*; the defendants were the Jamaica Fruit Importing and Trading Company, who were the charterers under a time charter of the steamship *Port Victor*.

On the 4th June 1897 the *Port Victor*, while on a voyage from London to Jamaica, collided with the steamship *Roecliff* in the English Channel and sank her.

The *Port Victor* was severely damaged and had to take salvage assistance.

The cause of the collision was the negligent navigation of the *Port Victor*.

An action *in rem* was brought for salvage by the present plaintiffs and by the owners of the tug *Lady Vita*.

At the time of the collision the *Port Victor* had on board some Government stores owned by the Admiralty. These goods were shipped by the charterers under contracts entered into with the Admiralty, and were carried under the Admiralty regulations for the conveyance of Government stores.

By these regulations it was provided in the note at their head that

The term "owners" used in the following regulations is to be understood as signifying the party or parties who engage to convey the stores under the agreement for freight or charter-party.

Clause 17 provided that

The owners will be held responsible for the safe delivery of the Government stores shipped, the act of God, Queen's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the voyage always excepted; and provided always that the liability of the owners arising from negligent navigation shall be limited as provided by the Merchant Shipping Act 1894, and shall in no case exceed 20*l*. per freight ton.

The stores were shipped under the usual Admiralty bill of lading, which is subject to the stipulations contained in the charter-party or other agreement entered into with or on behalf of the Lords Commissioners of the Admiralty and in the regulations of Her Majesty's Transport Service.

The salvage action was heard before Barnes, J., assisted by two of the Elder Brethren, on the 17th July 1897, when he awarded the sum of 800*l*. to the *Amelie*, 600*l*. to the *Columbia*, 400*l*. to the *Shamrock*, and 400*l*. to the *Lady Vita*, making a total of 2200*l*. in all. These awards were based on the total values of the *Port Victor* and her cargo, all questions as to the liability for the proportion due for the salvage of the Government stores being reserved for further consideration if necessary.

On the Admiralty being applied to they refused to pay salvage, or enter an appearance on the ground that the collision had been brought about by the negligence of the *Port Victor*, and as their contract did not exonerate the carrier from liability for negligence they declined to recognise the claim. The proportion of salvage that the Admiralty would have been liable to pay, had they recognised the claim, would have been 297*l*. 15*s*. 8*d*. The plaintiffs now sought to make the defendants liable for this amount.

By the terms of the charter-party, clause 10:

The captain shall sign bills of lading at any rate of freight the charterers or their agents may choose, without prejudice to the stipulations of this charter-party, and the charterers hereby agree to indemnify the owners from any consequences that may arise from the captain following the charterer's instructions and signing bills of lading. . . . The owners shall not under any circumstances be liable for condition of fruit or other cargo, and the charterers hereby indemnify the owners against any claim arising under any bill of lading.

Aspinall, K.C. (*Dawson Miller* with him) for the plaintiffs.—These Government Stores were at the risk of the defendants, and it is the defendants who have been saved a loss by the rendering of these salvage services. By the terms of the charter party the captain was to sign bills of lading as the charterers or their agents might choose, and the charterers agreed to indemnify the owners against any consequences that might arise from the captain so signing bills of lading and from any claim that might arise under any bill of lading. The captain acting in pursuance of the charterers' or their agents' instructions, signed the bills of lading for the Government stores which contained no negligence clause. In consequence of this omission, if the Government had sued the shipowners for non-delivery of their goods, there would have been no defence to the action, but the shipowners would have had a a remedy over against the charterers.

Milburn and Co. v. *Jamaica Fruit Company*, 83 L. T. Rep. 321; 9 Asp. Mar. Law Cas. 122; (1900) 2 Q. B. 540.

The result is that these defendants had an interest in these stores, and have been saved a pecuniary loss by reason of these salvage services. They cited

The Five Steel Barges, 63 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142;
Milburn and Co. v. *Jamaica Fruit Company*, 83 L. T. Rep. 321; 9 Asp. Mar. Law Cas. 122; (1900) 2 Q. B. 540;
Kennedy's Civil Salvage, p. 179;
The Pallada, *Times*, Dec. 24, 1900;
Duncan v. *Dundee, Perth, and London Shipping Company*, Scotch Sess. Cas. 4th series, vol. 5, p. 742;
The Gemma, 81 L. T. Rep. 379; 8 Asp. Mar. Law Cas. 585; (1899) P. 285;
The Dictator, 67 L. T. Rep. 563; 7 Asp. Mar. Law Cas. 251; (1892) P. 304.

Carver, K.C. (*Scrutton*, K.C. with him) for the defendants *contrà*. — The defendants were not carriers, but intermediaries between the carriers and the Government. They cannot be made liable for salvage. In the case of *The Five Steel Barges* (*ubi sup.*) the party held liable was in possession of the barges, and was for all practical purposes their owner, and had also a lien on them. There are propositions in the judgment in *The Five Steel Barges* (*ubi sup.*) which are not good law. Such propositions would render underwriters, mortgagees, or a vendor who had a right to stop *in transitu* liable for salvage. The fact that a salvage action can be maintained *in personam* does not necessarily import a personal obligation because proceedings *in personam* in Admiralty are really only a means of enforcing one's remedy against the *res*. Probably the only persons who can be sued *in personam* for salvage are the owners of the *res* or persons to whom the salvors have delivered it and who have appropriated it. Here the defendants were not owners of the ship nor in

possession of her or of the goods; nor were they carriers. It is submitted that *Duncan* v. *Dundee, Perth, and London Shipping Company* (*ubi sup.*) does not apply. There is not even a personal obligation on an owner to pay salvage; the personal liability only takes the place of the obligation of the *res*. There may be a personal liability on an owner in the case of damage, but not of salvage. [THE PRESIDENT.—But a person who takes the goods must surely be liable for their value?] Yes, perhaps, but the defendants did not take them:

The Hope, 3 C. Rob. 215;
The Trelawney, 3 C. Rob. n. 216; 4 C. Rob. 223;
The Chieftain, 4 Notes of Cases, 459;
The Elton, 55 L. T. Rep. 232; 7 Asp. Mar. Law Cas. 66; (1891) P. Div. 265;
The Cargo ex Schiller, 36 L. T. Rep. 714; 3 Asp. Mar. Law Cas. 439; 2 P. Div. 145;
The Zephyrus, 1 W. Rob. 329;
The Rapid, 3 Hagg. 419;
Falcke v. *Scottish Imperial Insurance Company*, 56 L. T. Rep. 220; 34 Ch. Div. 134.

At common law a salvor only had a possessory lien, but no right *in personam*:

Harford v. *Jones*, 1 Ld. Raym. 393; 2 Salk. 654;
Nicholson v. *Chapman*, 2 H. Bl. 254.

He also referred to

The County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 3;
The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 546, 554, 557, 560, 568;
Anderson v. *Ocean Steamship Company*, 52 L. T. Rep. 441; 5 Asp. Mar. Law Cas. 401; 10 App. Cas. 107;
Kennedy's Civil Salvage, p. 11.

Aspinall, K.C. in reply.—The defendants had a special property in these goods. They were entitled to possession of them, and could have sued the salvors for their loss had it been caused by the salvors' negligence during the salvage operations. The right to salvage mainly depends upon benefit conferred.

Cur. adv. vult.

March 23.—The PRESIDENT.—This is a claim for salvage in respect of certain Government stores carried in the steamship *Port Victor*, and the claim is made against the Jamaica Fruit Importing and Trading Company, of London, the defendants, as being interested in the cargo. The proportionate part of the salvage award for which the defendants are liable, if at all, has been ascertained, and the only question remaining is that of liability. The interest of the defendants in the cargo is of the following nature: By a charter-party of the 9th Oct. 1896 the defendants became the charterers of the *Port Victor* for thirty-six months. By clause 10 the charterers indemnify the owners against any claim arising under any bill of lading, and by clause 22 negligence of the master and officers is made one of the subjects of mutual exception. The defendants entered into various arrangements in respect of goods to be conveyed by the *Port Victor*, and *inter alia* engaged for the conveyance of the Government stores above mentioned, the engagement being made subject to the regulations for the conveyance of Government stores. These regulations provide for bills of lading, and further provide that the owners—which term is expressly declared to signify the party or parties who engage to convey the stores under the agreement for freight or charter-party—will be held responsible for the safe delivery of the Government stores shipped. The goods in question were shipped under a bill or bills of lading which state them to be shipped subject to the regulations contained in the charter-party, and in the regulations for Her Majesty's Transport Service. The salvage service was rendered necessary by reason of a collision caused by the negligence of the *Port Victor*. The result, therefore, is that as between the Government and the defendants, the defendants were responsible for the safe delivery of the goods, and they were therefore directly interested in the preservation of the goods and the salvage service was a direct benefit to them. It was argued before me that the above facts bring the case within that of *The Five Steel Barges* (*ubi sup.*), decided by Lord Hannen. In that case the defendants were under a contract to build and deliver certain barges to the Government. The barges were being towed by the plaintiffs for the defendants from Chepstow to Portland, and were salved by the plaintiffs, who brought an action *in personam* against the defendants in respect of two of the barges, which were given up to the Government. It was argued for the plaintiffs that the defendants had an interest in the barges being delivered safely to the Government, and that therefore a service was rendered to them personally. It was said in answer that the plaintiffs had lost any rights they possessed against the barges by giving them up to the Government, and that the defendants had no property in them. Lord Hannen held that it was perfectly clear within the authorities that an action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others and the lien lost. "In this case," the learned judge proceeded, "the property does not appear to have been in the defendants because it would, I think, under the contract be in the Government. But I am of opinion that the right to sue *in personam* is not confined to the case of the defendants being the actual legal owners of the property salved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which this court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendant was under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think if Mr. Barnes' argument is well founded—viz., that those instalments were all paid on condition that the barges should be delivered within twelve months of the date of the contract, it would follow that, if the defendants

had not been in a position to deliver the barges within the twelve months, then either they would have been liable in damages for not performing the contract or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears to me, therefore, that they had substantially an interest, to the full amount of the barges, at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property." There is a decision in the Scotch courts which appears to me to be in accordance with that in *The Five Steel Barges*. In *Duncan* v. *Dundee Shipping Company* (*ubi sup.*) it was held by the Court of Session that the shipowners in that case were acting as common carriers, and were in the circumstances of the case liable for the safe delivery of the goods, and that, therefore, they had no defence to a claim for salvage in respect of such goods. "The case," Lord Shand said, "comes to this, that the carrier of these goods being absolutely bound to deliver them at the end of the voyage, the salvage has directly enured to his benefit, for it has enabled him to fulfil his contract and to earn the freight which he charged for these goods. On the ground that it is established in this case as a matter of fact that the benefit of this salvage, in so far as regarded the cargo, enured directly to the carrier, I am of opinion that he is liable for the salvage which is here claimed."

It was argued before me that the present case can be distinguished from that of *The Five Steel Barges* on the ground that in that case the defendants had a lien for the price of the barges, and so, for practical purposes, were the owners, although the property in law was no doubt in the Government. It was contended that the claim for salvage is limited to claims against the owners, or at least against the persons who, like carriers, are in possession of the goods at the time of the salvage, but that in the present case the defendants were not the owners of the goods, nor were ever in possession of them. A legal foundation for this view was sought in the argument that the Admiralty action *in personam* is based on the supposition that the goods were allowed by the salvors to be returned to their former possessor on the terms that he should be liable to pay the salvage reward. I think that this contention is based on too narrow a view of the right of a salvor, and, in my opinion, the nature and origin of the Admiralty action for salvage do not impose any limits on that right narrower than those indicated by Lord Hannen and Lord Shand in the cases I have mentioned. It is quite true that in the case of *The Elton* (*ubi sup.*) I said, relying on the authorities I there cite, that "although salvage suits in the form of actions *in personam* are comparatively rare, the Court of Admiralty always had jurisdiction, founded apparently on the fiction of an action *in rem*, having been brought and the property salved having been allowed to be taken by the owners, to entertain such suits where at least there existed a corpus of property salved." But in the following year, when I had occasion, in the case of *The Dictator* (*ubi sup.*) to examine the subject of the origin and nature of the Admiralty jurisdiction more fully, I came to the conclusion, which the approval expressed by the Court of Appeal in the case of *The Gemma* (*ubi sup.*) leads me to hope was well founded, that the action *in personam* did not arise out of jurisdiction *in rem*, and that the distinction between actions *in personam* and actions *in rem*, depended only on whether the person or property of the defendant was arrested in the first instance. To rest the jurisdiction of the Admiralty Court upon an implied request from the owners of the property in danger to the salvors, or on an implied contract between the salvor and owner, with the relinquishment of the *res* for consideration is, I think, to confuse two different systems of law and to resort to a misleading analogy. The true view is, I think, that the law of Admiralty imposes on the owners of property saved an obligation to pay the person who saves it simply because, in the view of that system of law, it is just he should, and this conception of justice naturally imposes a proportionate obligation on any person whose interest in the property is real, though falling short of that of ownership. I see no reason, therefore, why I should not follow the view of Lord Hannen and of the Scotch Court of Session, that a man who has had a benefit arising out of the saving of the property is liable to a claim for salvage no less than the actual owner of it. It was urged before me that to take this view would expose mortgagees and insurers to salvage actions. I do not think it is necessary in this case to define exhaustively the classes of persons against whom under various circumstances claims of salvage might be made. There is, no doubt, the authority of eminent judges in the courts of common law for saying that contribution cannot be required by an owner from the lender upon bottomry or *respondentia* (Parke on Marine Insurance, ii., 898, and the judgments of Lord Mansfield and Lord Kenyon, there cited). On the other hand, Dr. Lushington, in *The Louise* (Br. & L. 59), held that mortgagees came within the term "owners" in the sections of the Merchant Shipping Act 1854 relating to salvage. It is, however, easy to see that the contingent interests of a person who makes advances by way of mortgage, or otherwise, on property, or of an insurer, is of a different character from that of persons who have a direct interest in its safe delivery, and may negative, or at least impose, different conditions on the right of a salvor against some of these persons. It may be, therefore, that it will become necessary hereafter to consider what is the exact definition of the interest in the property saved which gives rise to a claim of salvage. But in the present case I have no doubt that the defendant had such an interest; and my judgment must, therefore, be for the plaintiff.

A stay of execution, pending appeal, was granted on the condition of 150*l.* being paid into court.

Solicitors for the plaintiffs, *W. A. Crump* and *Son*.

Solicitors for the defendants, *Parker, Garrett*, and *Holman*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Dec. 5, 6, 12, 1900, *Feb.* 8 *and March* 2, 1901.

(Present: The Right Hons. Lords HOBHOUSE, MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.)

AJUM, GOOLAM, HOSSEN, AND CO., AND OTHERS *v* UNION MARINE INSURANCE COMPANY (*a*).

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Marine insurance—Seaworthiness—Loss from unascertained cause.

Where a ship is lost shortly after leaving port without any known cause sufficient to account for the catastrophe, the presumption in favour of unseaworthiness may be rebutted by evidence as to the actual condition of the ship at the time of sailing.

Pickup *v.* Thames and Mersey Marine Insurance Company (39 *L. T. Rep.* 341; 4 *Asp. Mar. Law Cas.* 43; 3 *Q. B. Div.* 594) *approved.*

A ship cannot be considered unseaworthy in consequence of a defect easily curable by those on board.

Judgment of the court below reversed.

THIS was an appeal from the judgment of the Supreme Court of Mauritius, dated the 1st Feb. 1899, whereby it was ordered that judgment be entered for the defendants, the rights of Ajum, Goolam, Hossen, and Company, and Hajee Essop Mamode Sulliman and another, in the case in guarantee, remaining intact.

The question raised by the appeal was whether the steamship *Taif* was seaworthy when she started on the voyage in question in the case, or was unseaworthy as found by a majority of the court below.

The appellants Hossen and Co. filed their declaration on the 28th Dec. 1896, claiming to recover Rs.126,346 from the respondents, the Union Marine Insurance Company, under certain policies of insurance subscribed by them, and dated in Mauritius the 23rd Sept. 1896, on bags of sugar free of particular average per the steamship *Taif*, at and from Mauritius to Bombay.

The respondents, the Union Marine Insurance Company, filed their plea on the 26th Jan. 1897, denying liability on the ground that the *Taif* was unseaworthy at the commencement of the voyage. The appellants, Hossen and Co., being the owners of the cargo on the steamship *Taif*, thereupon by notice of intervention fi ed on the 19th Feb. 1897, commenced proceedings in guarantee against Hajee Cassim Joosub and another (the defendants in guarantee), the owners of the steamship *Taif*, to recover the said sum of Rs.126,346 in case the Union Marine Insurance Company Limited should succeed in their defence. On the 2nd April 1897, an order was made by consent, that the defendants in guarantee should intervene in the case of Hossen and Co. against The Union Marine Insurance Company.

The action came on for hearing on the 12th May 1898, before Delafaye (Acting Chief Justice), Moncrieff, and Oliver Smith, J.J. The evidence consisted of depositions of witnesses at a wreck inquiry at Colombo, depositions of witnesses taken on commission at Bombay, Glasgow, and Mauritius, oral evidence given before the court, and various exhibits.

The evidence on all sides agreed that the *Taif* went down in deep water about nineteen hours after she started on her voyage without having encountered any weather sufficient to account for her loss.

The following facts were also proved or admitted:—

The *Taif* was a British steel screw steamer built in 1884, of 859 tons net and 1441 tons gross register, and at the time of her loss was on a voyage from Mauritius to Bombay laden with sugar in bags.

On the 23rd Sept. 1896, the *Taif* was lying in the harbour of Port Louis, Mauritius, where she had been taking in her cargo. Between 8.30 and 9 a.m. on that date the loading of the holds of the *Taif* had been completed, and the same were then full of bags of sugar. Some 300 bags of sugar were loaded later in the morning, but before 10.30 a.m., and were stowed in the storeroom, in the saloon cabin, in the dispensary, and hospital.

At the time that the loading of the holds was completed the after-ballast tank was full of water, and the *Taif* had a considerable list to port.

At 9 a.m. on the 23rd, the master was ready to sail except that he had not received orders from his agent or his clearance papers, and but for this he would have gone to sea. The *Taif* usually sailed with her after-ballast tank full when carrying cargo.

Between 9 a.m. and 11.30 a.m. the *Taif* was inspected on three different occasions by three different customs officers; once by the collector of customs on his rounds of the harbour, and twice by other officers who went for the purpose of granting her her clearances. On each occasion the clearance was withheld upon the grounds of the vessel's list, and of the submerging of her disc or load-line. At one of these inspections or at a subsequent interview, the captain of the *Taif* said that he could raise the vessel to the Plimsoll mark by pumping out the tank.

About noon an interview took place between the captain of the *Taif*, the ship's agent, the collector of customs and his deputy at which the clearance papers were refused by the collector until the ship had been put in order. The captain and agent then returned on board the *Taif*, and some time between twelve and one orders were given to pump out the ballast tank, and the pump was set to work.

According to the engineers it required at least three hours to empty the after-ballast tank from full, but at 1.15 p.m. the senior tide surveyor who had made the last of the three previous inspections, again inspected the *Taif's* load-lines, and having given the captain his clearance papers, allowed the *Taif* to sail at 1.30 p.m. Except for the pumping nothing else was done to remedy or alter the condition of the ship, and the *Taif* went to sea with free water in her after-ballast tank, a considerable list, and her port load-line submerged.

The *Taif* having started at 1.30 p.m. on the 23rd, encountered a strong wind and a confused sea, the wind being on the starboard side. Almost immediately after leaving, the after-ballast tank was filled up again by order of the master, and during the afternoon the sails were also set.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Some increase in the list of the ship seems to have occurred during the afternoon and night, as at 4 a.m. on the 24th, it had become considerably worse. At 4.15 a.m. the master ordered the after-ballast tank to be emptied, and pumping was commenced and went on as long as steam was available. At 6 a.m. the stokehole fires fell over to one side and stopped the supply of steam, and between 8 and 9 a.m. on the 24th the *Taif* fell over to port and went down.

The wells of the *Taif* were sounded periodically on the voyage, but she made no water at any time, and did not leak.

The figures relative to the amount of list with which the *Taif* started were variously given.

No trustworthy figures were given of the total amount of weight put on board the *Taif*.

Free water in a ballast tank is dangerous at sea. It causes listing, rolling, and may damage the tank top and start a plate.

Cargoes of sugar are liable to settle, and if there is a list, a cargo of sugar will probably settle to the side of the list.

The *Taif* had been engaged for some time in carrying sugar from the Mauritius to Bombay but had never before loaded so many bags. On some of the occasions on which she had sailed with her after-ballast tank full she had carried a correspondingly less number of bags.

The hearing of the case and arguments after several adjournments was concluded on the 2nd Sept. 1898, and the court took time for consideration.

On the 1st Feb. 1899, judgment was delivered by two of the learned judges in favour of the respondents (the Union Marine Insurance Company) and by the other learned judge in favour of the appellants. Delafaye, C.J. in giving judgment for the appellants declined to hold that there was any presumption to be drawn from the fact of the *Taif* sinking some nineteen hours after sailing without having encountered any weather sufficient to account for her loss, and was of opinion that he was unable to say or even to safely conjecture what it was that caused the ship to sink and that the safe and rational conclusion was that the loss was occasioned by the action of the sea.

Moncrieff and Oliver Smith, JJ. both found that the vessel was unseaworthy, because when she left harbour she had an unusual list, and a considerable amount of freewater in her after-ballast tank, and was deficient in stability, and she sank about nineteen hours after she sailed without any apparent cause other than her instability.

On the 13th March 1899, leave to appeal was granted both to the plaintiffs (Hossen and Co.) and the defendants in guarantee (Sulliman and another) by the Supreme Court of Mauritius.

Asquith, Q.C., *J. B. Matthews*, and *L. Batten* appeared for the appellants.

J. Walton, Q.C., *Horridge*, and *A. D. Bateson* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 2.—Their Lordships' judgment was delivered by

Lord LINDLEY.—This is an action on four policies of insurance on cargo shipped on board the s.s. *Taif* to be carried from Port Louis in Mauritius to Bombay. The underwriters defend the action on the ground that the ship was unseaworthy when she sailed. The burden of proving that she was so is on them, and the sole question is whether they have established their contention. In the court below the Chief Justice held that they had not; but his two colleagues Moncrieff and Oliver Smith, JJ. came to a different conclusion. The decision of the court was therefore in favour of the underwriters and against the plaintiffs, and from this decision the plaintiffs have appealed. The underwriters have the great advantage of the undoubted fact that the vessel capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe; and there is no doubt that if nothing more were known they would be entitled to succeed in the action. If nothing more were known unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness upon which a jury ought to be directed to act and upon which a court ought to act if unassisted by a jury. But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship are proved those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed such unseaworthiness cannot be properly treated as established, and the defence founded upon it must fail. The law on this point was finally settled in *Pickup* v. *Thames and Mersey Marine Insurance Company* (39 L. T. Rep. 341; 4 Asp. Mar. Law Cas. 43; 3 Q. B. Div. 594), which followed *Anderson* v. *Morice* (31 L. T. Rep. 605; 3 Asp Mar. Law Cas. 290; L. Rep. 10 C. P. 58). In these cases the court pointed out the danger and error of acting on the presumption in favour of unseaworthiness in case of an early loss of which the assured cannot prove the cause; and the court pointed out the necessity of bearing in mind that the defence of unseaworthiness must be overruled unless supported by a sufficient weight of evidence in its favour after duly considering all the evidence bearing on the subject, including, of course, the very weighty evidence with which the underwriters start their case. In this case an enormous mass of evidence has been given as to the condition of the ship before and when she sailed, and as to the mode in which she was loaded. Much of such evidence is very conflicting, but the results are clear and some of them are really not in controversy. [His Lordship went through the evidence in the case, and continued:] Such are the facts. There is no proof whatever that the ship was in danger when the captain ordered water to be pumped into the after tank. There is no evidence to show that if the great increase of the list which took place after 10.30 p.m. had been reported to the captain it could not then have been remedied. He says that he thinks it could. But when he came on deck after 4 a.m. it was too late to right the ship. The unseaworthiness relied upon by the defendants is stated in their sixth plea to arise from the ship being overloaded top heavy and crank when she started on her voyage. Danger from water in her after tank is not re-

ferred to. It was contended by the defendants' counsel that with such a cargo as the ship had and stowed as it was she was unsafe when she sailed whether her after tank was empty or full. If empty she was top heavy and unstable, if full she was overloaded and too deep in the water. The difficulty in accepting this view is that the direct evidence is very strong to show that when she left port she was neither overloaded nor top heavy. The port authorities objected to her sailing when she was too deep in the water and had a heavy list; but they allowed her to sail when these defects were cured by pumping out water from her after tank. This not only lightened the ship and brought her load line up, but considerably reduced the serious list which she had when the port authorities refused to let her sail. Their Lordships are satisfied that when she sailed she was not too deep in the water. Indeed overloading in this sense was practically abandoned in the court below, and was negatived by all the judges. On the inquiry at Colombo some of the crew said that in their opinion she was overloaded; and opinions were expressed that she must have been top heavy. But there was much evidence the other way, and weighing the whole evidence as it now stands their Lordships agree with the chief justice in accepting the pilot's evidence that she was neither overloaded nor top heavy when she left port. The other judges also negative top-heaviness, but they think her after tank was half full of water, and that this was a source of danger. Their Lordships are of opinion that the evidence tends more strongly to show that the loss of the ship was attributable to mistakes made in her management after she sailed rather than to her unseaworthiness when she sailed. The balance of the evidence is against rather than in favour of her unseaworthiness at that time. It was strongly contended that the captain filled the after tank early on the voyage, because he knew that the ship was unstable with a full cargo and an empty after water tank. It was contended that his desire was to sail if he could with a full cargo and a full tank, and that when prevented from doing this by the port authorities he satisfied them by pumping water out intending to pump it in again as soon as he got out to sea. But the pumping out of water from the after tank began on the 22nd Sept. before any difficulties with the port authorities arose; and as already stated there is no proof whatever that it was necessary to fill the after tank to avoid danger whether present or prospective. It may have been desirable to do so for other reasons; but to give effect to the theory in question would be to substitute conjecture for proof. On previous voyages with full cargoes the after tank appears to have been sometimes empty and sometimes full although the captain's evidence on this head is far from satisfactory. A great point was made in the court below, that the ship sailed with a large quantity of water in her after tank, and that the weight and wash of this water was or at all events might become a source of danger. This contention seems to have made a great impression on Moncrieff and Smith, JJ. Indeed, their judgments are mainly based upon it. It took the plaintiffs somewhat by surprise as it was inconsistent with the defendants' main contention, that the tank was empty when the ship sailed, and being empty that she was top-heavy. The suggestion that water in the tank made the ship unseaworthy, was not seriously pressed before their Lordships. The fact that the quantity of water in the tank cannot now be satisfactorily ascertained even approximately, and the fact that it could be increased or diminished with ease if desired probably accounts for the practical abandonment of this point by the experienced counsel who conducted the case for the underwriters before their Lordships. They fell back on overloading and top-heaviness. Even if water in the tank might be a source of danger the judgment of Lord Blackburn in *Steel* v. *State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72) shows that a ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board. The case is no doubt one of difficulty, and no one can be surprised that the underwriters defended the action on the ground of unseaworthiness. But as the evidence came out they were forced from one theory to another, and they have failed to prove their case. It is supposed that the cargo must have shifted; but this is a mere supposition, and there is no evidence of any bad stowage or other cause to account for any shifting of the cargo. All is conjecture. The real cause of the loss is unknown, and cannot be ascertained from the evidence adduced in this action. But underwriters take the risk of loss from unascertainable causes; and, after carefully weighing all the evidence and bearing in mind the presumption of unseaworthiness on which the underwriters rely, their Lordships have come to the conclusion that unseaworthiness at the time of sailing is not proved. They agree with the Chief Justice, and feel compelled to differ from his colleagues. The consequence will be that they will humbly advise His Majesty to allow the appeal, and to order judgment to be entered for the plaintiffs in the action for the sum assured and damages in the nature of interest at 4 per cent. per annum from the 21st Dec. 1896 until payment and costs, other than those occasioned by joining the shipowners as interveners. The insurance company must pay the costs of the appeal of the plaintiffs except those occasioned by the intervention of the shipowners. As regards the shipowners who were added as interveners, and appealed separately, their Lordships consider that the plaintiffs having joined them for their own convenience ought to pay their costs of the action and intervention, and that against them the action should be dismissed with costs, and their Lordships will so advise His Majesty. It would be unjust to the underwriters to order them to pay the costs of the shipowners' appeal, and they must bear their own costs of that. As the appeals have been consolidated, one order will be drawn up on both appeals.

Solicitors for the appellants Hossen and Co., *H. C. Barker* and *Son*.

Solicitors for the appellants Joosub and another, *Waltons, Johnson, Bubb*, and *Whatton*.

Solicitors for the respondents, *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 24 and Feb. 19, 1901.

(Before SMITH, M.R., COLLINS and ROMER, L.JJ.)

PARSONS v. NEW ZEALAND SHIPPING COMPANY LIMITED. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of lading—Description of goods—Mistake in marks—Liability of person signing bill of lading—Short delivery—Exception in bill as to correctness of marks—Bills of Lading Act 1855 (18 & 19 *Vict. c.* 111), *s.* 3.

Sect. 3 *of the Bills of Lading Act* 1855 *provides that, subject to certain exceptions, a bill of lading representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped.*

The indorsee of a bill of lading brought an action for short delivery against the agents of the ship-owners who had signed the bill.

The bill of lading described the goods consigned, which were a large number of frozen lambs' carcases, as being "marked and numbered as in the margin," and it also contained a clause that the ship would not be responsible for correct delivery unless each package was correctly marked by the merchant before shipment with a mark, number, or address. The marks and numbers in the margin of the bill consisted of a particular brand followed by three figures.

On the discharge of the ship in London the defendants tendered to the plaintiff some carcases marked as in the bill of lading which the plaintiff accepted, and others marked with the same brand as that mentioned in the bills of lading, but having after the brand three figures different from those mentioned in the bill of lading.

The plaintiff refused to accept these last-named carcases, and brought this action for short delivery.

At the trial Kennedy, J. found as facts that the figures following the brand had no distinctive value as regards the meat market, and that the meat tendered, as a commercial article, was absolutely unaffected in its character or value by the figures following the brand. He also found that the carcases tendered by the defendants were the very goods which had been shipped on board under the bill of lading.

Held (affirming the decision of Kennedy, J. (82 *L. T. Rep.* 327; 9 *Asp. Mar. Law Cas.* 33; (1900) 1 *Q. B.* 714), *that the defendants were entitled to judgment.*

Per Smith, M.R.: The defendants were protected by the clause in the bill of lading relieving the ship from responsibility for correct delivery unless the goods were correctly marked before shipment.

Per Collins and Romer, L.JJ.: The defendants were not estopped by sect. 3 *of the Bills of Lading Act* 1855 *from showing that the goods they tendered were identical with those shipped under the plaintiff's bill of lading.*

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

THIS was an appeal by the plaintiff from the judgment of Kennedy, J. at the trial of the action without a jury.

The action was brought by the indorsee of two bills of lading against the signers of the bills, who were agents of the owners of the steamship *Fifeshire*.

The claim was for 124*l.* 19*s.* 1*d.* damages for non-delivery of 154 frozen carcases of lambs.

The defendants paid into court 29*l.* in respect of thirty-one carcases and the action proceeded as to the remaining 123 carcases.

The carcases in question were part of a large number consigned from Timaru, New Zealand, to London.

The bills of lading described the consignment as "being marked and numbered as in the margin," the marginal marks being, as to 608 carcases "Sun Brand 622 X," and as to 226 carcases "Sun Brand 488 X"; and also contained the following clause:

> The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked by the merchant, before shipment, with a mark and number or address.

Together with each bill of lading the plaintiff received an invoice, a certificate of insurance, and a specification, all following the description of the goods in the bills.

The plaintiff alleged that there had been a short delivery of 102 carcases marked "Sun Brand 622 X," and of twenty-one marked "Sun Brand 488 X." On the discharge of the ship being completed the defendants tendered to the plaintiff 102 carcases marked "Sun Brand 522 X" and twenty-one marked "Sun Brand 388 X," but the plaintiff refused to accept them.

It appeared that the first figure in each mark, which was put on by the Christchurch Freezing Company, near Timaru, meant the day of the week when the lamb was killed, the second figure had reference to the weight of the carcase, and the third showed from which of the Christchurch Company's works the carcase came.

At the trial of the action before Kennedy, J. without a jury, the learned judge found as facts (1) that the figures had no distinctive value as regards the market for the meat; that, as a commercial article, the meat was absolutely unaffected in character or value whether marked 522 or 622, 488 or 388; and (2) that there was no tally at Timaru, except of the number of carcases, and that the carcases tendered by the defendants were in fact those which were shipped as part of the consignment mentioned in the plaintiff's bill of lading.

The learned judge held that the defendants were not precluded by sect 3 of the Bills of Lading Act 1855 from relying on these facts, and gave judgment for the defendants.

The case is reported 82 L. T. Rep. 327; 9 Asp. Mar. Law Cas. 33; (1900) 1 Q. B. 714.

The plaintiff appealed.

The Bills of Lading Act 1855 (18 & 19 Vict. c. 111), provides as follows:

> . . . And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground

of the goods not having been laden as aforesaid: Be it therefore enacted . . .

Sect. 3. Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims.

Jan. 24.—*Danckwerts*, K.C. and *Loehnis* for the plaintiff.—Sect. 3 of the Bills of Lading Act 1855 does not entitle the defendants to say that the goods mentioned in the plaintiff's bills of lading were not in fact shipped. The marks are the only things by which the carcases can be identified. The bills of lading are bought and sold on the faith of statements in it being correct. The correctness of the marks is a most material matter. The certificate of insurance which the plaintiff received with the bills of lading continues for two months after delivery of the carcases in the London Docks, and the insurance company would repudiate any liability if a claim were made against them in respect of carcases bearing marks different from those mentioned in the certificate, which follows the description of the carcases given in the bills of lading. It is not a fulfilment of the defendant's contract that they should offer to deliver carcases marked differently from those they contracted to deliver. The defendants kept the plaintiff waiting for the delivery of the carcases due to him until the ship was completely discharged, and it was found that there were 123 carcases remaining which were claimed by nobody. It was only then that the defendants tendered these remaining carcases to the plaintiff, and in the meantime the price of frozen lamb had been falling. The usual modern practice is to put a clause into a charter-party providing that the bill of lading shall be conclusive evidence against the owners of the quantity of cargo received being as stated therein:

Lishman v. *Christie and Co.*, 57 L. T. Rep. 552; 6 Asp. Mar. Law Cas. 186; 19 Q. B. Div. 333;
Fisher, Renwick, and Co. v. *Calder and Co.*, 1 Com. Cas. 456.

The object of the enactment in sect. 3 of the Bills of Lading Act 1855 is to prevent disputes arising out of mistakes in the description of the goods named in the bill of lading. The defendants cannot go behind the bills of lading and show what goods actually were put on board. The present case is exactly within the words of the section:

Bradley v. *Dunipace*, 5 L. T. Rep. 356; 7. H. & N. 200; affirmed in the Exchequer Chamber, 1 H. & C. 521.

There are also dicta to be found in the plaintiff's favour in other cases:

Blanchet v. *Powell's Llantwit Collieries Company*, 30 L. T. Rep. 28; 2 Asp. Mar. Law Cas. 224; L. Rep. 9 Ex. 74;
Jessel v. *Bath*, L. Rep. 2 Ex. 267.

Carver, K.C. and *Leck* for the defendants.—In the first place sect. 3 does not apply to the facts of the present case, and the defendants are therefore not estopped from showing that the goods they tendered were the goods actually shipped under the plaintiff's bills of lading; and, secondly, the defendants are entitled to rely upon the clause in the bills that the ship is not to be responsible for correct delivery unless each package is correctly marked before shipment. As to the Act of Parliament, sect. 3 does not make a bill of lading conclusive against its signer except as to statements of the quantity and kind of the goods shipped. The preamble to the Act shows that the Act was directed to cases in which the goods in respect of which a bill of lading purports to be signed have not been laden on board, and sect. 3 clearly refers, not to questions of misdescription of marks on goods, but to the question whether the goods were in fact shipped. Kennedy, J. has found as a fact that the goods with reference to which the bills of lading were signed were actually laden on board. The section therefore does not apply to the present case. The marks are put on the carcases merely as a means of identification so as to facilitate delivery. The plaintiff cannot complain if the ship delivers to him the identical goods shipped under the bills of lading, though the identification marks on the goods do not exactly correspond with those given in the bills of lading. The insurance which the plaintiff received with his bills of lading was by a declaration made under an open policy by the Christchurch Freezing Company with the insurance company—*i.e.*, a declaration by which the Christchurch Freezing Company insured all their shipments of frozen lambs whatever marks the carcases might bear. These declarations under an open policy need not be made at all; sometimes they are not made till after the goods insured have been lost:

Stephens v. *Australasian Insurance Company*, 27 L. T. Rep. 585; 1 Asp. Mar. Law Cas. 458; L. Rep. 8 C. P. 18.

The courts do not read sect. 3 in its strictest sense. Where the weight of a cargo is material, a master may be bound by the statement of weight in a bill of lading which he has signed:

Bradley v. *Dunipace* (*ubi sup.*).

But where the weight is not material, a statement of the weight of the goods in the bill of lading is not made conclusive by sect. 3:

Blanchet v. *Powell's Llantwit Collieries Company* (*ubi sup.*).

The plaintiff would not have suffered any damage by accepting as those which he claimed the carcases tendered by the defendants. No greater liability attaches to the signer of a bill of lading than to a vendor. If the defendants had agreed to sell to the plaintiff the goods mentioned in the bills of lading and had tendered what were in fact tendered to the plaintiff, the plaintiff would have been bound to accept:

Hopkins v. *Hitchcock*, 8 L. T. Rep. 204.

Secondly, as to the clause in the bills relative to correctness of marks. The marks are merchants' marks, not shipowners' marks. They are nothing more than an equivalent to the address of the consignee, put on to insure correct delivery. It was only by the fault of the shippers that proper

speedy delivery was not made here. The case comes within the clause in the bills:

Jessel v. *Bath* (*ubi sup.*);
Grant v. *Norway*, 10 C. B. 665;
Cox and Co. v. *Bruce and Co.*, 57 L. T. Rep. 128; 6 Asp. Mar Law Cas. 152; 18 Q. B. Div. 147.

Danckwerts, K.C. replied.

Cur. adv. vult.

Feb. 19.—SMITH, M.R. read the following judgment:—This is an action by an indorsee for valuable consideration of two bills of lading signed by the defendants to recover the sum of 124*l.* 19*s.* 1*d.* for short delivery thereunder in the Port of London of 154 carcases of frozen lambs *ex* steamship *Fifeshire*, and the question is whether the plaintiff was bound to accept in fulfilment of the contract contained in these bills of lading carcases of frozen lambs which not only did not bear the marks and numbers upon the bills of lading of which he was indorsee for value, but bore marks and numbers which were different from, and not those upon, the bills of lading. It is sufficient to trace what took place in respect of one of these bills of lading, for by so doing the case will be freed of many details, and the point will thus become more conspicuous. On the 30th March 1899, the defendants signed a bill of lading, which, so far as material, is as follows: "Shipped in good order by the Christchurch Meat Company Limited, on board the steamship *Fifeshire*, now lying in Timaru, 1076 carcases, frozen lambs, being marked and numbered as in margin, to be delivered in like good order and condition (subject to exceptions not material to this case) at the Port of London unto order or assigns." The marks and numbers in the margin of the bill of lading were as follows: "The Sun Brand, Canterbury, N.Z., Lamb 622 X, 608 carcases, 722 X, 468 carcases, weighing 35,806lb." The meaning of these marks and numbers, apart from special meanings unknown to the plaintiff, was that 608 carcases of Sun Brand, Canterbury, New Zealand, lambs marked 622 X, and also 468 carcases of similar lambs marked 722 X—*i.e.*, 1076 carcases in all, and so marked and numbered—had been shipped under the bill of lading upon the steamship *Fifeshire*, which carcases so marked and numbered, and not, in my judgment, marked and numbered with other and different marks and numbers, were contracted to be delivered in like good order and condition, subject to exceptions, at the port of discharge. Before dealing with what these marks and numbers further indicate I will state what took place. On the 16th June 1899, the plaintiff purchased the lambs covered by this bill of lading from the agents of the shippers, the Christchurch Meat Company, and upon such purchase received an invoice from them. By this invoice the plaintiff was debited with 1076 carcases marked 622 X and 722 X, and for these carcases he paid the sum of 820*l.* 11*s.* 1*d.* Upon the purchase the bill of lading was indorsed and handed to the plaintiff, and he also then received from the vendors a certificate of insurance which covered 608 carcases marked 622 X and 468 carcases marked 722 X, for two months from the date of the arrival of the steamship *Fifeshire* in dock, when lying at the premises of the Leadenhall Market Storage Company and other places. It will thus be seen that these carcases were shipped under specific marks and numbers. They were taken on board by the ship as being carcases so marked and numbered, and were to be, in my judgment, as I have said before, delivered, subject to exceptions not material to the point in hand, under these marks and numbers, and certainly not under different marks and numbers at the port of discharge. There is no question in the case of marks and numbers being obliterated by sea perils or otherwise. These carcases were purchased by the plaintiff from the shippers under the specific marks and numbers, and, as before stated, the plaintiff held a certificate of insurance covering carcases so specifically marked and numbered and none other. Upon the plaintiff having thus become indorsee of the bill of lading and purchaser of the carcases above-mentioned, application was made on his behalf for delivery, together with others, of the 608 carcases marked 622 X and of the 468 carcases marked 722 X, when delivery of the 468 carcases marked 722 X was duly made, but delivery of the whole of the 608 carcases marked 622 X was refused upon the ground that the defendants could not deliver the whole of these 608 carcases; for, it was said, they had not all been shipped on board; but the defendants were willing to deliver to the plaintiff 507 of the 608 carcases marked 622 X, as in my judgment they were bound to do, but this was 101 carcases short of the bill of lading quantity, and in respect of this shortage of 101 carcases they subsequently tendered 101 carcases not marked 622 X but carcases marked 522 X. These the plaintiff refused to accept in fulfilment of his contract with the defendants, and Kennedy, J. has held that he could not refuse and was bound to take these 101 carcases not marked according to his bill of lading, but marked in an altogether different way, for 622 X is certainly not the same mark and number as 522 X; and the plaintiff appeals.

Before I come to sect. 3 of the Bills of Lading Act 1855, I wish to consider whether the marks and numbers 622 X, which are the marks and numbers whereby to identify the plaintiff's carcases and without which they could not be identified, were marks and numbers which were material to the plaintiff either as regards the identity of the carcases which the plaintiff was entitled to receive under his bill of lading or as regards his dealing with the carcases after he received them, for if material to the plaintiff I cannot agree with Kennedy, J. that the plaintiff was bound to accept the carcases tendered in fulfilment of the contract contained in the bill of lading. If the marks and numbers were not material to the plaintiff other considerations would arise, and in my opinion that case would not be the present case. Now, first of all, why are marks and numbers of identification placed in the ordinary course of business upon goods and also upon a bill of lading? In my opinion in the first place to identify to the holder of the bill of lading, whoever he may be, the goods which that holder is entitled to demand and take delivery of *ex* ship upon its arrival. In the present case there were in the hold of the *Fifeshire* many thousands of carcases under different bills of lading with different marks and numbers. If a holder of a bil of lading has, for instance, a bill of lading for carcases or for other goods, take it for corn in sacks, in a ship containing different shipments of carcases or corn, with no marks at all thereon, a

very improbable contingency, what is he to demand *ex* ship upon its arrival? It seems to me he can demand nothing, and he must wait until all the holders of other bills of lading with marks and numbers thereon have been satisfied and then take what happens to be left in the hold of the ship, and it may be thus lose the market in the mean time; and, again, if he has a bill of lading with marks and numbers on it and no goods with like marks and numbers come up out of the hold of the ship, the same thing must happen. Again, suppose a bill of lading holder were to take *ex* ship goods not marked in accordance with his bill of lading, say goods marked as in this case 522 X, instead of goods marked 622 X according to his bill of lading, what would be his position if and when the holder of the bill of lading for goods marked 522 X came and demanded his goods from the bill of lading holder, who had taken the goods maked 522 X under a bill of lading only covering goods 622 X? The answer is obvious. The person who has thus taken these goods would have to give them up. Surely these matters have only to be stated to show the materiality of marks and numbers of identification in commerce and the importance necessarily attaching to them in the carrying on of daily business. In my judgment the marks of identification in this case are very material, although there may be some cases in which certain indentification marks may be superfluous or for some other reason immaterial. But this remark has no place in the present case. Again, if in the present case the plaintiff could be forced to take the carcases marked 522 X as Kennedy, J. has held that he can be, what becomes of his insurance which only covered carcases marked 622 X and not carcases marked 522 X? In my opinion if the plaintiff had had to make a claim against the insurance company if the goods were burnt, the company, under a defence that their insurance covered carcases marked 622 X and not carcases marked 522 X, would stand well for judgment, or at the very least there would obviously be protracted litigation. With these remarks as to the materiality of marks and numbers of identification I come to the Bills of Lading Act 1855. In my opinion sect. 3 of this Act prevents a person who has signed the bill of lading from attempting to show in a case such as this that, of the carcases marked 622 X, 101 were not shipped, but that carcases marked 522 X were shipped in their place. In my opinion the Bills of Lading Act was passed to shut out a person who signs the bill of lading from a controversy such as this with a holder for value of a bill of lading. This section enacts that "every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder or some person under whom the holder claims." No question arises upon the latter part of this section. What then are the goods in this case represented by the bill of lading to have been shipped on board the steamship *Fifeshire?* In my opinion the representation is not that 608 carcases not marked or numbered at all, nor that 608 carcases mark 522 X, have been shipped, but that 608 carcases marked 622 X have been shipped. That being, in my opinion the representation of the bill of lading, the Bills of Lading Act 1885 applies to this case and shuts out the present suggested defence from the defendants, and I do not think that the Bills of Lading Act is confined to marks of quality and quantity which are comparatively rare when compared with marks of identification, and which quality marks when used are usually coupled with a statement in the bill of lading "weight, contents, and value unknown." In my opinion sect. 3 of the Bills of Lading Act applies to what is usual if not universal in commerce—viz., to goods as in the present case shipped under specific marks and numbers of identification, and so represented in the bill of lading. The above is my opinion independently of the special value found in this case to be attached to the marks and numbers themselves. It was proved that "Sun Brand X" denotes the quality of the carcases; the number 6 denotes the date when the animal was killed and put into ice; the duplication of the numbers (2.2.) show where the animal was killed and frozen; the final number 2 shows the grade. These numbers appear to me to be material, apart from identification, should disputes arise as to the freshness or otherwise of or about the quality of the carcases. Moreover, if the plaintiff is bound to take carcases marked 522 X, as Kennedy, J. holds he is, instead of carcases marked 622 X, he will be bound to take carcases killed and frozen at a date different from that at which carcases marked 622 X in his bill of lading, which he has purchased, were killed and frozen. Can this be? I think not. Kennedy, J. embarked upon the inquiry as to whether a carcase marked 522 X had any different value in the market for meat from a carcase marked 622 X, and as a commercial article he found that it was absolutely unaffected in its character or value; but, with submission, it is not merely a question as to whether the carcases under the different marks were of the same value in the market, but whether the marks and numbers were material or immaterial to the plaintiff. If I purchase cases of champagne identified by marks A B C, what answer is it when I claim my goods so marked and identified, to say that the goods tendered, which are marked X Y Z, are of the same value in the market, or even of greater value than those marked A B C? For the reasons above I think that the marks of identification in this case were of materiality to the plaintiff, and that the tender was not a good tender. Kennedy, J. also investigated the question whether 101 carcases marked 622 X were put on board at Timaru, and he came to the conclusion that they were not, and that the 101 carcases marked 522 X were put on board in their place; but this, in my opinion, for the reasons above, he could not go into as a defence by a person who signed the bill of lading, and I think that the plaintiff could not be forced by the defendants in this case to take the 101 carcases not marked according to his bill of lading; and if this case had rested here I could not have found for the defendants. For the reasons

hereafter appearing I need say nothing about the damages.

A very formidable point was next taken by Mr. Carver for the defendants, which was that even if the tender of 101 carcases was a bad tender the defendants were protected by a clause in the bill of lading for being sued in the circumstances of this case for incorrect delivery of 608 carcases marked 622 X. This clause is as follows: "The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address." What is the meaning of each package being correctly marked with the mark and number before shipment? In my judgment it can only mean correctly marked with the mark and number according to the bill of lading; for with what else can the mark and number upon the packages mentioned in this clause be correct? These marks and numbers must also be distinct and permanent. In my opinion, this is the true meaning of this clause, and it was inserted to meet a case like the present, where the goods were not correctly marked according to the bill of lading. It must not be forgotten that the bill of lading is drawn by the shippers, who ought to make the marks and numbers in the bill of lading and on the goods correct with each other. Kennedy, J. has found, and I do not differ from his finding upon this issue, though he has not applied the clause, for it was not necessary for him to do so in the view he took of this case, that the 101 carcases marked 522 X were not correctly marked, and should have been marked 622 X, in which case, and in which alone, in my opinion, they would have been correctly marked within the meaning of the clause. As, therefore, these 101 carcases were not correctly marked, this clause comes into play and exempts the defendants from the present claim of the plaintiff. For this last reason I think this appeal should be dismissed, and with costs.

COLLINS, L.J. read the following judgment:—This case raises a point of some difficulty upon the meaning and effect of sect. 3 of the Bills of Lading Act 1855. The case came before us on appeal from Kennedy, J. in whose judgment the facts are fully set out. The plaintiff is the indorsee for value of two bills of lading signed by the defendants; and he sues for damages for non-delivery of certain carcases, part of a consignment of frozen lambs' carcases embraced in the said bills of lading. The same point arises on both the bills of lading, and it is not necessary to refer to more than one of them. This acknowledged the shipment of "1076 carcases frozen lamb," "being marked and numbered as in the margin." The marks in the margin are "Sun Brand, Canterbury, N.Z., Lamb, 622 X 608 carcases, 722 X 468 carcases, weighing 35,806lb." The learned judge has found as a fact, and I think the evidence warrants his conclusion, that there were included among the 608 carcases described in the margin as having the marks 622 X 101 carcases marked 522 X, which by a mistake of the shippers were misdescribed in the margin of the bill of lading as marked 622 X instead of 522 X, but were in fact shipped under, and intended to be comprised in, the bill of lading. Those marked 522 X were, as he finds, of precisely the same character and value as a commercial article as those marked 622 X, so that a contract for sale of Sun Brand lambs, second quality, of the Christchurch Company's freezing might have been satisfied equally well out of either mark, or out of both indiscriminately. In fact, the first two marginal figures have no significance whatever to the buyer, and convey to him no representation as to the character of the meat. The final figure does indicate the grade. In the words of Kennedy, J., "The meat as a commercial article is absolutely unaffected in its character or value, whether it is marked 522 or 622." The defendants tendered those carcases marked 522 X as being part of those shipped under the plaintiff's bill of lading, but, the price of frozen lamb having fallen since his purchase, the plaintiff refused to accept them, and brought this action for damages for non-delivery. His contention is that under sect. 3 of the Bills of Lading Act 1855, the defendants are estopped from denying that the goods marked as described in the margin of the bill of lading were shipped, and that, as those he tendered did not bear identically the same marks, there has been a failure to deliver which entitles the plaintiff to the damages fixed by the bill of lading in case of loss—viz., the invoice price of the goods. The defendants, on the other hand, contend that the goods tendered were in fact the goods shipped under and comprised in the bill of lading, although some of them were by mistake described as bearing a mark which they did not bear; that the existence and identity of the goods are unaltered in fact, though the identification may be more difficult by reason of the misdescription. And this was the view taken by Kennedy, J. He was of opinion that the identity of the goods tendered with those shipped under the bill of lading was proved, and my judgment is based on the finding. If such identity could not be established, very different considerations would arise. As the plaintiff's case is rested wholly on the estoppel of the Bills of Lading Act, it is desirable to see what was the mischief to which the Act was addressed in order to determine whether sect. 3 will bear the construction placed on it by the plaintiff. The preamble, so far as it relates to this matter, is as follows: "Whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid, Be it therefore enacted," &c. The mischief, therefore, which it was thought desirable to remedy only arose when the goods in respect of which the bill of lading purported to be signed had not been put on board, and the master or person signing relied on that fact as an excuse for non-delivery. Here it is a fact that all the goods in respect of which the bill of lading was intended to be signed were put on board, though certain of the marks on some of them were miscopied in the bill of lading, and the person signing is not setting up that they have not been laden, but, on the contrary, is insisting that they have been laden and is claiming to deliver them. Sect. 3 is as follows: [His Lordship read the section, and continued]: The section, thefore, addresses itself to the mischief named in the preamble. It deals with persons

who have acted on a misrepresentation in a bill of lading that goods have been shipped when they have not, and estops the person signing from denying the shipment. It is the identity of the goods shipped with those represented as shipped which is the pith of the matter; that is the subject of the misrepresentation referred to, and nothing which could not be material to such identity need be embraced in the estoppel. It is obvious that when marks have no market meaning and indicate nothing whatever to a buyer as to the nature, quality, or quantity of the goods which he is buying it is absolutely immaterial to him whether the goods bear one mark or another. These considerations throw a light on the interpretation of the section. It is only as to "such shipment" that the bill of lading is said to be conclusive, and such shipment refers back to the goods which the bill of lading represents to have been put on board. Now, the goods which the bill of lading represents as shipped continue to be the same goods, whichever out of any number of merely arbitrary marks are put on them, and will remain the same whether the marks were on them before shipment or are rubbed off or changed after shipment. In other words, they go to the identification only, and not the identity. The goods represented by the bill of lading to have been shipped have been shipped, and a mistaken statement as to marks of this class merely makes identification more difficult; it does not affect the existence or identity of the goods.

It seems to me, therefore, that both on the strict wording of the section and having regard to the mischief to which it was addressed the plaintiff has failed to bring his case within the estoppel which it creates. It is not the fact and it would not be true to say that the 1076 carcases which the bill of lading represented to have been shipped were not shipped because the bill of lading did not correctly describe the mark on some of their number. In my opinion, as I have already said, their identity was unaffected, and the property in them, marked as they were, passed to the plaintiff on the transfer of the bill of lading. The defendants are estopped from denying "such shipment," but nothing more, and the shipment is none the less the shipment represented by the bill of lading because some of the marks were misdescribed. The defendants are not here questioning the bill of lading on the ground of the goods not having been laden, and are not driven to asserting anything which they are estopped from asserting. I agree with Kennedy, J. that to adopt the construction contended for by the appellant would be to strain the fair meaning of the section and extend it beyond the mischief it was intended to meet. Moreover, if mere identification marks are within the estoppel, any discrepancy between the marks on the goods and the mark in the margin would equally destroy the identity. Every difference would be equally material, whether the result of accident or clerical error. To hold this would impose an enormous and. indeed, having regard to the practice of tallying, an impossible task on the shipowners. Marks which convey a meaning as to the character of the goods stand on a totally different footing. These, it seems to me, would be embraced in the estoppel, because the characteristics which they indicate are essential to the identity of the goods, and an article so marked is a different article in the market from one not so marked. They are material factors in the identity as distinguished from the identification of the goods sold, and therefore a discrepancy between the goods described and the goods shipped would mean a difference of identity, and the shipowner would therefore fail to prove that the goods which the bill of lading represented to have been shipped had been shipped, and being estopped from denying that the goods shipped were "such" as the bill of lading represented them to be he could not make a good delivery. On the other hand, suppose a mere arbitrary mark correctly described in the bill of lading had got rubbed off in transit, and that the package was, nevertheless, otherwise sufficiently identified, would not the indorsee of the bill of lading be bound to accept it? Would not the property in it have passed to him so that he could have maintained trover for it if the shipowner had on demand refused to deliver it, and though he might have his action for any delay in delivery through difficulty of identification, could he sue the carrier for non-delivery on the footing that it had been lost, though the carrier was pressing it on his acceptance? If not, it must be because the loss of the mark has not destroyed the identity. But the appellant's argument involves a right to sue for non-delivery in such a case, since the ground of rejection and of action would be precisely the same in both cases—viz., the want of correspondence in marks between the thing shipped and the thing tendered. Suppose the master had signed the bill of lading, and the price of the goods had gone up, and the action had been brought against the shipowner claiming delivery of the carcases in question, could he have defended himself on the ground that the master could not make him responsible for goods that had not been put on board, and that the undelivered balance of the bill of lading quantity had not been put on board? (See *Grant* v. *Norway*, 10 C. B. 665.) Or, on proof of the actual facts, would he not have been held liable on the ground that the goods were put on board, and that the master's mistake in allowing a wrong mark of this class to get into the margin (not a quality mark, as in *Cox* v. *Bruce*, *ubi sup.*) was a mistake within the scope of his authority, and that all the 1076 carcases were in fact shipped? Or, to take a still simpler case, if this action had been brought before the Bills of Lading Act, and the same facts had been proved, would they have supported a defence that the goods had never been put on board, and that the defendant therefore never became liable to deliver them? I think the defendant would have been forced to admit that he had in fact received on board the goods intended to be described in the bill of lading. But, if this be so, this case is clearly not within the mischief at which the Bills of Lading Act was pointed. Indeed, it was not suggested in argument that the shipper could have maintained this action, and the plaintiff takes only the shippers' rights under the bill of lading by the transfer, except so far as the statutory estoppel alters them. That estoppel is, in my opinion, limited to the identity of the goods shipped. An element of confusion, as it seems to me, has been introduced into this case based on the meaning which the first figure of the marks in question,

the only one which did not correspond with the bill of lading, had for the manufacturers, indicating, as it did, to them the day of the week on which the carcase was put into the freezing process. But, as it is found as a fact that these figures conveyed nothing whatever to dealers in these goods, and, further, that the first figure indicated in fact nothing which had any bearing on the quality of the goods, but was merely a private mark helping the manufacturers to trace them through their books, it seems to me that any considerations based on them can have no place in the discussion. The same remark applies to the insurance. The goods were equally covered under the floating policy, whether they were 522 or 622: (see *Stephens* v. *Australasian Insurance Company, ubi sup.*). The result is that the right of action, if any, for loss or inconvenience caused by the mistake is untouched, but the plaintiff cannot maintain an action for non-delivery based on estoppel.

The decided cases throw little light on the matter. They certainly do not favour the appellant's contention. *Bradley* v. *Dunipace* (*ubi sup.*) merely decided that where two sets of bags of rye meal of two different sizes but with the same mark had been shipped promiscuously, but the master had signed two bills of lading for them, one of which was for 467 bags, with a statement of weight added which, if calculated, would have worked out to approximately 12st. a bag, the master was not excused from delivering the right bags to the holder of the 467 bill of lading by the clause "not responsible for weight." It was his duty to deliver the right bags, and the statement of weight might have helped him to identify them. This does not seem to touch the point in discussion. *Cox* v. *Bruce* (*ubi sup.*) emphasises the distinction between quality marks and other marks. *Blanchet* v. *Powell's Llantwit Collieries Company* ((*ubi sup.*) decided that a master who had signed a bill of lading for goods described as of a certain weight was not estopped in an action brought by him against the consignee for lump freight from ascertaining that the amount stated was a mistake and that a less weight had been shipped, though he might have been had the action been against him for non-delivery. The defendant by paying money into court had admitted liability for some freight, whereas the defence, if good, would have gone to the whole. The issue of amount shipped was therefore immaterial. The decision and the dicta do not touch the question of marks, going not to quantity or quality, but to identification only. The other cases cited come no nearer to the point. It remains to consider the effect of the clause in the bill of lading: "The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address." The bill of lading is on the shippers' (the Christchurch Company Limited) own form. One side of it has a printed statement of their address and different factories and an enumeration of various brands used by them. The practice with respect to them, as proved in evidence, is that a bill of lading is filled in at their factory with the marks and numbers supplied to them by their own servants, whose business it is to tally the goods into cold vans for carriage to the ship's side. They are thence shot rapidly—at the rate of about 1000 per hour—into the cold chamber in the ship, and no attempt is made by the ship to do more than tally the number of carcases received. The marks and numbers filled in by the shippers in the margin are accepted by the person who signs the bill of lading without verification. Timaru, the port of loading, is an open roadstead and dangerous, and it is important that the loading should be done with the utmost dispatch. What, then, is meant by "correctly marked" in the clause? The marks referred to seem in their context to be clearly indentification marks, which would get copied as such into the margin of the bill of lading. If so, it is difficult to see what standard of correctness could be applied to such a mark which did not include conformity to the mark in the margin of the bill of lading as tendered by the shippers. If the two coincide, it is difficult to see in what other respect the "correctness" of the mark could be material. At all events, the clause is clearly framed on the footing that but for the clause the reciprocal rights to give and take delivery would be unimpaired by the incorrectness of mere identification marks, the shipowner being left at his peril to deliver to the person entitled, the latter retaining his right to complain of "incorrect delivery" brought about by the difficulty of identification, but not excused from accepting if the identity of the goods were established. I regard it not so much as a separate ground of defence in itself as confirmatory of the main position above indicated that in the contract of the bill of lading mere identification marks are not regarded as affecting the central obligation to give and take delivery of the goods shipped, though incorrectness may furnish ground for a cross-claim if the consignee is thereby damnified. As to the point that, if the estoppel is not extended to the identification marks, it will lead to great difficulty in practice, I think the difficulty is less formidable than it appears at first sight. It must be remembered that the difficulty, such as it is, exists in all cases where there is no estoppel. At the time when the Bills of Lading Act 1855 was passed bills of lading were much more rarely signed by persons other than the master than is the case now, and whenever the action was brought against the shipowner who had not signed, which would be the usual case, difficulty of identification would not have excused delivery or acceptance, if identity were in fact established. The Legislature does not seem to have addressed itself to the matter at all, but to have left it to the ordinary law. I am of opinion, therefore, that the appeal should be dismissed.

ROMER, L.J. read the following judgment:—On the evidence it has been found by Kennedy, J. that the carcases tendered by the defendants were part of those shipped under, and intended to be described in, the plaintiff's bill of lading. I am not prepared to differ from that finding. The plaintiff, however, contends that the defendants are by sect. 3 of the Bills of Lading Act 1855 precluded from going into evidence in order to establish the identity of the carcases tendered with those described in the bill of lading, by reason of the discrepancy between the marks on these carcases and the marks mentioned in the bill of lading. This contention raises a question of general importance as to the

meaning and effect of the section which speaks of a bill of lading "representing goods to have been shipped." Is every reference in a bill of lading to the marks on the goods of necessity part of the description of the goods within the meaning of the section? I think not. When it is remembered what the state of the law was at the time when the Act was passed, and what was the mischief intended to be remedied by the Act, it appears to me pushing the estoppel created by the section too far against the person signing the bill of lading to hold that he can in no case be permitted to go into evidence to prove a mistake in the bill of lading in reference to some of the marks on the goods. Suppose, by way of example, a bill of lading was dealing with five parcels of goods of the same size, quality, and value, and, after describing these goods accurately, it proceeded to state that the parcels were numbered consecutively 1 to 5, could a purchaser refuse to accept delivery of one or two of the parcels, and hold the signer of the bill of lading estopped under the section, because it turned out that the two out of the five parcels which should have been respectively marked 3 and 4 were both marked 4? It appears to me that he could not, and that to hold the contrary would be to put a construction on the Act, and give an effect to its wording, which was never contemplated by the Legislature, and which the contents of the Act do not justify. In short, for the purposes of the Act a description in a bill of lading of marks on the goods is not of necessity part of the description of the goods themselves. Of course, difficult questions may arise on particular bills of lading, whether certain references to marks do or do not form part of the description of the goods within the meaning of sect. 3. Those questions will fall to be determined according to the circumstances of the particular cases in which they arise. But, speaking generally, when the section refers to the bill of lading as "representing goods to have been shipped" it is, in my opinion, only contemplating those statements which may be said to describe the goods in the ordinary mercantile sense—that is to say, statements which would substantially affect a purchaser relying on the bill of lading as to the quantity, quality, or value of the goods he was buying. Marks on the goods which, so far as the purchaser is concerned, have no meaning, and could only be referred to in the bill of lading in order to assist in the more sure or speedy identification or delivery of the goods, do not, in my opinion, form part of the description of the goods within the meaning of sect. 3, so as to bind the signer of the bill of lading by way of estoppel. If a bill of lading makes a mistake in describing some marks like those last mentioned, and thereby delivery of the goods is delayed or not effected, the purchaser will have all the remedies for any damage caused by the delay or non-delivery which he would have had if the Act had not been passed. In this point of view, no doubt, marks assisting identification are material to a purchaser. But I do not think he is entitled, merely because a mistake in the bill of lading as to the identification marks may cause trouble in delivery, to say that sect. 3 applies, and that the signer of the bill of lading is bound to admit that the goods exactly as mentioned in the bill of lading were shipped, and yet cannot be delivered. Applying the above considerations to the case now before us, I come to the conclusion that the appellant fails. The differences in marking between the goods he refuses to take and the goods mentioned in the bill of lading are differences in respect of matters not relating to the quantity, quality or value of the goods he bought on the faith of the bill of lading, and which in no wise influenced or affected him in his character of a person considering whether he should buy the goods referred to in the bill of lading. It is clear on the evidence that, so far as he is concerned, the differences in marking are wholly unsubstantial so far as they relate to the goods in themselves. All that can be said on his behalf is that, owing to the marks not being correctly described in the bill of lading as compared with the marks on the goods themselves, some delay in delivery would probably ensue, and in fact did ensue. But, as already pointed out, this will not justify him in contending that the defendants are estopped under sect. 3, whatever other rights it may give him. As to the insurance I need not add anything to what has been said by Collins, L.J. For these reasons I think the appeal must be dismissed, and I have not to decide the further point that was raised upon the clause in the bill of lading which has been referred to by the Master of the Rolls and Collins, L.J. But, had I been obliged to take the view that the signer of the bill of lading was estopped as contended for by the appellant, I should have felt some difficulty in holding that a clause which was directed to "correct delivery" in case of packages not being "distinctly, correctly, and permanently marked by the merchant before shipment," freed the signer of the bill of lading from liability in a case where, *ex hypothesi*, he would be obliged to admit that goods of the appellant were shipped and are not delivered, and were not lost, injured, or altered in any way during the voyage.

Appeal dismissed.

Solicitor for the plaintiff, *Charles Butcher*.

Solicitors for the defendants, *William A. Crump and Sons*.

Wednesday, May 15, 1901.

(Before Lord ALVERSTONE, C.J., SMITH, M.R., and ROMER, L.J., and Nautical Assessors.)

THE CAMPANIA. (a)

Collision—Fog—Speed—Regulations for Preventing Collisions at Sea, art. 16.

A passenger steamship, fitted with twin screws, which was proceeding at the rate of nine and a half knots an hour in a dense fog, was held not to be going at a moderate speed, and to have committed a breach of art. 16 *of the Regulations for Preventing Collisions at Sea, although it was proved that her engines were so constructed that she could not go slower without stopping from time to time.*

That article is imperative, and, therefore, although such consequences as loss of handiness and the risk of loss of position may result from proceeding at a lower rate of speed, which may be attained by occasionally stopping her engines, considerations of that nature do not justify a vessel in proceeding at more than a moderate speed.

The judgment of Barnes, J. affirmed.

(a) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

THIS was an appeal in a collision action brought by the owners of the barque *Embleton* against the owners of the steamship *Campania*.

The case is reported in 83 L. T. Rep. 511 and 9 Asp. Mar. Law Cas. 151.

The collision occurred at about 8.30 a.m. on the 21st July 1900 about twenty-six miles north-east of the Tuskar Light in the Irish Channel. The weather at the time was a dense fog.

The *Campania* was a twin-screw steamship of 12,950 tons gross and 4974 tons net register, carrying passengers, mails, and a general cargo. She was manned by a crew of 417 hands all told, and was bound from New York to Liverpool. She was on a course of N. 35 E. true. Her engines were working at slow, and she was making between nine and ten knots an hour.

The *Embleton* was a barque of 1196 tons register, and was on a voyage from Liverpool to New Zealand, laden with a general cargo, and manned by a crew of eighteen hands all told. She was sailing close hauled on the starboard tack, heading about S.S.E. true, and making about two knots an hour through the water.

There was some controversy in the court below as to whether she was sounding her foghorn, either at all, or as required by the regulations.

No signals were heard from her by those on board the *Campania*, and the first that was seen of her was the loom of her hull about 150ft. from the steamer's bows.

The engines of the *Campania* were at once put full speed astern and the helm put hard-a-starboard, but the *Campania* struck the *Embleton*, causing her to sink almost at once.

The plaintiffs charged the defendants with proceeding at too high a rate of speed, in breach of art. 16 of the Regulations for Preventing Collisions at Sea, and the main question in the action was whether in the circumstances the speed of the *Campania* was a breach of the regulation.

By the Regulations for Preventing Collisions at Sea, art. 16:

> Every vessel shall in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Barnes, J. found, as a fact, that the whistle of the *Embleton* was being duly sounded at proper intervals, but was of opinion that the *Campania* was, under the circumstances, being navigated at an excessive rate of speed, and found her alone to blame for the collision.

From this decision the defendants appealed.

Pickford, K.C. and *Batten* (with them *Butler Aspinall*, K.C.) for the appellants.—In determining what is a moderate speed, due regard must be had not only to the safety of other vessels, but also to the vessel herself. In the case of a fast mail steamer like the *Campania*, the safest speed is that at which she can manœuvre most readily. At a lower speed than the one at which she was going she will not steer well, and, if she were to go ahead and then occasionally stop, as suggested, there would be danger of her losing her position. It is submitted that as the collision occurred in the open sea, and the *Campania* could at a speed of nine and a half knots be brought to a standstill in a little more than her own length, such a speed was a moderate one under the circumstances.

Joseph Walton, K.C., *Laing*, K.C., and *Bateson*, for the respondents, were not called on.

Lord ALVERSTONE, C.J.—In this case I agree entirely with the reasons of the very careful judgment of Barnes, J., and I think that would be sufficient for the purpose of giving the judgment of the court. But, having regard to the arguments that have been addressed to us by Mr. Pickford and Mr. Batten, and to the commercial point of view insisted on by them, I think it right to state my own views with reference to the objections to the judgment which have been raised. Barnes, J. has found, acting in entire concurrence with and on the advice of the Elder Brethren of the Trinity House, that this vessel, the *Campania*, was disobeying art. 16, and if she was disobeying it of course she is to blame. The nautical assessors who assist us tell us that they entirely agree in the findings of the learned judge of the court below, and therefore I have only to deal with the matter, not from the point of view of any dispute of fact, but from the point of view of the arguments addressed to us. The collision happened twenty-six miles N.E. of the Tuskar, and early in the day, in a position where the Elder Brethren have thought, and on the facts it is really not disputed, that vessels would be likely to be met with navigating in the opposite direction. The *Campania*, which has an ordinary full speed of twenty-one knots, was steaming uniformly—that is to say, continuously—before and at the time of the collision at a speed of a little over nine knots—9.23—roughly, between nine and ten knots an hour. The weather was such that vessels could only be seen at a distance of possibly the ship's length, about 600ft. The distance at which the other vessel was actually seen was 150ft. The *Campania* is a twin-screw vessel, and it is said that she is best under command about nine knots—that is to say, a speed of not less than nine knots—and that she does not steer so well, and possibly, I think, she steers badly, if going under nine knots. I think it is very important to consider one fact pointed out in the judgment of Barnes, J.—namely, that from nine to ten knots is the full speed of a very large proportion of the cargo steamers navigating the seas, and if we are to have a different rule for vessels which have a higher ordinary speed, the Legislature should so lay it down. The court should not impose a less responsibility upon a ship that is going at that speed unless the circumstances are such as to show that there has been no breach of the rule. The reasons why the *Campania* says she must go, and was right in going, at over nine knots are, first, that she might otherwise lose her reckoning; in other words, she might either overrun her log or not know by mere observation, counting the number of revolutions, what distance she had gone. Of course it is common knowledge that vessels do calculate their speed and ascertain their position partly by the number of revolutions of their engines when they are running without interruption. As to that, I would call attention to what Barnes, J. was

advised on the point. He says in his judgment: "But the Elder Brethren advise me that unless there is something exceptional in the circumstances, all that this might involve would be delay and the taking of proper precautions to haul out from the coast, if approaching it, and for verifying her position." So far as losing her position is concerned, what had occurred to my mind before I noticed the advice given to Barnes, J. by his assessors was that although it might involve delay and difficulty it cannot be a sufficient reason to justify a higher rate of speed, or a speed which we think would be a breach of the rules. The other ground put forward is that she maneuvres best at nine knots, and assuming there is risk of collision she is handier at nine knots. As to that the learned judge, having adopted the view laid down over and over again in the Admiralty Court, that vessels in such a position ought to stop from time to time and listen—feel their way—I remember Lord Esher and Butt, J. saying the same thing—Barnes, J. is advised thus: "The objection to this by the defendants is that she cannot then steer properly and ensure a good course and certainty as to the distance run; but the Elder Brethren advise me . . . there was nothing in the circumstances or conditions of the present case to prevent the *Campania* from proceeding in this manner and yet keeping sufficient steerage way."

Therefore if we are to accept the arguments of Mr. Pickford and Mr. Batten, we must on some ground of law go against the advice given in the court below and concurred in by our assessors and many most distinguished judges. To my mind in these collision cases the facility in handling these large steamers is by no means the only important consideration. One of the most important considerations is how soon the way can be taken off a very large ship. I do not rely upon the circumstances of this particular case so very much, though it is very striking that a ship should cut through a barque of 1100 tons, laden with iron, and sink her in a very few minutes, with the loss of eleven of her crew. But I rely upon the experience of the courts, that when you have this enormous momentum, and if that momentum is the consequence of nine or ten knots speed, you have to take it off by reversing, and I think that facility in taking off way quickly and reducing to a position of comparative rest is not only of great importance so as to avoid collision, but also in avoiding the serious consequences of it. I think that consideration must have affected the framers of the rule and the judges in construing it when dealing with questions of speed. Next, speaking for myself, I must say that I think the court below did consider that vessels which are going at nine and ten knots and not stopping and doing that very thing which learned judges have pointed out ought to be done, do not give themselves the same opportunity of hearing sound signals, for it is common knowledge that foghorns and other sounds are not easily distinguishable in abnormal weather. I see no reason for differing from the views of the learned judge, and in my opinion it is of very great importance that persons who have this great responsibility, both to their own ship and to other ships, should not act contrary to the rule so often recognised, unless there is paramount necessity. I have only one more word to say. I am not going to say for a moment that there may not be cases in which under the rule it would be right to go at a higher rate of speed than what, in other circumstances, would be thought to be moderate. I can imagine that even in a fog, owing to danger, either from narrow channels or currents, it might be necessary for the safety of the ship to go at a higher speed. This is not one of those cases. It is a case of a steamship in St. George's Channel, where, speaking generally, there is ample sea room, but where there is danger from other vessels which are likely to be coming down to the Tuskar. I have, perhaps, said more in this case than I need have said, because I end as I began by saying that I see no reason to differ from the very carefully considered judgment of the learned judge, and I think we could not upon any ground of law, and certainly not of fact, hold that this speed at which the *Campania* was going was, within the terms of art. 16, moderate, having regard to the existing circumstances and conditions. The appeal must be dismissed.

SMITH, M.R.—I have not the slightest doubt in the world that the *Campania* was breaking the rule in going at the speed she did in this dense fog.

ROMER, L.J. concurred. *Appeal dismissed.*

Solicitors for the appellants, *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitors for the respondents, *Batesons, Warr*, and *Wimshurst*, Liverpool.

Monday, May 20, 1901.

(Before Lord ALVERSTONE, C.J., SMITH, M.R., and ROMER, L.J., and Nautical Assessors.)

THE DEVONIAN. (*a*)

Collision—Tug and tow—Improper lights on tug—Liability of tow—Regulations for Preventing Collisions at Sea, art. 3—*Mersey Rules, art.* 4 (a) *Merchant Shipping Act* 1894, *s.* 419 (1), (4).

A steam-tug made fast to a vessel at anchor in the river Mersey, ready to assist her if required, is a steam vessel towing or attached for the purpose of towing or manœuvring her, and must at night exhibit the lights required by art. 4 (a) *of the Mersey Rules.*

In such circumstances the tow is responsible for the lights of the tug and will be deemed in fault under the Merchant Shipping Act 1894, *s.* 419, *if the tug exhibit other lights, and if the breach of the rule may have contributed to a collision between the tow and another vessel.*

The Regulations for the Navigation of the River Mersey, made by Order in Council the 17*th Sept.* 1900, *have the same statutory sanction as the Regulations for Preventing Collisions at Sea.*

Judgment of Sir F. Jeune, affirmed.

THIS was an appeal by the plaintiffs in a collision action brought by the owners of the Norwegian steamship *Veritas* against the owners of the steamship *Devonian*.

A report of the case will be found in 84 L. T. Rep. 125; 9 Asp. Mar. Law Cas. 158.

(*a*) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

The collision occurred in the river Mersey about 10.45 p.m. on the 12th Oct. 1900.

The *Veritas* at the time was at anchor in the river, exhibiting two anchor lights in accordance with rule 6 of the Mersey Rules—namely, a white light forward and a white light aft, not less than 15ft. lower than the forward light. She had put into the Mersey on account of her engines having broken down, and at the time of the collision the tug *Prairie Cock* was fast fore and aft on the starboard side, ready to assist her if required.

The *Prairie Cock* was exhibiting the usual masthead and side lights of a steamship under way.

In these circumstances the *Devonian*, which was coming up the river in charge of a duly qualified pilot with a steam-tug fast ahead of her, ran into the *Veritas*. At the trial it was alleged on behalf of the *Devonian* that the *Veritas* was not exhibiting any, or, at least, proper and visible, anchor lights, and that those on board the *Devonian* were misled by the under-way lights of the *Prairie Cock*. It was also contended that, if the *Devonian* was in fault, the collision was due to the negligence of the pilot alone.

The learned judge found that the *Veritas* was exhibiting proper anchor lights, that they were burning sufficiently brightly, and that those on board the *Devonian* were to blame for not having seen them. He also found that the pilot had not received proper assistance from those on board the *Devonian*, and that the plea of compulsory pilotage did not avail the defendants. He further held that the *Prairie Cock* ought to have been exhibiting the regulation towing lights, and as, in his opinion, the absence of the towing lights might have contributed to the collision, he held that the *Veritas* was to be deemed in fault for the tug's breach of the statutory rule as to lights. He therefore found both vessels to blame for the collision.

By the Regulations for Preventing Collisions at Sea:

Art. 3. A steam vessel when towing another vessel shall, in addition to her side-lights, carry two bright lights in vertical line one over the other, not less than 6ft. apart. . . . Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white lights mentioned in art. 2 (*a*), except the additional light, which may be carried at a height of not less than 14ft. above the hull. . . .

By the Mersey Rules:

Art. 4. (*a*) A steam vessel when towing another vessel or vessels, or when attached for the purpose of towing or manœuvring such vessel or vessels, shall carry the compulsory lights prescribed by art. 3 of the General Regulations. . . .

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 419.—(1) All owners and masters of ships shall obey the collision regulations, and shall not carry or exhibit any other lights, or use any other fog signals, than such as are required by those regulations. (4) Where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulations has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances made departure from the regulation necessary.

Laing, K.C. and *Stubbs* for the appellants.—The *Veritas* is not liable for the negligence of the tug. There is no evidence that the *Veritas* had control over the tug's lights. In order to bring the *Veritas* within the highly penal sect. 419 (*a*) of the Merchant Shipping Act 1894 the breach must be by the ship herself. That section cannot depend on a nice inquiry of fact as to which vessel had control at the time of the accident. The tow can only be made liable for a wrong act of the tug when it is such a one that it could have been checked and corrected by the tow. If the defendants' contention is right, a breach by the tug under sect. 419 involves the master of the tow in committing a misdemeanour. The tug is an independent contractor:

Jones v. *Liverpool Corporation*, 14 Q. B. Div. 890.

The question is, was the tug in fact under the control of the tow, and it is submitted she could not be in this case, for she had not begun to tow. She was merely attached to the tow instead of being anchored a short distance off. The tug was, under the circumstances, exhibiting proper lights, and does not come within either art. 4 (*a*) of the Mersey Rules or art. 3 of the Regulations. She was not at anchor, nor made fast to the ground nor ashore. She was not towing. It may be that this is a *casus omissus*. The exhibition of under-way lights could not, in the circumstances, possibly have contributed to the collision.

Joseph Walton, K.C. (*Aspinall*, K.C. and *Glynn* with him) for the respondents.—The tow is responsible for the negligence of the tug. The tug and tow become one instrument of navigation, and the tug is as much one with the ship as if she was a part of it:

The American and The Syria, 31 L. T. Rep. 42; 2 Asp. Mar. Law Cas. 350; L. Rep. 6 P. C. 127.

The failure of the *Prairie Cock* to carry towing lights is a breach of the regulations, and it cannot be argued she was not attached for the purpose of towing or manœuvring. If the tow had drifted, the tug might at any moment have been called to put a strain on the rope.

Laing, K.C. in reply.

The following cases were also cited:

The Niobe, 59 L. T. Rep. 257; 6 Asp. Mar. Law Cas. 300; 13 P. Div. 55;
The Quickstep, 63 L. T. Rep. 713; 6 Asp. Mar. Law Cas. 603; 15 P. Div. 196;
The Stormcock, 53 L. T. Rep. 53; 5 Asp. Mar. Law Cas. 470;
The Morgengry and Blackcock, 81 L. T. Rep. 417; 8 Asp. Mar. Law Cas. 591; (1900) P. 1.

Lord ALVERSTONE, C.J.—This is an interesting and important case. Before I deal with the law applicable to the case I think it is desirable I should clear away any misunderstanding as to what the facts are. If the case had been that of a tug merely hanging on to a vessel at anchor—hitched on, as Mr. Laing cleverly put it when he opened the case—for the purpose of preventing herself drifting away, and not at the time engaged, or not at the time in a condition to enter the service of any ship, I think very different considerations might have arisen. It is for that reason I think that we ought to be very careful to ascertain what the facts are. In all these cases statements made in the ship's log are assumed to be honest, except perhaps in salvage cases. The

ship's log is taken to be a fair contemporaneous statement of what manœuvres are being carried out, and over and over again the court has taken a log as fair evidence against the ship. The log in this case says that about seven o'clock a tug came, and was engaged to make fast alongside, and to manœuvre and keep the vessel to her anchor until she could enter the dock. When that position is put to the captain, he is asked, "Is that right?" He answers "Yes, he was engaged to stop alongside to manœuvre, and to keep us up to our anchor if anything should happen." I think the learned President has come to the conclusion, and I do not think there is any evidence to show that it is wrong, that the tug was fast fore and aft, and that she was in a position to put a strain on the rope at any time she might see fit or be required to do it. I do not think we could come to any other conclusion merely because it was only a 7in. rope. The judge seems to have thought it was a larger rope which was going to be employed. At any rate, he has come to the conclusion that she was there to assist, and to manœuvre, if necessary, the vessel to which she was fast. In these circumstances I am clearly of opinion that she comes within the words under which a steam vessel when towing another vessel or attached for the purpose of towing shall carry the lights prescribed. I come to the conclusion that the tug was in such a position and doing such work in the Mersey as made it imperative for her within the rule to have two white lights at her masthead. We have not troubled Mr. Walton on the question whether the absence of that white light might have contributed to the collision. I will only say that since *The Fanny M. Carvill* (32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565; L. Rep. 4 A. & E. 417; 13 A. C. 455, n.) was approved by the unanimous judgment in the case of *The Duke of Buccleuch* (65 L. T. Rep. 422; 7 Asp. Mar. Law Cas. 68; (1891) A. C. 310), I have considered it settled that "the true construction of this section is that the infringement must be one having some possible connection with the collision; or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision." It has not been argued before us that the rule has not the force of the statutory rule, and, for the reasons very clearly stated by the learned judge, I think he was right in coming to the conclusion, not only that there was a possibility, but more than a possibility, that the absence of a second white light might by possibility have contributed to the collision.

There still remains another very important point, and one not free from difficulty—namely, as to whether or not the *Veritas* was responsible for the presence—or, rather, the absence—of the second white light, and whether she is responsible in such a way as to bring her within sub-sect. 4 of sect. 419 of the Merchant Shipping Act. With regard to her responsibility, apart from the statute, I think there is not any real difficulty about the law. There has been difficulty about its application. Ever since the case of of *The Cleadon* (4 L. T. Rep. 157; 1 Mar. Law Cas. 41; 14 Moo. P. C. C. 97), it has, I think, been recognised that where one ship is in tow of another the two ships are, for some purposes, to be regarded as one, the commanding or governing power being with the tow, and the motive power with the tug. That was really the judgment in the case of *The Cleadon*. When that case came to be considered in *The Niobe* (*ubi sup.*), Lord Selborne used these words: "Where a ship in tow has control over and is answerable for the navigation of a tug, and the two vessels are physically attached to one another for a common operation—that of the voyage of the ship in tow, for which the tug supplies the motive power—they have been considered by high authority to be for many purposes properly regarded as one vessel." No doubt there have been cases in which that rule has not been applied, or it has not been necessary to apply it, as, for instance, where, the action being brought against a tug, as in the case of *The Stormcock* (*ubi sup.*), the tug was held responsible for its own negligence in respect of its own manœuvring. Speaking for myself, I think that if you find two vessels are so attached, and are under such management and control that they move practically as one vessel, the tow is responsible for the action of the tug. Whether or not the tug is also responsible we need not consider. Therefore, if it was a case of collision actually brought about by absence of lights, that would dispose of the case, because I think, attached as she was, waiting for the orders of the master or pilot of the tow to put on her engines for the purpose of manœuvring, the two vessels were so attached and were under such control as to be regarded as one vessel. It still remains to consider the point as to which I have had considerable doubt—viz., as to sub-sect. 4: "Where in a case of collision it is proved to the court before whom the case is tried that any of the regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary." Mr. Laing says that "ship" is a physical object; a ship on which or by which the rule has been infringed. I think that would be too narrow, for when this section was passed, that by law the tug and tow were to be regarded as one ship was perfectly well known, and *ex hypothesi* the authority which could direct proper lights to be exhibited would be the tow, as well as the master of the tug if he regarded it as his own duty. In these circumstances I think it is right to say that the ship by which the rule has been infringed in this case was the authority to see that proper lights were exhibited on the tug, and, having neglected to see that that was done, the ship has infringed the regulations. I do not deny that it is possible to come to another conclusion on the matter, and I do not put it as a matter that is absolutely clear. But, giving it the fullest consideration I can give it, I think it is not straining the section to say the regulation has been infringed by the ship, the master of which had the duty imposed on him of controlling and governing the tug, and that it would be wrong for us to hold that, because the particular place where the light was not exhibited happened to be on board the tug which was alongside the ship, therefore the regulation was not infringed by the ship. For these reasons I think the appeal must be dismissed.

SMITH, M.R. and ROMER, L.J. concurred.

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper* and *Co.*

Solicitors for the respondents, *Rowcliffes, Rawle*, and *Co.*, agents for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Wednesday, May 22, 1901.

(Before Lord ALVERSTONE, C.J., SMITH, M.R., and ROMER, L.J.)

THE PORT VICTOR. (*a*)

Salvage—Government stores—Liability of charterers for proportion of salvage—Action in personam.

Where Government stores are being carried at the risk of charterers, and such stores are salved from a danger for which the charterers are responsible, the charterers are liable to pay salvage.

Salvors have a right to sue in personam *as well as* in rem, *provided some property or some interest in property has been saved to the person whom it is sought to make responsible for salvage.*

Judgment of Sir F. Jeune affirmed.

THIS was an appeal by defendants in a salvage action *in personam* from a judgment of Sir F. Jeune, pronouncing that the plaintiffs were entitled to recover salvage from the defendants. The case in the court below is reported in 84 L. T. Rep. 363; 9 Asp. Mar. Law Cas. 163.

The plaintiffs in the action were the owners, masters, and crews of the steamship *Amelie* and of the tugs *Columbia* and *Shamrock*. The defendants were the Jamaica Fruit Importing and Trading Company, who were the charterers under a time charter of the steamship *Port Victor*.

On the 4th June 1897 the *Port Victor* was on a voyage from London to Jamaica when she collided in the English Channel with the steamship *Roecliff*, and in consequence had to take salvage assistance.

An action was accordingly brought against her by the present plaintiffs and the owners of the tug *Lady Vita*.

At the time of the collision the *Port Victor*, which was sailing under a time charter, had on board some Government stores owned by the Admiralty.

These stores were shipped by the charterers under contracts entered into with the Admiralty, and were carried under the Admiralty regulations for the conveyance of Government stores. In the note at the head of these regulations it was provided that:

The term "owners" used in the following regulations is to be understood as signifying the party or parties who engage to convey the stores under the agreement for freight or charter-party.

Clause 17 provided that:

The owners will be held responsible for the safe delivery of the Government stores shipped, the act of God, Queen's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the voyage always excepted; and provided always that the liability of the owners arising from negligent navigation shall be limited as provided by the Merchant Shipping Act 1894, and shall in no case exceed 20*l.* per freight ton.

(*a*) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON THEMIS, Esq., Barrister-at-Law.

The stores were shipped under the usual Admiralty bill of lading, which is subject to the stipulations contained in the charter-party or other agreement entered into with, or on behalf of, the Lords Commissioners of the Admiralty, and in the regulations of Her Majesty's Transport Service.

The salvage action was heard before Barnes, J. assisted by two of the Elder Brethren, on the 17th July 1897, when he awarded the sum of 200*l.* to the *Amelie*, 600*l.* to the *Columbia*, 400*l.* to the *Shamrock*, and 400*l.* to the *Lady Vita*, and reserved all questions as to the liability for the proportion due for the salvage of the Government stores for further consideration, if necessary.

On the Admiralty being applied to they refused to pay salvage or enter an appearance, on the ground that the collision had been brought about by the negligence of the *Port Victor*, and, as their contract did not exonerate the carrier from liability for negligence, they declined to recognise the claim. The proportion of salvage that the Admiralty would have been liable to pay, had they recognised the claim, would have been 297*l.* 15*s.* 8*d.*, and the plaintiffs sought to make the defendants liable for this amount.

By clause 10 of the charter-party:

The captain shall sign bills of lading at any rate of freight the charterers or their agents may choose, without prejudice to the stipulations of this charter-party, and the charterers hereby agree to indemnify the owners from any consequences that may arise from the captain following the charterer's instructions and signing bills of lading. . . . The owners shall not under any circumstances be liable for condition of fruit or other cargo, and the charterers hereby indemnify the owners against any claim arising under any bill of lading.

Sir F. Jeune gave judgment for the plaintiffs.

The defendants appealed.

Carver, K.C. (*Scrutton*, K.C. with him) for the appellants.—The defendants were not carriers, but intermediaries between the carriers and the Government. They cannot be made liable for salvage. In the case of *The Five Steel Barges* (63 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142) the party held liable was in possession of the barges, and was for all practical purposes their owner, and had also a lien on them. If a time charterer in such a case as this is made liable for salvage, so must underwriters, mortgagees, or a vendor who had a right to stop *in transitu* be liable. The fact that a salvage action can be maintained *in personam* does not necessarily import a personal obligation, because proceedings *in personam* in Admiralty are really only a means of enforcing one's remedy against the *res*. Probably the only persons who can be sued *in personam* for salvage are the owners of the *res* or persons to whom the salvors have delivered it, and who have appropriated it. Here the defendants were not owners of the ship, nor in possession of her or of the goods: nor were they carriers. There is not even a personal obligation on an owner to pay salvage; the personal liability only takes the place of the obligation of the *res*. He also referred to

Duncan v. *Dundee, Perth, and London Shipping Company*, Scotch Sess. Cas. 4th series, vol. 5, p. 742;

The Parlement Belge, 42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197;

The Meg Merrilies, 3 Hagg. 346;
The Rapid, 3 Hagg. 419;
The Johannes, Lush. 182;
The Two Friends, 1 C. Rob. 271;
Falcke v. *Scottish Imperial Insurance Company*, 56 L. T. Rep. 220; 34 Ch. Div. 234;
Hartfort v. *Jones*, 1 Ld. Raym. 393; 2 Salk. 654;
The Cargo ex Schiller, 36 L. T. Rep. 714; 3 Asp. Mar. Law Cas. 439; 2 P. Div. 145;
The Fusilier, Br. & L. 341;
The Zephyrus, 1 W. Rob. 329;
The Chieftain, 4 Notes of Cases, 459;
The Trelawney, 3 C. Rob. n. 216; 4 C. Rob. 223.

Butler Aspinall, K.C. and *Dawson Miller*, for the respondents, were not called upon.

Lord ALVERSTONE, C.J.—We have listened to an extremely able and learned argument from Mr. Carver, going back into the history and the original foundation of salvage jurisdiction. With the greater part of that argument I absolutely and entirely agree, and in the judgment I propose to give I do not desire in any way to infringe upon any of the main principles which Mr. Carver contends for. I think this case is, as was the case before Sir James Hannen, and the case in the Scotch courts, of a very special character, and I should like to state the facts first. The defendants became the charterers of a ship for eighteen months. They might use that ship for their own purposes, putting their own cargo on board. The particular amount of freight which they were going to pay to the shipowners was by no means the measure of the freight which they would earn. They could make any bargain they liked with the persons who put cargo on board; and it is clear that in this case the bargain between the particular owners of goods and the defendants was different from the bargain between the defendants and the shipowners. Now, in that position of things the defendants contracted with the Government to carry some Government stores. By the terms of the contract they are to be liable in any event for the delivery of these stores. The stores are then put on board their hired ship, and the combined adventure then consists of the ship, of the goods belonging to various owners, amongst others the Government, and of the interest that the charterers have in earning the freight. The vessel meets with some disaster, and is salved and towed into an English port. The salvors, for some reason which I do not know, do not arrest —at any rate they do not arrest the cargo—and the whole adventure then comes back to its original position and the salvage action is brought. Now, Mr. Carver does not say an action *in personam* cannot be brought against the owners of the ship. He admits, and I do not think he could possibly have contested it, having regard to the long practice, that against any person in the position of owner of the ship an action *in personam* can be brought. He does not say that an action *in personam* cannot be brought against the owners of the cargo for the same reason. Therefore, whether or not the foundation of the action was that there must originally have been an arrest, in which I entirely agree, it was not conclusive as to the form of action, because dealing with the simple case of owner of ship and cargo, certainly an action in the present day can be brought in the Admiralty Court for salvage either *in personam* or *in rem*. We, then, have to consider what is the real position of these defendants, apart from authority and apart from the decisions to which I will refer in a moment, in respect of the interest which has been the subject of salvage. I think the defendants were bailees of these goods. It is perfectly true that they were put, not upon their own ship, but upon a hired ship, but they were put there in pursuance of a contract made with the defendants and for the purpose of earning freight which was to go into the pocket of the defendants, and under a contract whereby the defendants undertook, if I may use the expression, in the event which happened, to deliver these goods. Now, when the accident happened which led to the salvage, what were the real interests which were at risk and at stake? There was the interest of the owners of the ship, the interest of the owner or charterer in the freight—because, of course, the charterers' freight may be an entirely different thing from what the owner's freight is—in fact it is quite possible that the chartered freight would not be at risk at all because it might be something paid for the hire of the ship in advance and so not be at risk at all —and then there is the interest of the owner of the goods. In my opinion that includes, for the purpose of what we have got to consider, all the persons who were collectively or singly the owners of goods for the purpose of that adventure. I do not think it at all necessary to go through the cases which Mr. Carver has put of persons whose contracts may be affected more or less indirectly by the destruction of the goods. I think that in a common maritime adventure of the kind we are speaking of the persons who have the interest of owners in the goods by virtue of the contract they have made for the purpose of delivery, have an interest for the purpose of salvage. Now, before I come to the authorities, which I think binding upon us in this sense that they are the authorities of great judges, I wish to say one word upon a part of Mr. Carver's argument to which I entirely assent. I quite agree that in all salvage services there must be some *res* saved. That was clearly established in the case of *The Renpor* (48 L. T. Rep. 887; 5 Asp. Mar. Law Cas. 98; 8 P. Div. 115), where Lord Esher laid it down that something must be saved in order to give valid ground for a salvage action. That authority, together with others, is cited in Mr. Justice Kennedy's book. I entirely agree with Mr. Carver's argument that you must have a property saved so as to represent a fund out of which the salvors can be remunerated. But when once you get that, I consider that, at any rate in the present day, proceedings against the persons who properly can be made liable to pay that salvage may be either *in rem* or *in personam*. It is quite immaterial to consider what the original object of jurisdiction *in personam* was. In the present day, both in the County Courts and in the Superior Courts, because property has been saved, the people who are liable to pay salvage can be proceeded against *in personam*. Now, how do the authorities stand? Speaking for myself, I really feel almost bound by an authority of so great a lawyer on such a subject as Sir James Hannen, under circumstances practically identical with the circumstances of the present case. I should hesitate a very long time to overrule his decision in the case

of *The Five Steel Barges* (*ubi sup.*). They were five Government barges. Three of them were still in such a position that they could be proceeded against *in rem*, and were so proceeded against. The other two had been delivered to the Government, and the action was brought against the persons who had previously been interested in these barges. Sir James Hannen used these words, speaking on this very point—an action *in personam* against a person who had been interested in the property: "I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security." I ventured in my own way to paraphrase those words, "the subject of salvage." Here he speaks of an interest in property which has been saved. Further on he says it is a legal liability "arising out of the fact that property has been saved; that the owner of the property, who has had the benefit of it, should make remuneration to those who have conferred the benefit upon him, notwithstanding that he has entered into no contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property." I do not intend to decide more than is necessary for this case, but having regard to ordinary commercial relations, in my opinion that test of Sir James Hannen does include, and properly includes, the class of persons within which the defendants in this case come—I mean the charterers of ships who have received goods put upon their hired ships and are liable to replace those goods if they are lost, and are interested in the earning of freight for carrying those goods.

I do not wish to rely on the case of *Duncan* v. *Dundee, Perth, and London Shipping Company* (*ubi sup.*) beyond saying that independently four very learned Scotch judges—I see one was President Inglis—came to the same conclusion. It seems to me that at any rate we are justified upon these authorities, as well as upon principle, in coming to the conclusion that Sir Francis Jeune was right. Mr. Carver has ingeniously endeavoured to suggest that the reason why proceedings *in personam* have been taken against the owner of property, whether ship or goods, is because the salvers have handed back the property to the owners for the purpose of continuing the adventure. I see nothing in any of the cases which amounted to special handing back. If actions *in personam* had been originally founded upon some misrepresentation or inducement by the owners of the goods or ship, whereby they had persuaded the salvor into not standing up for his rights, I could understand the distinction, but looking at the long-standing authorities and the reasons, I come to the conclusion that these defendants had such a direct interest in these goods, in the fulfilment of the contract of carriage, that they are properly made defendants in this action. Therefore, without attempting to deal with the further developments which Mr. Carver says are the consequences of that view, I am of opinion that the decision of the court below must be upheld.

SMITH, M.R.—We are asked to overrule the President of the Admiralty Division on a point as to which he has, no doubt, special knowledge, and we are asked to reverse the authority of Sir James Hannen, who of all men was a man of peculiar knowledge on that point—namely, as to whether an action *in personam* for salvage was properly brought in the Admiralty Court. The judgment of Sir James Hannen in *The Five Steel Barges* (*ubi sup.*) was delivered in 1890, after the judgment of the Scotch Court of Session in *Duncan* v. *Dundee, Perth, and London Shipping Company* (*ubi sup.*), and curiously enough the Scotch case was not brought to the attention of Sir James Hannen when he decided the case of *The Five Steel Barges* (*ubi sup.*). Therefore we have, independently of each other, four Scotch judges and afterwards Sir James Hannen spontaneously arriving at the same conclusion. Now we are asked in the year 1901 to say that all of those five learned judges were wrong in what they decided in those cases. I myself am prepared to rest my judgment upon the judgment of Sir James Hannen, and I will say this, that having read this judgment through twice during the argument of this case, I consider it is founded upon common sense. A clearer judgment was never delivered by any learned judge, and I refuse to say it is wrong. I think this appeal ought to be dismissed.

ROMER, L.J. concurred. *Appeal dismissed.*

Solicitors for the appellants, *Parker, Garrett,* and *Holman.*

Solicitors for the respondents, *W. A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 7 and 9, 1901.

(Before BIGHAM, J.)

HARLAND AND WOLFF LIMITED v. J. BURSTALL AND CO. (a)

Contract of sale—Goods to be delivered c.i.f.—Delivery to shipper—Shortage in goods—Property in goods—Insurance of price and "profit."

In a contract for the sale and delivery of unascertained goods c.i.f., the shipment of a quantity of such goods substantially less than the quantity contracted to be sold is not a substantial or pro tanto *execution of the contract.*

Whether in such a contract the shipment of the full quantity would be, in the absence of any agreement to the contrary, a sufficient appropriation of the goods to vest the property in such goods in the purchaser, query.

Where such goods are insured by the vendor in his own name at their invoice price, together with an addition for "profit," and are lost during the voyage, the purchaser is not entitled to recover from the vendor the sum paid to him by the underwriters under this "profit" insurance.

ACTION for breach of contract, in the Commercial Court.

Counsel for the plaintiffs, *Scrutton,* K.C. and *Mackinnon.*

Counsel for the defendants, *J. A. Hamilton,* K.C. and *T. F. D. Miller.*

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

The facts and arguments appear sufficient from the judgment.

Cur. adv. vult.

March 9.—BIGHAM, J. read the following judgment.—This is an action brought to recover damages for the breach of a contract by which the plaintiffs bought of the defendants 500 loads of timber on c.i.f. terms. The facts are as follows: The defendants are timber merchants trading at Quebec. In the autumn of 1899 they had in stock a quantity of about 600 loads of Waney timber. On the 9th Aug. the plaintiffs, who are shipbuilders at Belfast, telegraphed to the defendants' London house asking if they had any Waney timber to offer. The answer to the inquiry was contained in a letter from defendants of the 17th Aug, saying: "We can offer you about 500 loads first-class Waney for shipment as soon as tonnage is procurable." The letter then described what the size of the timber would be, and mentioned the terms of sale and of payment. On the 13th Sept. the defendants telegraphed to the plaintiffs that they had an offer of freight room for 500 loads, and asking whether they would buy. On the 14th Sept. the plaintiffs telegraphed that they would take 500 loads, and thereupon the defendants engaged room for that quantity in a ship called the *Merrimac*. The bargain was reduced into the form of a contract note on the 20th Sept., and, so far as is material, the terms were as follows: "Sold 500 loads prime Waney pine, cost, freight, and insurance, freight to be deducted from the invoice, and paid by buyers in terms of charter-party, and the balance to be paid in cash ten days after final delivery in Belfast." The note also described the sizes of the timber to be shipped. The defendants then proceeded to select from their stock timber to answer the contract, but apparently they were unable to collect as much as 500 loads of the required description, and they, in fact, only collected 470 loads. This quantity they shipped, taking bills of lading to their own order. The ship sailed on the 24th Oct., but was lost on the voyage to Belfast. The bills of lading were never tendered to the plaintiffs, nor was the shipping invoice sent to them, but no doubt the defendants intended that the shipment should be applied to the plaintiffs' contract. The insurance of the goods was effected by the defendants in the following manner: They had a floating policy open with underwriters upon which they were in a position to declare 92 per cent. of the value of their risks; as to the remaining 8 per cent., the defendants took the risk themselves. By arrangement with their underwriters the defendants were also entitled to declare on each adventure a further 20 per cent. for what they called "profit." Accordingly, when the shipment by the *Merrimac* was made, they declared the invoice price as the value (about 2000*l.*). and they also declared 400*l.* for the "profit." The question is whether by what they have done the defendants have performed their contract. They say they have; they contend that by the sale itself, or, if not by the sale, then by the shipment, they vested the property in the 470 loads of timber in the plaintiffs, and that, having insured it and arranged for the freight, they did all that the contract required them to do. Perhaps if these contentions were well founded the defendants would be right; but, in my opinion, they are not well founded. No shipment within the meaning of the contract was ever made. The contract was to ship 500 loads; a shipment of 470 loads does not comply with the requirement. Nor does it satisfy the contract *pro tanto*. The shipment cannot be made piecemeal; it must be in one parcel. Some evidence was given before me to show that in a contract of that kind it is open to the vendor to deliver about the quantity named, and that "about" means 10 per cent. more or less; and reliance was placed on the fact that during the negotiations leading up to the contract note the word "about" was used. I am quite satisfied, however, that no such custom as that contended for in fact exists, and I think the use of the word "about" in the negotiations has no significance, and cannot be allowed to qualify the reading of the document into which the contract was finally reduced. Of course, in carrying out a commercial contract such as this some slight elasticity is unavoidable; no one supposes that the delivery is to be within a cubic foot of the named quantity, but it must be substantially of the quantity named; and in my judgment 470 loads is not substantially 500. It was a shipment which the plaintiffs would have been entitled to reject if it had been tendered to them as a shipment under the contract. I doubt, moreover, whether, even if the shipment can be regarded as within the meaning of the contract, it can be said to have vested any property in the goods in the plaintiffs. The plaintiffs had no notice of the so-called appropriation of the goods, nor were they in any way tendered to them; and it was always, in my opinion, open to the defendants to have substituted other timber in place of the shipment in the *Merrimac*, and, if such substituted timber complied with the contract requirements, to have insisted on the plaintiffs accepting it. Such a position is, of course, inconsistent with the contention that the property in the goods in the *Merrimac* had passed to the plaintiffs. For these reasons I come to the conclusion that the defendants cannot say that they have performed their contract. I assess the damages for the breach on the evidence before me at 175*l.*

It was argued by the plaintiffs that, if the defendants could be said to have fulfilled their contract, then they (the plaintiffs) were entitled to the full benefit of the insurance, and they asked for a judgment for 400*l.*, the amount of the so-called profit insurance. It is not necessary that I should decide this point, because I have found that the defendants never did make the contract shipment, but I desire to say that I do not think the plaintiffs could recover this sum. All the defendants were bound to do was to insure the cost of the goods; they chose to do more, and to insure a so-called profit in addition. This they did, in my opinion, for their own benefit; it was an insurance without interest, for, beyond the price of the goods, the defendants had nothing at risk, and the underwriters might have refused to pay the 400*l.* But the underwriters have paid it, and the defendants, I presume, have the money in their pockets. No doubt the plaintiffs themselves could have insured anticipated profit, and the insurance would have been legitimate enough, because any profit to result from the arrival of the goods would enure to them. So they might have authorised the defendants to make such an insurance; but they did not do so. The insurance therefore cannot be said to have been effected

under the terms of the contract or at the plaintiffs' request, and therefore the plaintiffs are not entitled to the proceeds of it.

Judgment for 175*l. for the plaintiffs.*

Solicitors for the plaintiffs, *Parker, Garrett,* and *Holman.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

Thursday, May 2, 1901.

(Before Kennedy and Phillimore, JJ.)

Re An Arbitration between Tyrer and Co. and Hessler and Co. (*a*)

Charter-party—Hire payable in advance—Breach—Waiver—Estoppel.

By a charter-party, payment of the hire was to be made in cash fortnightly in advance, otherwise the owners were to have the faculty of withdrawing the steamer from the service of the charterers.

On the 21*st June a fortnight's hire became due in advance.*

On that date the steamer commenced a voyage from B. to S. She arrived at S. on the 25*th, and lay there until the* 27*th, on which day she proceeded to H. to load her homeward cargo. While at S. the master, who was the servant of the owners, telegraphed to H. to order the cargo to be ready.*

On the 28*th June the owners by telegraph withdrew the vessel for nonpayment of the hire.*

Held, that the withdrawal was unlawful, as the owners by their conduct were estopped from so doing, for by allowing the charterers to alter their position after the right of withdrawal had accrued, they must be taken to have waived their right.

Nova Scotia Steel Company *v.* Sutherland Steam Shipping Company (5 *Com. Cas.* 106) *considered.*

The mere fact that punctual payment of hire has been waived on former occasions, does not amount to a waiver of punctual payment of future instalments.

Special case stated by arbitrators.

By a charter-party dated the 13th Feb. 1900, and made between Hessler and Co. as owners and Henry Tyrer and Co. as charterers, being a time charter of the s.s. *Lagom* for about nine months, it was (*inter alia*) agreed that payment for the hire of the vessel was to be made in cash fortnightly in advance to the owners at West Hartlepool, and, in default of such payment, the owners or their agents should have the faculty of withdrawing the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have on the charterers in pursuance of that charter.

The vessel was handed over to Henry Tyrer and Co. under the charter-party, on the 6th April 1900, and on that day the first fortnight's hire was duly paid in advance, and the vessel remained in the charterer's hands, and was employed by them until the 28th June 1900, when she was withdrawn from their service by Hessler and Co., such withdrawal giving rise to the claim for damages by the charterers, which was the subject of the arbitration.

The second payment of hire was due on the 20th April, and was paid the 27th April. The third was due the 6th May and paid the 10th May. The fourth the 20th and paid the 26th May. The fifth the 6th June and paid the 11th June.

No complaint was ever made by Hessler and Co. about the hire not being paid absolutely on the day when it was due, and no suggestion was ever made that if the hire was not paid on the actual date when it became due, the vessel would be withdrawn from the service of the charterer.

Early in the currency of the charter complaints were made as to the short carrying capacity of the vessel, and in answer to a letter on this subject, written by Tyrer and Co. on the 20th June to Hessler and Co., the latter replied on the 21st June:

Your letter of yesterday to hand, which will receive Mr. Hessler's attention on Friday.

On the 21st June another fortnight's hire of the vessel became due in advance. No application for payment thereof was made, and no debit note was sent therefor, and no intimation was given that if the hire was not paid the vessel would be withdrawn from the charterer's service.

On the 21st June the vessel had just commenced a voyage from Burntisland to Stockholm on the charterers' account. She arrived at Stockholm on the 25th June and lay there until the 27th, when she proceeded to Hernösand to load her homeward cargo on the charterers' account. While at Stockholm the master of the steamer, who under the charter-party was the servant of and paid by Hessler and Co., telegraphed to Hernösand to order the cargo for the steamer to be ready.

On the 28th June, about 3.30 p.m., Tyrer and Co. received from Hessler and Co. a telegram as follows:

Lagom. Astonished not received hire from you due 21st inst. Please note we withdraw steamer in accordance with charter.

This was the first communication which had been sent by Hessler and Co. to Tyrer and Co. since their promise of the 21st June that the matter should have Mr. Hessler's attention, and in spite of Tyrer and Co.'s protests and offer to pay the freight, Hessler and Co. refused to cancel the withdrawal. Hessler and Co., prior to their telegram of the 28th June, never demanded payment of the hire or sent a debit note.

The arbitrators found as a fact that Hessler and Co. waived the immediate and punctual payment of the hire, and ought to have demanded payment of the hire before withdrawing the vessel from the service of the charterers, and that such withdrawal was not *bonâ fide* for the purpose of enforcing payment of the hire. They held that such withdrawal was an unlawful act, and awarded Tyrer and Co. damages.

The arguments amply appear from the judgments delivered below.

Carver, K.C. (*Bigham* with him) for Tyrer and Co.

Hamilton, K.C. for Hessler and Co.

Kennedy, J.—In this case the question arises upon a case stated by arbitrators, who have given one of the parties, who were the charterers under a charter-party of the steamer *Lagom,* 586*l.* 13*s.* 7*d.*

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

for damages for the unlawful withdrawal, as it is termed, of the steamship from the chartered service. The question is whether that can be upheld. This question seems to me to give rise to points of some interest and difficulty, but we have both come to a clear conclusion and there is no reason for delay in its expression. The contract between the parties which is set out in the case, was, as to its material parts, to charter the *Lagom* for about nine months it being amongst other things agreed that payment for the hire of the vessel was to be made in cash fortnightly in advance to the owners at West Hartlepool, and in default of such payment or payments as therein specified, the owners or their agents should have the faculty of withdrawing the steamer from the service of the charterers without prejudice to any claims which the owners might otherwise have on the charterers in pursuance of that charter. The vessel entered upon the services of the charterers on the 6th April last year, and it is stated that there were several payments not made in advance fortnightly as prescribed by the charter-party. It is also stated that no objection was raised and no warning given in respect of such lateness of payment. For myself, I lay no stress whatever in the judgment which I am about to pronounce upon the facts there stated. It seems to me that although persons may be generous or careless in enforcing their rights with regard to the days of payment, yet that does not give a so to speak prescription to the person in whose favour a remission of strictness is made, in regard to the observance of the charter in the future. However that may be, on the 28th June this vessel was withdrawn by notice by telegram, the telegram being sent by the owners of the vessel to the charterers, "Please note we withdraw steamer in accordance with the charter." At that time the fortnightly payment had been due for seven days. It was due it has been stated on the 21st June, and it was on the 28th June, as I have said, that the that the notice was sent. The arbitrators have come to the conclusion that there was no right to withdraw. They appear to have stated their reasons in the case, and I must say that as far as they are concerned, except in relation to the expression, "waive immediate and punctual payment of hire," as to which I shall have to say a word or two, I cannot agree in the grounds of opinion there given. I think it is clear that whatever may have been their purpose, their own personal advantage in giving notice of withdrawal is a matter which ought not to have been weighed with the arbitrators, and is not a legal ground for dealing with the decision of the case. I will say in a moment why I personally do not agree with their finding that the owners ought to have demanded payment before withdrawing the vessel; but with the conclusion to which the arbitrators have come, in finding that it was an act which was not justified by the agreement, and, therefore, for which damages, if provable, could properly be claimed by the charterers, I agree. Therefore my judgment is ultimately in favour of the charterers, and I will just very shortly state the grounds in dealing with the arguments that have been advanced to us on either side. In my opinion in construing this document, proceeding as I hope upon a reasonable and sound basis, and saying that where words are clear I decline to import other words so as to alter their meaning, as I find in this document nothing requiring a claim or demand for payment, I cannot acquiesce in the view that is put forward by Mr. Carver, and which apparently the arbitrators accepted, that there could be no default of such payment within the meaning of the charter-party, unless there had previously been a demand of payment on the part of the owners. There is not a word in the charter-party to justify it. I decline altogether to introduce into business documents connected with shipping, any inferences to be drawn from that which is necessarily and historically more or less a technical view of the law with regard to forfeitures in relation to landlord and tenant. It seems to me that when one man says to another, and the other agrees to it, "Cash is to be paid fortnightly in advance, and in default of such payment fortnightly in advance I am to have certain rights of withdrawal," I should not be justified as a lawyer in importing into that contract that which business men would be sorry to see imported, namely, a fresh term as to the demand of payment and when it is to be given. It would be extremely difficult to say either at what time or in what manner it was to be given, and by doing so it might be said we were introducing a new term in order to give precision to the contract between the parties. I do not think there was any claim or demand which, according to this contract, ought to be made before doing that which I think the owners reserved to themselves the right of doing, that is to say if the payment was not made fortnightly in advance to give notice of withdrawal. Notice they must give; notice they have given. It seems to me that they were entitled each time when the day passed for payment and payment had not been made, subject to any right which may have arisen by special circumstances, to exercise their option which they could only do by notice to withdraw the vessel.

Therefore, with regard to the argument which was put before us by Mr. Carver—namely, that there was no default because there was no demand—speaking for myself, I confess I have a strong view that there is no such implied term in the agreement between the parties, and therefore, so far as this case rests upon that, the case fails. Then the next point was taken that the right could not be exercised, because it had not accrued until the fortnightly period had begun. If the point is to be so stated I should not agree with that also. I think myself it must depend upon the circumstances of the case. I think that there must be a notice determining it. A notice is a general request wherever there is to be an election, and here the shipowner has a right to elect whether he will treat the nonpayment as forfeiture or not. But it seems to me what he ought to do is to give notice either immediately, or, from a business point of view, and looking at the business position of affairs, within that which I should call a reasonable time, I can conceive its not mattering to the knowlege of both parties whether a day had passed or not, the vessel doing nothing and intending to do nothing, and so far as the charterer was concerned no loss to him, because the day had passed, but at any rate it ought to be a notice which is given within at least a reasonable time after the default in payment is known to the shipowners. Now in this

case I do not think that there was such a notice. It may be put in this way; I referred to the term waiver as mentioned in this case. It seems to me to come to the same thing that their conduct was such that the owners must be taken to have waived the immediate and punctual payment of the hire. By that I mean this, I come to the conclusion that the facts stated in the case are sufficient to create what may be called an estoppel on the one side, or a waiver if you please, such conduct as does prevent the owners from now insisting upon the right to withdraw the ship by reason of the nonpayment on the 21st June. In my opinion their conduct was such as to their knowledge was calculated to produce, and did in fact produce in the ordinary course of business in the user of this ship, a position on the part of the charterers in dealing with the ship which entitles them to say: "We had a right to assume, and to act upon the assumption, that the use of this vessel was not forfeited, and that you did not intend to withdraw." What is the position? On the 21st June payment ought to have been made, and it was not made for seven whole days, that is not including the first, until the 28th and when notice was given this vessel was being used and having engagements made for her by the charterers without one suggestion on the part of the owners that they were going to treat the withdrawal of the ship as a right which they would exercise because of something which took place on the 21st June. I do not myself think anything turns on the alleged letter of the 21st June, which for some reasons the arbitrators have stated in the case as being written about the remission of future hire as a matter to be considered in the future, the charterers having said that they must have some negotiations about the alleged breach of warranty of the capacity of the ship, and for this reason: That letter, written on the 21st June, while it says that the letter of the charterers on that question will receive their attention on the Friday—that would be some days ahead—was written at a time when it was still open to the charterers to fulfil the contract, because they had the whole of that day until the end of the 21st as found by the case, to make payment. Therefore there was nothing in their writing that letter, because they had not then got the right of withdrawal. But it does appear that on the 21st June the vessel had begun her voyage from Burntisland to Stockholm. She arrived at Stockholm on the 25th and she lay there until the 27th and the charterers were making engagements and arrangements with regard to her user and in regard to her crew in the ordinary course of business. On the 27th the charterers, still, of course, presuming they had got the user of her, and that she had not been withdrawn, proceeded to Hernösand to load coal; and while at Stockholm the master of the steamer telegraphed to Hernösand ordering the cargo down from some place inland and incurring expense on the part of the charterers for the steamer on arrival. I do not think the act of the master, although he is the servant of the owners, apart from the conduct of Messrs. Hessler in allowing him so to do and authorising him so to act and to remain the person to carry out the charterers' wishes with regard to the ship, is of much importance, but I think that if under those circumstances, a week having elapsed since an alleged right by default had accrued, and it being a case in which in the ordinary course of business it must have been known to the owners that the charterers were acting in the way they were because they believed that the vessel was still remaining in their service, and that there had been no election to withdraw on the ground of their nonpayment, I think under these circumstances the action of the master is important, because it is in that sense the action of the owners who had it in their power to put a stop to that conduct, and they knew that by not putting a stop to it they were allowing and causing the charterers to act in a way quite different to that in which they would have done if they had known that the charter had been put an end to. I think, therefore, on that ground the charterers are right. I will only say a word in conclusion as to a case which has been much referred to, which was decided by my brother Bigham, to whose judgment I should attach the utmost importance in a matter of this kind, although it is not binding upon us. That is the case of the *Nova Scotia Steel Company Limited* v. *Sutherland Steam Shipping Company Limited* (5 Com. Cas. 106). Upon the first of the grounds on which he came to the decision as it is reported I need not express any opinion, because there were special facts in the case with regard to loading cargo. He decided upon those particular facts, that what had happened amounting to a waiver of the defendant's right to withdraw the vessel. But on the more general ground I will just say this: It seems to me that when he goes on to say: "The defendants had lost their right to withdraw the vessel by not having exercised it sooner," he means, I venture to think, what I have endeavoured to express in this case, not necessarily that that option must be exercised on the very moment at which the default takes place, but that, assuming from a business point of view, they might, within a reasonable time after notice of non-payment, have exercised an option, they ought to have done it on the facts of that case sooner than they did, because not having done it sooner there had been mischief done to the parties whose conduct had been affected by the non-withdrawal of the ship, being allowed to load the ship and deal with it as their own, and making their arrangements with regard to it accordingly. Then he further says: "I hold that the exercise of the option to withdraw ought to have been made by the defendants themselves sooner than it was made, and not having been made, they must be taken to have waived their right." That is substantially the ground on which I decide this case. Whether the word "waiver" is the best word or not, it expresses, I think, sufficiently that which is the right of the charterers here—namely, to say: "You have so acted as to lead us to believe a certain state of things, and to act upon that belief, and having done that you cannot now say that you have withdrawn on account of some failure of ours to perform the contract at an earlier date."

Phillimore, J.—This is a difficult case, but upon the whole I think the decision of the arbitrators must be supported. It is said that it may be supported on three grounds. The first is, that where there is a forfeiture, not *ipso facto*, but at the option of the person entitled to take advantage of the default and

that forfeiture is to operate by reason of the nonpayment of money, there ought to be a demand of the money before the forfeiture. Now I prefer to say that I express no opinion one way or the other; I am not at all certain one way or the other. I should like to agree with my learned brother at once, but I am not prepared to agree with him; neither, on the other hand, am I prepared to disagree. Analogies from the law of personal property are very dangerous, and cannot be pushed very far; but I am not sure that it is not deserving of consideration whether in all cases where the forfeiture is for nonpayment of hire, and that forfeiture is to be at the election of the parties, I think I might go further and say nonpayment of money, and that forfeiture is to be at the election of one of the parties, it was not the law of England that there shall be a demand for the money before there is a forfeiture. I express no further opinion upon that. The second point taken by Mr. Carver was that the forfeiture here must be exercised at once, because otherwise the charterer might be in the position of having to pay a fortnight's hire only to get his ship for eleven or twelve days of that fortnight, and lose his charter at the end. I was rather impressed at one time by that argument, but I have come to the conclusion it is not sound. If, and I do not say for the moment decidedly one way or the other, the charterer is liable for the fortnight's hire, as soon as a portion of that fortnight has been actually used by him, if he is liable to pay that in advance, or on the first day, or before the first day, that liability is only to be removed if the whole fortnight is to be taken away from him, then I think this case cannot be otherwise than that he would have to pay however early the owners gave the notice, because they certainly could not give notice until some time in the first day, possibly not until the end of the first day. If, on the other hand, the charterers are not liable if the owners determine, which is a possible view, the charter-party during the fortnight they are not liable for that fortnight, then the charterer is not damnified by the exercise of the option in the fortnight; and if my brother Bigham, in the case which has been referred to, decided on that view, I must respectfully express my dissent from it. But, as my brother has pointed out it may very well be that he decided it upon the ground that has been adopted to-day, and on a ground which I concur in, only I prefer rather to put my judgment in this way. The one condition which Bramwell, L.J. pointed out in *Williams* v. *Stern* (42 L. T. Rep. 719; 5 Q. B. Div. 409) as not existing in that case, in my opinion, is in existence in this case. I think here the charterer did alter his position, and he altered his position upon the faith that the forfeiture would not be enforced, and he was allowed to do so by reason of the delay in giving notice of the forfeiture. It seems to me expense was incurred, and very appreciably incurred by the charterer in going from Stockholm to Hernösand, which expense he would have saved if the owner had exercised the option while he was lying in the harbour at Stockholm, and if he had found the notice ready for him by or before the time the ship had got to Stockholm. I think that the owner must have known that the charterer would incur that expense. I do not myself attach much weight to the fact as my brother Bigham did in the other case, that the captain is partially the owner's servant, and the actual acts of commission which involve the charterers in expense were the acts of the captain who is partially the owner's servant. I prefer to put it on the ground that, as a matter of business the ship owners must have known that the charterers would incur expense, and they let him incur the fruitless expense of a voyage in ballast to a distant port which they might have saved if they had given notice determining the charter at a reasonable time. Therefore I agree that our judgment should be for the respondents.

Judgment accordingly.

Solicitors: *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool; *W. A. Crump* and *Son*, for *Turnbull* and *Tilly*, West Hartlepool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 5 *and March* 5, 1901.

(Before Sir F. Jeune, President, and Barnes, J.)

The Deerhound. (a)

Charter-party—Demurrage—Delay owing to consignee having other vessels discharging in the dock—Liability of charterer for acts of consignee—Extra cost of discharge owing to stevedore's men refusing to allow crew to work.

A vessel was chartered to proceed to the S. dock, Maryport, and there unload her cargo. Owing to the fact that the consignee, who had bought the cargo from the charterers, had other vessels discharging in the dock at the time of her arrival, she was unable to get a berth and unload within the time agreed by the charter-party.

Held, that the charterers were not responsible for the delay.

This was an appeal from a judgment of the judge of the Cardiff County Court.

The plaintiffs were the owners of the steamship *Deerhound*; the defendants were H. Borner and Co. the charterers.

By a charter-party dated the 28th May 1900 the defendants chartered the *Deerhound* to load a cargo of iron ore at Carthagena, and proceed therewith to Senhouse Dock, Maryport.

The *Deerhound* arrived in the basin, Senhouse Dock, on the 13th June 1900, and was brought into the dock by midnight on the 15th June, but was not got into a berth until the 26th June.

The plaintiffs claimed demurrage, and it was agreed that, if entitled to any, they were entitled to twenty-two hours' demurrage. They also claimed a sum of money representing the difference between what they alleged had been improperly deducted from the freight by the defendants for extra labour in discharging the cargo, by reason of the plaintiff failing to supply winches and the use of the crew in order to discharge the same.

By the terms of the charter-party time for discharging was to count from the time when the

(a) Reported by Butler Aspinall, Esq., K.C., and Sutton Timmis, Esq., Barrister-at-Law.

ship was in every respect ready in berth, "but berth guaranteed within twenty-four hours after arrival or time to count."

The cargo was received by the consignees, and the delay in unloading occurred through their having other vessels in the dock berth, which prevented the *Deerhound* from getting a berth.

By the terms of a bye-law of the Maryport Dock Company, no one consignee was allowed to have more than three vessels in dock at the same time, and the charterers contended that they were not responsible for delay caused entirely by the consignees.

With regard to the deduction made from freight for extra cost of discharge it was stipulated by the charter-party that the ship should give the "use of cranes and winches with necessary steam power and hands," which it was alleged had not been done. It appeared that the owners were ready and willing to perform their part of the contract, but that the stevedores employed by the consignees of the cargo had refused to work with the ship's crew owing to some rule of the labour union.

The County Court judge gave judgment for the plaintiffs on both issues.

From this judgment the defendants appealed.

Laing, K.C. and *Sankey* for the appellants.—The charterers are not liable. They did not prevent the vessel getting a berth. It was the action of the consignees, who had a number of vessels discharging at the same time, and who therefore were prevented by the dock company's rules from getting the *Deerhound* a berth. In *Watson* v. *Borner* (4 Com. Cas. 335) the facts are very similar, and in that case it was held that the charterers were not liable because the obstacles which prevented the charter-party from being carried out were obstacles the risk of which the shipowner took upon himself. As to the extra cost of discharge the shipowner undertook to supply winches and the use of his crew by the charter-party, and he did not do so, and in consequence the charterers have had to pay 4*d*. per ton extra for discharge of the cargo. The loss must be where it falls.

Robson, K.C. and *Bailhache* for the respondents.—*Watson* v. *Borner* is not in point. It was decided on a different ground. In that case the consignees filled two capacities, as they were owners of a private wharf as well as consignees of the cargo. The real ground of the judgment was that the wharf being a private one, and managed by the consignees, it could not be said the consignees as such prevented the ship from getting to the wharf. There is an absolute contract by the charterers not to put obstacles in the way of the discharge, and load with the usual dispatch:

Ashcroft v. *Crow Orchard Colliery Company*, 31 L. T. Rep. 266; 2 Asp. Mar. Law Cas. 397; L. Rep. 9 Q. B. 540.

They also referred to

Tapscott v. *Balfour*, 27 L. T. Rep. 710; 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46;

Nelson v. *Dahl*, 41 L. T. Rep. 365; 4 Asp. Mar. Law Cas. 172, 392; 12 Ch. Div. 568;

Postlethwaite v. *Freeland*, 42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 129, 302; 5 App. Cas. 599.

Laing, K.C. in reply.

Cur. adv. vult.

The judgment of the court (the President, Sir F. H. Jeune, and Barnes, J.) was delivered by

BARNES, J.—This is an appeal from the decision of the County Court judge at Cardiff in an action by the plaintiffs, the owners of the steamship *Deerhound*, against the defendants, the charterers of the vessel, holding that the plaintiffs are entitled to receive from the defendants 22*l*. for twenty-two hours' demurrage at Maryport, and in respect of a charge of 4*d*. per ton on the cargo discharged, which had been deducted from the freight payable by the charterers. The facts were as follows: On the 28th May 1900 the vessel was chartered by the plaintiffs to the defendants by charter-party of that date to load at Carthagena or Porman a cargo of iron ore, and proceed to Maryport, Senhouse Dock, and there deliver the same as customary when and as directed by the consignee, to whom notice was to be given of the same being ready for discharge, paying for discharging 1*s*. per ton, freight to be paid as in the charter-party mentioned. The charter-party provided that the cargo was to be shipped at the rate of 200 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays excepted, and to be discharged on the same conditions (subject to certain exceptions); days to be averaged to avoid demurrage. Time not to count between the hours of 1 p.m. on Saturdays and 7 a.m. on Mondays, unless used, and the time for discharging should count when ship is in every respect ready in berth, but berth guaranteed within twenty-four hours after arrival or time to count, and in free pratique, as per custom of port, written notice of such readiness to be given to consignees during office hours. Ship to work night and day if requested to do so, and to give use of cranes and winches with necessary steam power and hands, charterers paying all extra expenses of night work. Demurrage (if any) at the rate of 20*s*. sterling per hour. Dispatch money at the rate of half the demurrage, not less than 10*s*. per hour, to be settled in discharge port. Steamer to be consigned to Messrs. Gibson and Greenop or Mr. Joseph Holmes at Maryport. There was a cesser clause in the charter, but by a letter of the 21st June the charterers guaranteed that the charter-party would be carried out in its entirety, and on the conditions as to time provided therein, and to pay any demurrage legally incurred according to the terms of the charter-party. After loading under the charter-party the vessel proceeded to Maryport, and arrived in the harbour outside the Senhouse Dock on Wednesday, the 13th June, and on the 14th, at 10 a.m., the master gave notice to Messrs. C. Cammal and Co. Limited, the consignees and holders of the bills of lading, to whom the defendants had sold the cargo, that the vessel had arrived and was ready to discharge. At the time the vessel arrived as aforesaid the said consignees had other vessels at berths in the dock and waiting to discharge, and in consequence the vessel was not allowed, in accordance with the dock regulations, to enter the dock until midnight of the 15th. If the time is to count from the time at which the vessel entered the dock, it is admitted that she was afterwards duly discharged, but the plaintiffs' claim is that in the circumstances they are entitled to treat

the time as counting from 10 a.m. on the 15th, and if they are right I understand the effect would be to give them twenty-two hours' demurrage. The County Court judge held that the case was governed by the case of *Ashcroft* v. *Crow Orchard Colliery Company* (*ubi sup.*), and that the plaintiffs were entitled to recover for twenty-two hours' demurrage. It was argued before this court that the decision was wrong in law, and also that the presence of the other vessels for the same consignees did not, according to the regulations, prevent the *Deerhound* from getting into dock. With regard to the second point, it seems clear that the case was heard in the court below on the admissions of counsel, witnesses who were present to prove the facts therefore not being called, and that the case proceeded on the assumption that the consignees had other vessels at the berths in the dock and waiting to discharge, which fact did, according to the regulations and practice of the port, which the harbour master acted on, prevent the vessel from getting into the dock until the night of the 15th, and I think the case must be decided on the principal point, which is one of general importance. Several cases were cited to us, but they appear to me to turn so much on their particular facts and the language of the particular charters that they are only indirectly of assistance in arriving at a conclusion in this case. In *Tapscott* v. *Balfour* (27 L. T. Rep. 710; 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46), where a vessel was to proceed to a dock as ordered by the charterers, and load coal which would be supplied by a colliery agent and loaded from the tips, it was held that the lay-days did not commence until the vessel got into dock, and that the charterers were not responsible for delay in her so doing, caused by the colliery agent having three other vessels in the dock and two more ready to go in, and not being permitted by the dock regulations to have more than three vessels in the dock at a time. It was the usual course to load through a colliery agent, and there was nothing improper or unreasonable in the course pursued by the charterers: (see the remarks made by Bovill, C.J. at p. 50). The next case is *Ashcroft* v. *Crew Orchard Colliery Company* (*ubi sup.*), which the judge of the court below acted on. In my opinion that case does not govern the present case, and is entirely different from it both in the language of the contract and the facts. The charter was for the loading of the plaintiffs' vessel with a cargo of coal at the port of Liverpool, to be loaded with the usual despatch of the port, or if longer detained to be paid 40*s*. per day demurrage, and the charterers engaged to load "on the above terms"; and by a memo. at foot the vessel was to load in the Bramley Moore or Wellington Dock, High Level Railway. By one of the regulations of the docks no coal agent was to be allowed to have more than three vessels in the dock loading and to load at the cranes at one time. The charterers acted as their own coal agents, and as they had three other ships loading in the docks and other charters in their books having priority over the plaintiffs' vessel, she was not allowed to go into the dock for thirty days after she was ready to do so. The judgment in that case appears to me to have proceeded on the ground that the court construed the particular contract before them as imposing an absolute obligation to load the vessel with the usual despatch of the port, and it was immaterial to consider whether the delay occurred outside or inside the dock: (see the observations on this case made by Lord Esher in *Nelson* v. *Dahl*, 41 L. T. Rep. 369; 4 Asp. Mar. Law Cas. 172, at p. 177; 12 Ch. Div. 588 and 589; and by Lord Blackburn in *Postlethwaite* v. *Freeland*, 42 L. T. Rep. 845, at p. 851; 4 Asp. Mar. Law Cas. 306; 5 App. Cas. 599, at p. 622). The last case was *Watson* v. *Borner* (5 Com. Cas. 377), where a steamship was chartered to carry a cargo to Dowlais Wharf, Cardiff. The cargo was sold by the charterers to the Dowlais Iron Company, the lessees of the wharf, which was in the Roath Dock, Cardiff. The company had control of the wharf and the berthing of vessels there. The time for discharge, according to the charter-party, did not commence until 6 a.m., after the vessel was ready in berth. It was held that the charterers were not responsible for delay caused to the vessel in getting into berth after she had got into dock, by the consignees, in order to suit their business arrangements, giving preference to other vessels which arrived at the dock after the plaintiffs' vessel. The ground of the decision appears to be that the owners of the vessel had agreed to take her to the wharf, that the delay was caused by the way in which the Dowlais Company, as proprietors of the wharf, managed the business, and that the charterers were not responsible for this merely because the Dowlais Company happened to be the purchasers of the cargo.

In the present case the plaintiffs agreed that the vessel should proceed to the Senhouse Dock, Maryport, and the charterers agreed by the clauses in the charter-party, as to discharge and guarantee of berth, to discharge her within a certain time after her arrival—that is, arrival in dock. It is the ordinary and natural implication that neither party should prevent the other from performing that part of the contract which falls to be performed by the other, and if the charterers, by themselves or their agents, acting within the scope of their authority, had placed impediments in the way of the shipowners bringing their vessel into dock, the charterers ought to be responsible for the delay so caused, as if the vessel had in fact arrived in dock. It appears to follow that if the charterers have other vessels which they have to discharge and have arranged to discharge in the docks before the vessel which by the charter is to proceed to the dock, and by the practice of the port will not be admitted into the dock while the charterers have the other vessels in the way, the charterers do prevent the shipowners from performing their contract until the charterers have cleared away the impediments. The charterers, however, had sold the cargo to consignees. The position then is that those consignees became agents of the charterers, to receive the cargo and pay the freight in accordance with the charter-party, and their obligations arose after the vessel arrived in dock. It is true that the consignees had, at the time of the vessel's arrival outside the dock, other vessels at berths in the dock and waiting to discharge, in consequence of which the plaintiffs' vessel was prevented from entering the dock, but the charterers are not, in my opinion, responsible for

this. The engagements and actions of the consignees in relation to the other vessels were not entered into or taken by them as agents for the charterers. It was not contended that there was anything unreasonable in the charterers selling the cargo to the particular consignees. The charterers would not know what the engagements of the consignees would be at the time of the vessel's arrival! As between the shipowners and charterers the delay is one of the risks taken by the shipowners when they agree to take their vessel to a particular dock. They could guard against it by proper stipulations in the charter-party. There appears to me to be nothing unreasonable in the view which I have expressed of the shipowners' position. It is contemplated in this class of case that the cargo may be sold. Very frequently the charterers' liability under the charter-party ceases by virtue of the cesser clause on shipment. It was so in this case but for the letter of guarantee above referred to. In such cases the shipowners have to look to the consignees only at the port of discharge, and for this purpose the bills of lading usually incorporate the terms of the charter. Even when the charterers remain liable on the charter for its due performance, the cargo is frequently sold to consignees who have to act for the charterers in performing their obligations under the charter-party with regard to the cargo, but are not otherwise agents for the charterers, and the shipowners will have such rights against the consignees, as such, as are provided for by the bills of lading, but as against the charterers only such rights as are conferred by the charter-party. The shipowners know that in ordinary course the cargo may be received by persons other than the charterers, and over whose other engagements the charterers have no control, and there is nothing in the charter-party imposing on the charterers the risk of such other engagements preventing the vessel from reaching the spot to which it has been agreed that she shall go. The result in this case is that the defendants are not liable, in my opinion, for the delay occasioned before the vessel arrived in dock. There is another point turning on the facts of this case, and not of general importance. Owing to repairs to the Senhouse Dock it was only available as a tidal harbour when the *Deerhound* arrived, and the steamer grounded after tidefall when discharging, and in consequence it was necessary to use the winches. The master of the vessel was ready and willing to give the use of the winches, with necessary steam power, and the ship's hands to work them, but the stevedore's men would not allow the crew to work the winches, and insisted on doing it themselves, and on being paid 4*d.* per ton additional for discharging. The defendants, as I understand, have deducted the amount of 4*d.* per ton on the cargo discharged from the freight, and the County Court judge has held that they were not entitled to do so. I am of the same opinion on the point. The shipowner was only to pay 1*s.* per ton for discharging, and he was ready and willing to perform his part of the contract. The loss through the extra demand of the stevedore's men must fall on the charterers. The appeal must be allowed as to the item for demurrage. In my opinion each of the parties should pay their own costs of the appeal, except that the costs of the printing of the record should be divided between them.

Solicitors: for the appellants, *Ince, Colt,* and *Ince*; for the respondents, *Downing, Bolam,* and *Co.*, agents for *Downing* and *Handcock*, Cardiff.

Feb. 15, 16, *March* 4 *and* 25, 1901.

(Before Sir F. JEUNE, President.)

THE HEATHER BELL. (*a*)

Mortgage—Charter or agreement for use of ship by mortgagor—Wrongful seizure by mortgagee —Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 34.

Where the mortgagor of a vessel entered into a charter or agreement for the use of the vessel with a third party (the plaintiff) whereby the plaintiff was to have possession of the ship for about six weeks, and was to run her on specified voyages between places in the United Kingdom and was to finance the vessel, being granted the highest charge and lien on the vessel the mortgagors could grant to secure any sums he might so disburse:

Held, that such a charter or agreement did not impair the value of the mortgagee's security, and that the latter was liable in damages to the plaintiff for taking possession of the vessel under his mortgage after default had been made by the mortgagor.

Where a mortgagee wrongly took possession of the mortgaged ship as against the charterer, and paid wages then due to the crew from the charterer, it was held that the charterer was liable to the mortgagee for the wages so paid.

THIS action arose under the following circumstances:—

In July 1900 the defendant, William Ward, sold the steamship *Heather Bell* to the South Coast and Continental Service Limited for the sum of 2500*l.* Of this sum 625*l.* was paid in cash, and three bills for 625*l.* each at two, four, and six months respectively were given for the balance.

To further secure the payment of the sums due upon the bills the purchasers mortgaged the *Heather Bell* to the defendant.

The plaintiff, William Horton, was the owner of an hotel at Rhos, Colwyn Bay, North Wales, called the Rhos Abbey Hotel, and of the pier at that place.

The plaintiff was anxious to secure a service of passenger vessels between Liverpool and Rhos during the summer months, and with that object he, on the 29th Aug., entered into an agreement with the South Coast and Continental Service Limited, the material parts of which are set out below. Previous to this the plaintiff had to some extent financed the *Heather Bell.*

The material parts of the agreement of the 29th Aug. were as follows:

Memorandum whereby the South Coast and Continental Service Limited, the owners of the *Heather Bell* . . . agree to charter her to William Horton, of Bryn Dinarth, Colwyn Bay, from Aug. 29 until Oct. 15, 1900, on the following terms: (1) The boat shall be delivered to William Horton, at Liverpool, forthwith as

(*a*) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

she now is. . . . The vessel shall be used for passenger and merchandise traffic between Liverpool, Rhos-on-Sea, Llandudno, Menai Straits, Colwyn Bay, and Rhyl, and not otherwise without the consent in writing of the owners. (2) It is admitted that at the present time part of the machinery of the boat is held as a lien for the repairs thereto; and it has been agreed that the said William Horton will advance such amount as may be necessary to liberate such machinery, and shall add same to what is already due to him thereon. (3) The owners also admit that William Horton has advanced certain other sums in connection with the boat, for which sums it is agreed that the said W. Horton shall have a charge and lien on the boat, ranking in the highest position the owners are able to fix the same having regard to existing circumstances. (4) The said W. Horton is hereby authorised to sell such of the effects on board the boat as may not be requisite or necessary for the use of the boat and the service aforesaid, but shall bring the proceeds into the accounts hereinafter mentioned. (5) The said W. Horton shall be in no way responsible . . . for any repairs which may be from time to time necessary or desirable, but any repairs he thinks fit to execute shall be added to his charge and lien. (7) The charterer shall keep true and exact accounts of all receipts . . . and of all payments and expenses of the service. The beforementioned expenses shall be paid out of the beforementioned receipts . . . and accounts shall be made up weekly. (8) The profits of the venture (if any) shall belong to and be divided into equal shares and proportions between the owners and the charterers at the expiration of the charter. (10) In case the mortgagees of the said vessel shall exercise their rights (if any), and thereby the charter hereby granted shall be affected, the owners shall not be responsible to the charterers in damages or otherwise in respect thereof.

The defendant had notice of this agreement.

The *Heather Bell* ran (daily) in pursuance of this agreement from Liverpool to Llandudno and Rhos until the 4th Sept., when she was taken in execution by the sheriff under a judgment which had been obtained against her owners.

On the 8th Sept. the sheriff withdrew from possession, but on the same day the *Heather Bell* was seized by the defendant under his mortgage, the bill for 625*l.* which fell due on the 4th Sept. having been dishonoured by the South Coast and Continental Service Limited.

The plaintiff then brought this action against the mortgagee to recover damages alleged to have been sustained by him owing to the withdrawal of the *Heather Bell* from the service in which she had been engaged.

The defendant denied liability, and also counterclaimed for wages paid to the master and crew when he took possession. These wages had become due before the defendant took possession.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 34. Except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof.

Carver, K.C. and *Leslie Scott* for the plaintiff.

Robson, K.C. and *Ernest Pollock* for the defendant.

The following authorities were cited:

Cory v. *Stewart*, 2 Times Rep. 508;
Collins v. *Lamport*, 11 L. T. Rep. 497; 2 Mar. Law Cas. O. S. 153;
Keith v. *Burrows*, 37 L. T. Rep. 291; 3 Asp. Mar. Law Cas. 481;
Brown v. *Tanner*, 18 L. T. Rep. 624; 3 Mar. Law Cas. O. S. 94; L. Rep. 3 Ch. 806;
The Celtic King, 70 L. T. Rep. 652; 8 Asp. Mar. Law Cas. 440; (1894) P. 175;
Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 34

Cur. adv. vult.

March 4.—The PRESIDENT.—The question in this case is whether the defendant, Mr. Thomas William Ward, was justified in taking possession of the *Heather Bell* by virtue of a mortgage to him of that vessel notwithstanding a contract (I purposely use a general term) which had been entered into between the owners and the plaintiff in regard to her. The mortgage to the defendant was registered on the 13th July 1900, and, after reciting that the South Coast and Continental Service Limited had purchased the *Heather Bell* from Mr. Thomas William Ward, mortgaged the vessel to Mr. Ward to secure the instalments of the purchase money with interest. On the 4th Sept. 1900 default was made in the payment of one of these instalments, and thereafter the defendant was unquestionably entitled to exercise his rights as mortgagee and take possession of the vessel unless he was prevented from doing so by the operation of the contract to which I have referred. That contract was made on the 29th Aug. 1900 between the South Coast and Continental Service Limited, and was in the following terms: [His Lordship then read the agreement, and continued:] It was alleged by the plaintiff that this contract was a charter-party, and by the defendant that it was an agreement. In fact it was both. It provided for the terms on which the plaintiff should use the vessel on the service between Liverpool and Rhos and other places, and it also gave the plaintiff a charge on the vessel in respect of the advances and payments made, or to be made, by him, and referred to in clauses 2 and 3. The law with regard to the rights of the mortgagor of a ship to deal with it so long as the mortgagee abstains from taking possession is, in general, well recognised. The 70th section of the Merchant Shipping Act 1854, which enacted that "a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be the owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt," received an authoritative exposition by Lord Westbury in the case of *Collins* v. *Lamport* (*ubi sup.*), decided in 1865. It was there laid down that "as long as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice or detract from or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there Parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and full benefit of his property." This case, therefore, asserts in the clearest terms the right of a mortgagor

to deal with his property, provided that his dealings do not materially impair the security of the mortgagee, and his right so to deal is not limited to doing so by any particular form of contract, whether that of a charter-party or any other. The case of *Keith* v. *Burrows* (*ubi sup.*) shows that the mortgagor is by no means bound to employ the ship in a way profitable to himself, or of advantage to the mortgagee, as providing earnings of which the mortgagee might take possession. Lord Cairns in that case laid it down in the broadest terms: "The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or, indeed, to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purposes of bringing home goods of his own, or for his own benefit"

The principles of these cases were followed in the case of *Cory Brothers* v. *Stewart* (*ubi sup.*). In that case it would appear that by the terms of the charter-party the whole, or nearly the whole of the freight was payable at or before the time of the sailing of the vessel, so that the mortgagee could not by taking possession obtain any or any substantial advantage out of the operation of the charter party. "The security," said the Master of the Rolls, "was of course a freight-earning ship, but a particular charter-party was not part of the security. That was not what was mortgaged. The ship must be capable of earning freight, but not necessarily within a week or a month, or any particular period. If anything had been done in the present case which had prevented the ship from being a freight-earning ship that would no doubt have impaired the security, but what had in fact happened had not impaired the security. The mortgagee so long as he kept possession could not throw over the charter-party, but must fulfil it in all its terms." It is not, to my mind, easy to reconcile the principles laid down in these cases with the principle which governed the case of *Brown* v. *Tanner* (*ubi sup.*) in the Court of Appeal. There the mortgagor, after making a charter-party under which freight was payable, during the voyage assigned the freight to a third person. It was held that the mortgagee, having taken possession before the freight became due, was entitled to it notwithstanding its assignment by the mortgagor. Page Wood, L.J., in delivering the judgment of the court said: "The mortgagor can bind the mortgagee by a charter-party, being to that extent in a different position from the mortgagor of real property, who cannot bind his mortgagee by a lease. This was decided by Lord Westbury in *Collins* v. *Lamport*. But we cannot accept the inference drawn from the case by Mr. Druce, that the mortgagor, having so effected a charter-party, can also mortgage the freight before it becomes due so as to prevent the mortgagee of the ship on taking possession before the freight is due from receiving it. So to hold would enable the mortgagor to deprive the mortgagee of the whole benefit of the security. The ship might be chartered for several years, and the freight immediately assigned behind the back of the mortgagee." I am not aware whether Lord Cairns (who was Lord Chancellor at the time, and who appears to have sat in the case decided before *Brown* v. *Tanner*) was party to the decision in *Brown* v. *Tanner*. The report is silent on the point. If he was, the decision in *Brown* v. *Tanner* clearly cannot be at variance with his Lordship's previous decision in *Keith* v. *Burrows*. But I confess it is not to me easy to understand why, if the freight under a charter-party is no part of the mortgagee's security, and if the mortgagor may make a charter-party which yields no freight, or may make a charter-party under which the freight is made payable to a third party before the voyage commences, he may not assign the freight during the continuance of the voyage. It certainly can make no practical difference to the mortgagee whether the freight is alienated by the charter-party itself or by a subsequent document, his power of obtaining it being equally in both cases destroyed. However, for the purposes of the present case, it is sufficient for me to say that whether the freight created by a charter-party can or cannot be assigned subsequently so as to defeat the prospect of the mortgagee obtaining it by taking possession, the mortgagee cannot challenge or repudiate a charter-party merely on the ground that its terms are unfavourable to the interests of the mortgagor and therefore of himself. I may add that the case of *The Celtic King* (*ubi sup.*), decided by Barnes, J., illustrates the kind of charter-party which does impair the security of the mortgagee, and may therefore be repudiated by him. In that case there was an agreement by which a shipowner, whilst a steamer was being built for him, bound himself to fit her for a particular trade—that is to say, the trade in frozen meat—and run her for five years as one of a particular line, and it was held that this agreement would have a depreciatory effect upon the security of the mortgagee. "It seems to me," said the learned judge, "that where there is a contract of this particular character it would be prejudicial to the security if the mortgagee were to be obliged to admit that he could not sell the ship to realise his security in an open market without that restrictive contract. It is not like an ordinary contract for the ordinary employment of a ship which is made from time to time as things are good and as things are bad, but it is a contract which binds the vessel for a very long period and has various clauses in it which might make it extremely difficult for anybody to purchase a ship of this kind if they were bound by its terms." While, therefore, it would seem clear on the earlier authorities that the mortgagee, as I have said, cannot repudiate a contract made by the mortgagor on the ground that it is unfavourable, that must be understood with the limitation that the contract must not be such as by reason of the length of time during which it binds the ship, or by reason of unusual provisions in it, to injuriously affect the power of sale by the mortgagee. To apply these principles to the present case: Can it be said that the contract in question impairs the security which the *Heather Bell* constituted for the defendant by reason of his mortgage? During the argument I had some doubt whether the security was not impaired by the provisions in sect. 7 which appeared by the term "before-mentioned expenses" to make the sums

advanced or to be advanced by the plaintiff under clauses 2 and 3 payable out of the gross receipts of the vessel. This would have been in effect an assignment of the earnings of the ship during the period of the contract, and, notwithstanding the case of *Cory Brothers* v. *Stewart*, I should have thought it difficult, having regard to the decision in *Brown* v. *Tanner*, to hold that such a contract did not impair the security and render the sale of the vessel difficult, if not impossible, according to the view taken in *The Celtic King*, unless, indeed, it could be said that the comparatively short time during which the contract in the present case was to be in force—viz., till the 15th Oct. 1900—made a material distinction with the facts in the case of *The Celtic King*. But, on considering the present contract, I come clearly to the conclusion that the "beforementioned expenses" in clause 7 do not include the sums referred to in clauses 2 and 3. This difficulty being cleared away, there remains, I think, no other. It is true that clauses 2 and 3 give the plaintiff a charge and lien on the *Heather Bell* for his advances, but this charge is clearly subordinated to that of the defendant, and, therefore, in no way impairs his security. The right conferred by sect. 4 to sell certain articles of equipment appears to relate to some matters of very trifling importance. The rest of the contract provides for the terms on which the boat was to be run. I do not think I have to inquire whether these terms were unduly favourable to the plaintiff. They were not likely to be so, as the plaintiffs had interests in the steamer running apart from her earnings. I do not think that they were unusual terms for the employment of such a vessel as the *Heather Bell*, constructed as she was, for exactly such employment as is contemplated by the contract. I doubt if they would render the vessel less saleable during the currency of the contract; certainly they would not at its termination, which was only some five weeks after the defendant took possession. It results, therefore, that in my opinion the defendant had no right to interfere with the execution of the contract; and there must be judgment for the plaintiff, with costs, and an inquiry as to the amount of damages.

March 25.—The liability of the plaintiff in respect of the counter-claim was now argued.

Ernest Pollock for the defendant.—It should be implied that there was a request of the plaintiff that the defendant should pay these wages. See

Johnson v. *Royal Mail Steam Packet Company*, 17 L. T. Rep. 445; L. Rep. 3 C. P. 38; 3 Mar. Law Cas. O. S. 21;
The Orchis, 62 L. T. Rep. 407; 15 C. P. Div. 38; 6 Asp. Mar. Law Cas. 501.

Carver, K.C. for the plaintiff *contrà*. — No request should be implied. The payment of the wages was incidental to the wrongful taking possession of the vessel, which has been declared to be illegal. See

The Ripon City, 78 L. T. Rep. 296; (1898) P. 86; 8 Asp. Mar. Law Cas. 391.

The PRESIDENT.—The remaining question is as to a counter-claim for a sum of money, which, put shortly, was for wages due to the master and crew of the ship before the mortgagee seized her. Now, it is clear to my mind that this question is covered by the case of *Johnson* v. *Royal Mail Steam Packet Company*. If the mortgagee had rightly seized, there would be no question whatever that the payment of the wages would give him a claim against the person liable to pay them; but in this case I have held that the mortgagee had no right to take possession of the ship as against the person who was properly in possession under the charter-party—namely, the charterer. Does that make any real difference? I think that it does not. In the first place, I am by no means certain that on the facts of the case it would not be sufficient to say there was an implied request, because when I find that notice was distinctly given of the intention to pay these sums, so that it would have been open for the plaintiff to say "No, don't pay for me; I will deal with the matter myself," and he took no such step, I do not think it would be too far to go, on the facts, to say that there was an implied request. If it were necessary, I should say there was. I do not think, however, that the matter need be put upon that ground, because it seems to me immaterial whether the mortgagee had the right to take possession or not. The ship was his property, and the seizure was practically a good seizure but for the fact that there was a charter-party which, by the Admiralty law, the mortgagee could not disturb. What difference does that make? I do not think it makes any. The principle is decided in the case of *Johnson* v. *Royal Mail Steam Packet Company*, namely, that if there is an implied request it would be enforced; but the law goes further, and says, in the words afterwards used by Lord Esher in the case of *The Orchis*, that "if by reason of the default of one person the property of another becomes subject to seizure by law, if the person whose property is thus seized by a right process of law in consequence of the default of another pays the debt, the law implies a promise from the one whose debt is paid to repay it to the person who paid it." Now, I do not think anything turns upon the actual phrase "is thus seized," because I take it that it is enough that in this case there was a threat of seizure by those—namely, the master and crew—who had the power to seize, and, although the mortgagee's ownership is not the same as that of the actual owner, still for all real intents and purposes, looking at the law in its broadest aspect, it appears to me that the mortgagee, in order to protect the property in which at the moment he was interested in fact—whether rightly or not does not matter—was compelled to pay certain sums, and the reason was that it was by the default of the plaintiff they were unpaid. It therefore seems to me that this case comes within the principle of the judgments in the case of *Johnson* v. *Royal Mail Steam Packet Company* and *The Ripon City*. In the latter case I put it upon the ground that "the personal liability of the defendants to pay the sum which the plaintiff was considered to be compelled to pay, and did pay, was wanting." In this case I think the defendant was compelled to pay and did pay, and that it was by reason of the default of the person—namely, the plaintiff—who was legally liable. In those circumstances I think the counter-claim must succeed, and with

such costs as are properly attributable to it. With regard to the costs as a whole, if my attention had been called to the 2*l.* alternatively paid into court by way of satisfaction for any damage sustained, I might have thought that that might prove to be sufficient, and the plaintiff not entitled to costs. But I did give the plaintiff the costs, because his rights were infringed, and I do not think I ought to go back from that. With regard to the reference, I think the costs must be left open. There will be no costs of this hearing

Judgment for the plaintiff on the claim; for the defendant on the counter-claim.

Solicitors for plaintiff, *Whitley* and *Co.*, Liverpool.

Solicitors for defendant, *H. Forshaw* and *Hawkins*, Liverpool.

Monday, April 1, 1901.

(Before Sir F. JEUNE, President.)

THE FRANKLAND. (*a*)

Collision—Contribution between joint tortfeasors—Admiralty rule as to division of damages—Objection to registrar's report.

Where two vessels have been found both to blame for a collision and each has been condemned in a moiety of the other vessel's damages, such damages include a sum of money which one of them has become liable to pay for damage done to a third vessel in consequence of the collision.

In such cases the common law rule of no contribution between joint tortfeasors does not apply.

THIS was a motion in objection to the registrar's report assessing the damages in a collision action.

On the 8th Aug. 1900 a collision occurred between the Swedish steamship *Avera* and the steamship *Frankland*, in Long Reach, river Thames.

The action was tried before Barnes, J., assisted by two of the Elder Brethren, on the 27th Nov. 1900, and resulted in his finding both vessels to blame and decreeing accordingly.

The *Avera* at the time of the collision was proceeding from the Thames to Middlesborough in ballast, and was struck on the starboard bow and driven against the barge *Hope*.

An action was commenced in the City of London Court by the owners of the barge against the owners of the *Avera*, who admitted liability for the collision, subject to the damages being assessed by the registrar of the City of London Court. This was done, and the damages were assessed at 269*l.* 16*s.* 10*d.* with interest and costs.

At the reference before the registrar of the Admiralty Court the moiety claim of the *Frankland* was settled by the parties out of court, and the moiety claim of the *Avera* was heard on the 1st March 1901.

At the reference it was not suggested that the owners of the *Avera* had improperly admitted liability for the damage done to the barge *Hope*, nor was the amount of the damages paid disputed.

The only contention of the owners of the *Frankland* was that, the plaintiffs and defendants being joint tortfeasors, the plaintiffs could not obtain contribution from the defendants for any part of the damages decreed due in the City of London Court.

The registrar held that, as both vessels had been found to blame, and as it had been admitted by the defendants that the damage done to the barge was damage in fact arising out of the collision, the plaintiffs' right to recover rested on the decree of the Admiralty Court. Consequently the Admiralty rule for division of the damages must apply, and that the plaintiffs were entitled to recover from the defendants a moiety of the damages and costs—viz., 174*l.* 7*s.* 5*d.*

The defendants moved to set aside the registrar's report.

Dawson Miller in support of the motion.—There is no difference between the Admiralty practice and the common law practice. At common law the plaintiffs could not recover, for the rule that there is no contribution between joint tortfeasors is settled law. In *The Avon* v. *The Thomas Joliffe* (63 L. T. Rep. 712; 6 Asp. Mar. Law Cas. 605; (1891) P. 7) Butt, J. held that when both tug and tow could be sued for the whole amount of damage done to a third vessel, neither could obtain contribution from the other. That was not a case in which a decree had been, or apparently could have been, obtained for division of damages between tug and tow, and consequently it came within the common law rule. See, too,

The Englishman and Australia, 72 L. T. Rep. 203; 7 Asp. Mar. Law Cas. 605; (1895) P. 212.

He also referred to

The Milan, 5 L. T. Rep. 590; 1 Mar. Law Cas. O. S. 185; Lush, 388;

The Bernina, 58 L. T. Rep. 423; 6 Asp. Mar. Law Cas. 257; 13 App. Cas. 1.

Butler Aspinall, K.C. and *Dr. Stubbs, contra.*—The doctrine of no contribution between joint tort feasors ought not to be applied by the Admiralty Court. It is not founded on any principle of equity, and is inconsistent with the language of the decree in a collision action. The principle upon which this court has always acted is to divide all the losses consequent on a collision, and make each wrongdoer pay a moiety—*e.g.*, salvage, loss of charter party, the expense of raising either vessel if wrecked. They referred to

Palmer v. *Wick and Pulteney Town Steam Shipping Company* (1894) A. C. 318;

Tatham, Bromage, and Co. v. *Burr*, 78 L. T. Rep. 473; 8 Asp. Mar. Law Cas. 401; (1898) A. C. 382;

The North Britain, 70 L. T. Rep. 210; 7 Asp. Mar. Law Cas. 413; (1894) P. 77.

Dawson Miller in reply.

The PRESIDENT.—The question raised in this case presents some difficulty, because I confess it appears to me there are two principles which are to a certain extent in conflict. On the one hand it is contended that where two vessels come into collision, *ex hypothesi* by the fault of both, and one of them, in consequence of the collision, comes into contact with another vessel and does damage which has to be paid for,

(*a*) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

then that is part of the "damages arising out of the collision" which, by the decree of the Admiralty Court, are to be shared between the two vessels. On the other hand it is contended that inasmuch as the collision with the third vessel is a tort, and as both the vessels which previously came into collision are joint tortfeasors, if one is sued by the third vessel she is sued for a tort, and therefore, if her owners have to pay, they cannot recover from the owners of the other vessel, on the principle that there is no contribution between joint tortfeasors. I confess it is not very easy to see one's way out of this difficulty. My own inclination is to rest upon the broad language of the decree of the Admiralty Court, which no doubt has decided that these two vessels were to blame, and that for the damages—practically in terms, and certainly, according to the meaning of the decree, for all damages arising out of that collision—both vessels are equally responsible; that is to say, they have to divide them between them. Then the only question is, What damages come within the category which have to be divided equally? The expenses of salvage or the expenses arising from a contract which had to be broken, or many other things, might be suggested as giving rise to incidental damage, to be brought into those damages which are to be equally divided. Then it is said that all these suggested damages do not arise out of tort, and that, therefore, the principle of no contribution between joint tortfeasors does not arise in those cases. I confess there is that great difficulty, but, on the whole, I am inclined to rest upon the wording of the decree of the Admiralty Court, that all "damages arising out of the collision" are to be divided equally. Are these damages? Beyond all question they are. It may well be that if a third vessel sued and recovered against one of the two other vessels, as she could, it is within the ordinary common law principle that the vessel which was sued could not recover against the other vessel with which she came into collision. But to my mind it is an extension of that doctrine to say that you must so construe the decision of the Admiralty Court as to exclude damages arising from tort committed by one of the vessels in consequence of or as the result of the collision. No doubt it is a rule of law that joint tortfeasors cannot be called upon to contribute, and I do not intend to vary from that in the slightest degree, but I do not wish to extend it so as to put upon a decree of the Admiralty Court a limitation arising out of an extension of that principle. Unfortunately there is no decision in the courts of law which governs this case. The case of *The Avon* v. *The Thomas Joliffe* (*ubi sup.*) only decides that where a person is injured he can bring an action against either of the persons who did him that injury, and can recover from one, and that one cannot have the decree amended so as to enable him to recover from the other tortfeasor. In that respect the Admiralty Court does not differ from the principle of the common law; and both cases of *The Englishman and the Australia* (*ubi sup.*) seem to go no further. All they say is that you can recover against one of two joint tortfeasors, and that one cannot recover against the other. All that is law which I think is very obvious, but, none of those cases go so far as to say that where damages are connected with what in law would be a tort, they are not damages which fall within the wording of the decree of the Admiralty Court. I find no decision to that effect. I do not think the case of *The Milan* (*ubi sup.*) really helps one one way or the other. I should not like to rely strongly upon that case, even if I thought it applied, because there is no doubt that the most intelligible principle upon which *The Milan* (*ubi sup.*) rests is the identification of the cargo with the ship. That principle has been so shaken in the case of *The Bernina* (*ubi sup.*), that I should not be prepared to rely upon the decision in *The Milan* (*ubi sup.*) as one which ought to be strongly relied upon, or extended in the present day. But I do not think the case of *The Milan* (*ubi sup.*) really affects the matter, because it was only a case where cargo owners brought an action and inasmuch as the cargo was in a wrongdoing ship its owners could only recover half its value from the wrong-doing ship. In my view, in the present case, the damages are to be recovered, not less because the collision with the barge arose out of a tort.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *Stokes* and *Stokes*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

May 8 *and June* 13, 1901.

(Present: Lords MACNAGHTEN, DAVEY, ROBERTSON, LINDLEY, and Sir FORD NORTH.)

THE BAKU STANDARD; OWNERS, MASTER, AND CREW OF THE STEAMSHIP ANGÈLE v. OWNERS, MASTER, AND CREW OF THE STEAMSHIP BAKU STANDARD. (a)

Salvage—Damage suffered by salving vessel during services—Liability of vessel salved for damage—Onus of proof.

Where a vessel suffers damage while rendering salvage services and there is no proof that those in charge of her have been guilty of any negligence or unskilful management, there is a presumption that such injury is caused by the necessities of the services, and, in the absence of proof to the contrary, the vessel salved is liable to compensate the salving vessel for such damage. It is not the custom of a Court of Appeal to vary the decision of a court below on a question of amount merely because, had the case come before them in the first instance, they might have awarded a different sum.

THIS was an appeal from a judgment of the Supreme Consular Court at Constantinople affirming, on rehearing, an award, in an action for salvage, of O'Malley, J., sitting in Vice-Admiralty.

The facts of the case were shortly as follows: About 6 p.m. on the 10th Dec. 1898 the *Baku Standard*, an oil tank steamship of 3708 tons gross and 2375 net register, while on a voyage from London to Batoum in ballast, broke her propellor shaft. At the time she was in the Sea of Marmora, Erekli Light bearing N. 15 degrees W. and 10½ miles distant. The weather was fine, there was no sea, and the wind was a light breeze from the N.E. While she was lying

(a) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

broken down two steamships spoke her and offered assistance, but, as in each case they were outward bound from Constantinople, their services were not accepted. Eventually, about 10 p.m. on the same day, the respondents' steamship *Angèle* came up and her services were engaged.

The *Angèle* was a steamship of 1821 tons gross and 1149 tons net register, fitted with engines of 209 horse power nominal, and at the time was on a voyage from Marseilles to Constantinople in ballast. A hawser was passed without difficulty, and towing commenced at about 12.10 a.m. on the morning of the 11th Dec.

The weather remained fine, and towing proceeded without event until about 3 a.m., when a shock was felt on board the *Angèle*, and her engines began to race, indicating some injury to her propellor. She, however, continued towing the *Baku Standard*, and brought her to a safe anchorage off Constantinople about 9 p.m.

Upon her arrival a survey was held, and it was found that two of the four blades of her propellor had been broken off, and that the third one was damaged, having been broken about 8in. from the boss.

At the trial of the action before O'Malley, J., sitting in Vice-Admiralty, it was contended that this damage was due to the towage. The judge awarded 1000*l.* to the plaintiffs for salvage services, and such amount as might be found due to them for damage occasioned to the propellor.

At the reference before the registrar and merchants, the damages were assessed at 1316*l.* 11*s.* 7*d.*, and judgment was given for this amount accordingly.

The defendants appealed, and the case was reheard and affirmed on appeal.

The defendants now appealed to the Privy Council.

Aspinall, K.C. (*Scrutton*, K.C. with him) for the appellants).—The judge was wrong in holding the defendants liable for the damage to the propellor. For the plaintiffs to recover in respect of such damage they must establish that it was occasioned by the necessities of the service. If the cause of the damage is left in doubt the defendants ought not to be made to pay for it:

The Thomas Blyth, Lush. 16;
The Cornelius Grinnell, 11 L. T. Rep. 278; 2 Mar. Law Cas. O. S. 140.

Joseph Walton, K.C. and Dr. *Stubbs*, for the respondents, *contrà*.—If the salvors have not been guilty of negligence, the presumption is that any loss or damage incurred during the rendering of the services was occasioned by the necessities of the service. The practice of the courts has always been to give effect to this presumption:

The De Bay, 49 L. T. Rep. 414; 5 Asp. Mar. Law Cas. 156; 8 App. Cas. 559;
Kennedy on Civil Salvage, p. 143.

Aspinall, K.C. in reply.

Cur. adv. vult.

June 13.—The judgment of the court was delivered by Sir FORD NORTH.—This was an appeal by the master and owners of the steamship *Baku Standard* from a judgment of the Supreme Consular Court at Constantinople, affirming a judgment of O'Malley, J. by which he awarded to the master and owners of the steamship *Angèle* (the present respondents) the sum of 1000*l.* for salvage and towage services; and also damages subsequently assessed at 1316*l.* 11*s.* 7*d.* The facts were as follows: The *Baku Standard*, of London, was a large oil tank screw steamer of 2375 tons register. On the evening of the 10th Dec. 1898, while passing through the Sea of Marmora on a voyage to Batoum, in ballast, she became disabled by the fracture of her propellor shaft. This was about 6 p.m. She was practically in no danger, as she was not making any water; there were numerous steamers about, and the weather was not unfavourable. Tugs could easily have been procured the next day from either Constantinople or the Dardanelles, and if in the meantime the currents had carried her towards the shore she could have anchored in safety. But she was helpless, and made the usual signals for assistance. First one and then another steamer came up and offered help, but the master declined their aid, thinking he might do better. About 10 p.m. the *Angèle*, having seen the signals, came up. She was a British steamer of 1149 tons, belonging to Malta, and bound for Constantinople in ballast; and after some discussion it was agreed that she should tow the *Baku Standard* to Constantinople, then about fifty miles distant. The price to be paid for her services was left to be settled between the owners. Accordingly a 4½in. wire hawser belonging to the *Baku Standard* was carried to the *Angèle* and made fast on her starboard quarter. The other end of that hawser was shackled to the starboard cable of the *Baku Standard*, the total distance between the vessels being about sixty fathoms. When ready the *Angèle*, with the other vessel in tow, started for Constantinople between midnight and 1 a.m. on the 11th Dec. It appeared that both vessels (probably from being in ballast) steered irregularly and yawed a good deal. About 3 a.m. a violent shock was felt on board the *Angèle* and her engines began to race, indicating some injury to the screw. But she completed her tow to Constantinople, reaching that port in the evening of the same day. Upon her arrival there it was found that two of the four blades of her propellor had been broken off from the boss, while a third blade had also been broken across about 8in. from the boss. There could be no doubt that this occurred at the time of the shock above-mentioned, but there was no direct evidence what was the cause of the accident. Various suggestions were made, but it was impossible to ascribe the injury with certainty to any definite cause. It occurred during the towage, and there was no proof that the master and crew of the *Angèle* were guilty of any negligence or unskilful management. The action was instituted on behalf of the *Angèle* claiming salvage and also the amount of damage actually sustained by her in carrying out the salvage work, with consequent demurrage, and other expenses. The judge of the Supreme Consular Court condemned the defendants in 1000*l.* for salvage service, and also for the other damages claimed, the amount to be ascertained by the registrar. That decision was affirmed on appeal. The amount claimed for damages was 1504*l.* 5*s.* 1*d.*, and the registrar awarded 1316*l.* 11*s.* 7*d.* To deal first with the question of damages. It is clearly settled that when the vessel of a salvor has, without default on his part, been injured in the performance of

salvage services, compensation may be awarded to him in respect of the injury so sustained, and damages consequent thereon. It was laid down by the Judicial Committee in *The De Bay* (*ubi sup.*) that it was always justifiable—and sometimes important, if it could be done — to ascertain what damages and losses the salving vessel had sustained in rendering salvage services. It is often difficult and expensive, and sometimes impossible, to ascertain exactly the amount of such loss, and in such cases the amount of salvage must be assessed, in a general manner, upon so liberal a scale as to cover the loss, and to afford also an adequate reward for the services rendered. It is also laid down in the case of *The Thomas Blyth* (*ubi sup.*) that when the vessel of a salvor was injured or lost while engaged in a salvage service, the presumption was that the injury or loss was caused by the necessities of the service, and not by the default of the salvors; and that the burden of proof lay upon the parties who alleged that the loss was caused by the salvors' own acts. Adopting the principles thus laid down, and in the absence of any evidence that the damage to the *Angèle* was caused by negligence or default on the part of the master or crew of that vessel, their Lordships are of opinion that the damages assessed by the registrar were rightly awarded against the appellants. That being so, the compensation to be given for salvage services, as distinguished from compensation for damage, ought to be calculated on a less liberal scale than if the sum given for salvage was intended to cover compensation for damage also. Their Lordships are of opinion that, considering the evidence and that the compensation for damage was dealt with separately, full justice would have been done by an award of less than 1000*l.* for salvage. But that is a question of amount only, and it is not the custom of the committee to vary the decision of a court below on a question of amount, merely because they are of opinion that if the case had come before them in the first instance they might have awarded a smaller sum. It has been laid down in *The De Bay* (*ubi sup.*) and other cases that they would only do so if the amount awarded appeared to them to be grossly in excess of what was right; which is not the case here. Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs.

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper* and *Co.*

Solicitors for the respondents, *Jull, Godfrey,* and *Danvers.*

Supreme Court of Judicature.

COURT OF APPEAL.

April 16 *and* 17, 1901.

(Before RIGBY, COLLINS, and STIRLING, L.JJ.)

KÖNIG *v.* BRANDT. (a)

APPEAL FROM THE CHANCERY DIVISION.

Consignment of goods—Alleged specific appropriation—Claim for lien—Bills drawn against particular shipments of goods—Contemporaneous letter of advice—Non-acceptance of bills—Passing of property in goods.

The defendants carried on business in London, and their practice was to sell in their own names goods shipped to them by P. and Co., who carried on business abroad. P. and Co. used to specify in advising drafts against what particular shipments the same were drawn, so as to enable the defendants to tell whether the particular shipments consigned to them did in fact cover the then outstanding drafts, but not to affect their right to treat all shipping documents as cover for the whole account between them and P. and Co.

P. and Co. used likewise to draw upon the plaintiffs, who also carried on business in London, against shipments of goods, bills which the plaintiffs accepted, P. and Co. afterwards forwarding to them, as security, before the bills reached maturity, bills drawn by P. and Co. on first-class firms (among them being the defendants), accompanied by the shipping documents of the goods shipped by them to such firms, and on such firms accepting the bills the plaintiffs would hand over to them the shipping documents which otherwise would have been retained.

The defendants having received instructions from P. and Co. to sell certain goods at a specified price, entered into contracts for the sale thereof. Subsequently P. and Co. wrote to the defendants that they had drawn upon them against the goods, and the bills were specified. The bills were drawn to the order of the plaintiffs by P. and Co. upon the defendants for various sums, and were together intended to provide for part of the credit or advances made by the plaintiffs to P. and Co.

Bills of lading for the goods, indorsed in favour of the defendants, were afterwards forwarded to them by P. and Co. The defendants took possession of the bills of lading, and applied them in satisfying, so far as they would go, the contracts into which they had entered; but, becoming doubtful as to the financial position of P. and Co.'s firm, they declined to accept the bills of exchange, and claimed to treat the proceeds of sale of the goods as available for payment of the general balance of account between themselves and P. and Co.

Held (affirming the decision of Buckley, J.), that there was no specific appropriation of the goods in favour of the plaintiffs; that the defendants were not compellable to accept the bills; and that nothing had been done to defeat the primary right of the defendants, in whose custody the goods were, to deal with them for their own purposes and irrespective of any rights of the plaintiffs.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

THIS was an appeal on the part of the plaintiffs, König Brothers, that the order made in this action by Buckley, J., and dated the 26th March 1901 (refusing to make any order upon the plaintiffs' motion except that the costs thereof should be costs in this action), might, except in regard to the direction as to costs, be reversed or varied; and that it might be ordered that the defendants William Brandt, Sons, and Co., their servants and agents, be restrained until the trial of this action or further order from parting or dealing with the proceeds of sale of 2250 bags of linseed and 2375 bags of linseed respectively shipped by the firm of William Paats, Roche, and Co., of Buenos Ayres, per the ship *Minho*, and 1518 bags of linseed shipped by the same firm per the ship *Virgen de Lourdes*, the respective bills of lading for all which shipments were in the months of Jan. and Feb. 1901 sent to the defendants, or any part of such proceeds of sale, without providing for the payment to the plaintiffs of all moneys owing to the plaintiffs in respect of the sum of 9000*l.*, part of the credits or advances to the amount of 12,500*l.* made by the plaintiffs to the firm of William Paats, Roche, and Co., such sum of 9000*l.* being the amount intended to be provided for by three bills of exchange, dated the 22nd Jan. 1901, drawn to the order of the plaintiffs by the said firm upon the defendants for the respective sums of 2500*l.*, 3000*l.*, and 3500*l.*, which bills the defendants refused to accept.

The material facts of the case are fully stated in the judgment of Buckley, J., which was delivered on the 26th March 1901, as follows:

BUCKLEY, J.—In Aug. 1899 and onwards William Paats, Roche, and Co. were a firm of merchants carrying on business at Buenos Ayres. At the same time William Brandt, Sons, and Co. were a firm of merchants and foreign brokers carrying on business in the city of London. As between Paats and Co. and Brandt and Co. there was a course of dealing respecting which I will read from the affidavit of Augustus Philip Brandt. He says: "At first the said William Paats, Roche, and Co. were in the habit of drawing from time to time drafts for large amounts which they advised to my said firm without specifying in the drafts the shipments or contemplated shipments in respect of which they were drawn, and though, as a rule, they remitted in due course bills of lading as cover for the drafts, my firm found that this course of business was inconvenient because it was impossible to tell readily whether the shipping documents which my said firm might have in hand or expect at any particular time were sufficient to cover the drafts drawn by the said William Paats, Roche, and Co., and whether, therefore, they might prudently accept the bills of the last-mentioned firm. Consequently the said William Paats, Roche, and Co. were requested by my said firm to specify and thereafter did specify in advising against what particular shipments or contemplated shipments such drafts were drawn. The practice of specifying the shipments against which bills were drawn was adopted entirely for the protection and convenience of my said firm, and to enable them to tell whether the particular shipments consigned to them did in fact cover the then outstanding drafts, and to enable them to exercise a discretion in accepting the drafts, and was not intended to and did not affect the right of my said firm to treat all shipping documents as cover for the whole account between them and the said William Paats, Roche, and Co., or give any security to bill holders upon the shipments. We were never under any obligation to accept a draft, but always reserved the right to refuse if in our judgment the state of the general account between us and the said William Paats, Roche, and Co., the cover in hand or expected, and all the other circumstances, justified us in so doing. All accounts between us and the said firm of William Paats, Roche, and Co. were made up with interest on both sides." During the same time König Brothers were a firm carrying on business in the city of London, and, under a transaction which initiated with a letter of the 25th Aug. 1897 written by König Brothers to Brandt and Co. as the representatives of Paats and Co., a course of business had been established between the parties. As to the course of business between them, I will read from the affidavit of Friedrich Adolph König. He says: "Considerable business took place between Paats, Roche, and Co. and my said firm in accordance with those terms, the course of such business being for Paats, Roche, and Co. to draw upon my firm, against their shipments of goods, bills which we accepted, and for Paats, Roche, and Co. afterwards to forward to us as security, before the bills accepted by us reached maturity, bills drawn by them on first-class firms accompanied (except in such instances as hereinafter mentioned) by the bills of lading and shipping documents of the goods shipped by them to such firms, and on such firms accepting the bills when presented by my firm for us to hand over to such firms the bills of lading and shipping documents, and, in the event of any such firm declining to accept such bills, my firm would have retained the bills of lading and shipping documents and the goods to which they related as security for the bills so accepted by us. In some instances the bills of lading and shipping documents would be sent direct to the firms on whom Paats, Roche, and Co. had drawn in our favour, but in those cases the said documents and the goods to which they related were so sent as cover for the bills drawn in our favour, and in order that by means of the said documents and goods, or by means of the bills being accepted, our previous advances should be met. No objection was taken by us to this departure from the original terms, provided the bills in our favour were drawn on firms of whom we approved and were accepted by such firms. It is usual in dealings of a similar nature, where the parties are well known to each other, to send the shipping documents to the intended acceptors of the bills direct, it being a condition that they will accept the bills when presented. This course was always adopted by Messrs. Paats, Roche, and Co. when drawing on the defendants, who are a well-known firm of merchants." That being the course of dealing between those two firms of Brandt and Co. and König Brothers respectively, the transaction with which I have to deal is this: By a telegram of the 15th Oct. 1900, Paats and Co. instructed Brandt and Co. to sell for them 500 tons of linseed, and a contract was made accordingly. The grain was to follow. That transaction is known as "linseed business

No. 22," and the contract is dated the 17th Oct. 1900. On the 19th Oct. 1900, upon further instructions given by Paats and Co. to Brandt and Co. the latter sold for Paats and Co. 300 tons of linseed, and that is known as "linseed business No. 23." On the 30th Oct. 1900 Paats and Co. wrote to König Brothers: "We have the honour to inform you that we have made free to value upon your esteemed firm against our shipments for account of third parties"—then follow the descriptions of three bills, aggregating to 12,500*l.*, at ninety days sight, London and Union Bank—"which please protect on presentation to the debit of our account. The shipping documents which form the security for these drafts as cover will be forwarded to you as usual." What next took place was that on the 22nd Jan. 1901 Paats and Co. drew upon Brandt and Co. three bills for 2500*l.*, 3000*l.*, and 3500*l.* respectively, making a total of 9000*l.* I will read one of those bills, which will be sufficient as they are all in similar form: "Buenos Ayres, 22nd Jan. 1901. 2500*l.* At ninety days sight of this our second of exchange (first and third of the same tenour and date unpaid) pay to the order of Messrs. König Brothers 2500*l.* sterling. Value in account which place to account of against shipment of grain as advised per *Citta de Milano.*" On the same date Paats and Co. wrote to Brandt and Co.: "We confirm our respects of the 18th inst., and now beg to inform you that we have taken the liberty of drawing upon you against . . . and against linseed business No. 22, 5500*l.*, and against linseed business No. 23, 3500*l.*, as follows." Then the letter gives the numbers of the bills and their amounts, and they are the same amounts as before mentioned—viz., 2500*l.*, 3000*l.*, and 3500*l.*, making 9000*l.* They conclude thus: "Which drafts we recommend to your protection on presentation to our debit." What took place, therefore, so far as that transaction is concerned, was this: Paats and Co. drew upon Brandt and Co. bills which refer to a certain cargo of grain by these words "which place to account of against shipment of grain" and so on, and simultaneously wrote to Brandt and Co., saying: "Against linseed contract No. 22 and linseed contract No. 23 we have drawn these bills." Now, I pause there for the purpose of saying that, as I understand the decision in *Brown, Shipley, and Co.* v. *Kough* (52 L. T. Rep. 878; 5 Asp. Mar. Law Cas. 433; 29 Ch. Div. 848), the effect of a bill in that form and of a letter of advice in that form is not to appropriate the goods contained in the shipment referred to in the bills to answer the bills; it is not a specific appropriation. On the 21st Jan. 1901 Paats and Co. wrote to König Brothers, and the letter to them was as follows: "We confirm our respects of the 17th inst., and have the honour to hand you inclosed." Then follows a list of bills, among which are the 2500*l.* and the 3000*l.* and the 3500*l.* on Brandt and Co. Then they go on to say: "Which we request you to negotiate at best for our credit against our drafts of 12,500*l.*" On the 18th Feb. 1901 Brandt and Co. received the letter of the 22nd Jan. 1901 which I have read. Two days before that—*i.e.*, on the 16th Feb. 1901—Brandt and Co. heard of the death of William Paats, who was the senior member of the firm of Paats and Co., and Brandt and Co. had reason to believe that the firm of Paats and Co. would request a moratorium. On the 18th Feb. 1901 Brandt and Co. received from Paats and Co. a further letter, dated the 25th Jan. 1901, and that is one in which they wrote: "We beg to confirm our letter of the 22nd inst., and to hand you inclosed bills of lading and invoices for the following linseed contracts"—amongst which were the linseed business No. 23, 2250 bags—"and request you to credit us for the following amounts." In respect of that the sum is 1859*l.* 10*s.* On the 25th Feb. 1901 Brandt and Co. received another letter, dated the 1st Feb. 1901, in which Paats and Co. say: "Please find herewith further bills of lading and invoices for the following linseed contracts No. 23, 2375 bags, and we request you to credit us with the following amounts." In respect of that the sum is 1871*l.* 16*s.* 4*d.* The bills drawn on Brandt and Co. came forward; they were sent to Brandt and Co. for acceptance, and, under the circumstances which I have mentioned, Brandt and Co. refuse to accept them. The bills of lading as they came forward were indorsed by Paats and Co.: "Deliver to Messrs. William Brandt, Sons, and Co., or order. Paats, Roche, and Co." That is the state of the facts. In that state of things König Brothers claim to be entitled as against the cargoes of linseed which I have referred to—or rather against the sums which are to be placed by way of credit against them, the linseed having been sold—to have a security. The question is whether they are entitled to such a security or not. First, I want to examine what was the position of matters as between Paats and Co. and Brandt and Co. It appears to me that in the course of business as between Paats and Co. and Brandt and Co., the latter had in the middle of Oct. 1900 sold linseed forward by the orders of Paats and Co., and, in order to complete all those contracts, Paats and Co. were bound to supply Brandt and Co. with linseed to comply with the orders for goods which they had sold. Paats and Co. did send shipping documents relating to linseed indorsed to Brandt and Co., or their order, and the same were sent to answer these particular contracts. What were Brandt and Co.'s rights in respect of them? According to the course of business as between Paats and Co. and Brandt and Co. as detailed in the affidavit which I have read, it seems to me that Brandt and Co. were entitled to take that linseed and to sell it, and to appropriate the proceeds of sale to the general account as between them and Paats and Co. But suppose that it were the fact that they were not entitled to do so unless they also accepted the bills, I have got to see then whether Paats and Co. were entitled to say to Brandt and Co.: "We send you these goods to answer the sales which you have made under our order; but we send them on the condition that you shall not take the goods unless you accept these bills." It appears to me that they could not do that. It seems to me that immediately Paats and Co. sent to Brandt and Co. the bills of lading representing the goods indorsed to their order, the property passed to Brandt and Co., and that Brandt and Co. were entitled to take that property, and the proceeds of that property, and to deal with it according to the course of business as between them and Paats and Co. What is argued on the other hand is this: It is said that that is not so; that the goods were only sent with a condition that Brandt and Co. should accept the bills;

that Brandt and Co. did not accept them; and that, therefore, either the property did not pass or that, if it did pass, it revested in Paats and Co. Upon that I will only refer to what was said in the Court of Appeal in *Ex parte Banner; Re Tappenbeck* (34 L. T. Rep. 199; 2 Ch. Div. 278, at p. 289) by Mellish, L.J. Referring to *Shepherd* v. *Harrison* (24 L. T. Rep. 857; 1 Asp. Mar. Law Cas. 66; L. Rep. 5 E. & I. App. 116), he said, the bill having been sent to an agent: "Under these circumstances it was held by the House of Lords that the consignee had no right to keep the bill of lading without accepting the bill of exchange. This case is no authority for holding that if the property in the goods had already passed, the property would revest on the bills of exchange being refused acceptance." But suppose that I were wrong in respect of that, I want to go on to investigate next what were the rights as between Paats and Co. and König Brothers. Now, here I am assuming an hypothesis contrary to what I said just now, that, as between Paats and Co. and Brandt and Co., Paats and Co., by reason of Brandt and Co.'s refusing to accept the bills, had retaken the property and had the disposal of the goods. Suppose that that was so, what did they do? They wrote to König Brothers. The letter was that of the 30th Oct. 1900, saying that they had drawn upon König Brothers for such and such amounts, "which please protect," and adding, "The shipping documents which form the security for these drafts as cover will be forwarded to you as usual." That did not give any security, of course; it was a promise of something to be done in the future. In effect they say: "We have drawn upon you and we ask you to come under liability for our benefit, and we will hereafter give you a security." That will not give a security. Then on the 21st Jan. 1901 they write that they hand König Brothers certain bills—those were bills in the form which I have read—and add, "which we request you to negotiate at best for our credit against our drafts of 12,500*l.*" Paats and Co. then sent to König Brothers the bills in the form in which they were in *Brown, Shipley, and Co.* v. *Kough* (*ubi sup.*), which would show, of course, that a particular cargo was referred to in the bill. But otherwise there was no communication by Paats and Co. to König Brothers that the goods dealt with by such bills of lading, if there were any—and, of course, there would be in respect of those shipments—were to be security for them. It seems to me that the utmost that they did by the letter of the 21st Jan. 1901 was in effect to say: "We give to you, König Brothers, such rights as arise from the fact that the bills on Brandt and Co. which we send you contain a reference to the cargo." Does that give a security? It appears to me that it does not. If the proposition be right as laid down by Chitty, J., and, I think, again by the Court of Appeal, in *Brown, Shipley, and Co.* v. *Kough* (*ubi sup.*) be correct, it seems to me that that cannot be so. Chitty, J. says this (at p. 856 of 29 Ch. Div.): "I take it now to be settled law that a mere reference on the face of the bill to a cargo, showing that the bill is drawn (to use a term in mercantile language) as against the cargo, does not create any charge in favour of the bill-holder as against the cargo or the proceeds of the cargo." In the letter of the 21st Jan. 1901 that is the most that, it seems to me, König Brothers got. They got such benefit as would flow from the fact that the bills were drawn—according to mercantile language—as against the cargo. To show that that proposition is right, I will refer to what Mellish, L.J. laid down in *Robey and Co.'s Perseverance Ironworks* v. *Ollier* (27 L. T. Rep. 362; 1 Asp. Mar. Law Cas. 413; L. Rep. 7 Ch. App. 695, at p. 699). There the Lord Justice says this: "The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words 'which place to account cargo per A.,' that he was to have a lien on the cargo. A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed; if there is no bill of lading annexed, he only expects to get the security of the bill itself." It seems to me, therefore, that all that König Brothers got from Paats and Co. was such right, if any, as arose from the fact that the deal was in the form in which, in point of fact, it was. That, it seems to me, is not an appropriation of the goods to answer the bill. But then the plaintiffs' counsel disclaimed the notion of appropriation, and said that their case really rested upon equitable assignment. I do not see how equitable assignment is available at all. For the purpose of equitable assignment, it seems to me that you must get to this: that Paats and Co. having goods in the hands of Brandt and Co., which goods, or the proceeds of which goods, belonged to them, Paats and Co. say to Brandt and Co.: "Hand those goods or their proceeds to König Brothers, and tell König Brothers of that." I do not see that the facts here come up to that. What Paats and Co. had said to Brandt and Co. was: "Here are these goods deliverable to you to answer our sales." And, according to the course of business as between Paats and Co. and Brandt and Co., if Mr. Brandt's affidavit is right, the proceeds would go to the general credit of the account as between the parties. It appears to me that Paats and Co. could not, and did not, assign in favour of König Brothers any right in respect of these goods. I must, therefore, make no order upon this motion except that the costs of the motion be costs in the action.

From that decision the plaintiffs now appealed.

Henry Terrell, K.C. and *Christopher James* for the appellants.

Birrell, K.C. and *R. J. Parker* for the respondents.

The arguments sufficiently appear from the judgments.

The following authorities were cited or referred to in the course of the arguments:

Frith v. *Forbes*, 4 De G. F. & J. 409;
Inman v. *Clare*, 1 Johns. 769;
Shepherd v. *Harrison*, 24 L. T. Rep. 857; 1 Asp. Mar. Law Cas. 66; L. Rep. 5 E. & I. App. 116;
Brown, Shipley, and Co. v. *Kough*, 52 L. T. Rep. 878; 5 Asp. Mar. Law Cas. 433; 29 Ch. Div. 848;
Ex parte Banner; Re Tappenbeck, 34 L. T. Rep. 199; 29 Ch. Div. 278, at p. 288;
Tailby v. *Official Receiver*, 60 L. T. Rep. 162; 13 App. Cas. 523, at p. 543;
Sale of Goods Act 1893, s. 19, sub-ss. 1, 2, 3.

RIGBY, L.J.—I am of opinion that the judgment of the learned judge in the court below ought to be supported, and that the relief asked for by this appeal ought to be declined. I think that the learned judge in the court below was quite right in his judgment upon the points that were there raised, and that that is sufficient. I therefore say that the decision found by the learned judge in the court below was right and ought to be affirmed, and I do not think it necessary to make any other obervations upon the points argued. The appeal will be dismissed with costs.

COLLINS, L.J.—I am of the same opinion. I agree with the decision of Buckley, J., and I agree with the grounds upon which he has arrived at it. The foundation of Mr. Terrell's argument is double; he has two points. First of all he contends that by the general agreement between the plaintiffs, König Brothers, and William Paats, Roche, and Co., the foreign firm in Buenos Ayres, the plaintiffs became entitled to a specific assignment of the particular cargo upon which the lien is claimed in this case. The plaintiffs say that there was a general agreement which gave them an equitable right to each specific portion of cargo as and when it was the subject-matter of a bill of exchange drawn against it, and that, taking the antecedent agreement and the appropriation by the drawing of a particular bill of exchange against it, the conditions entitling them to their lien were fufilled. On that ground they say that they have a lien upon the proceeds of a particular cargo in this case. But, furthermore, they say that that lien overrides any claim of the defendants William Brandt, Sons, and Co. to hold that cargo in their own right. Buckley, J. has held first—I think that he held it as the second point, but it is one of the essential points—that no specific appropriation of this particular cargo in favour of the plaintiffs was made out; and, secondly, that nothing was done to defeat the primary right of the defendants, in whose custody it is, to deal with it for their own purposes and irrespective of any rights of the plaintiffs. Now, I will deal with the second point first. The defendants were the persons who acted as correspondents for the foreign firm of William Paats, Roche, and Co.. Their course of business was to sell in their own name, as principals, certain consignments forwarded to them by the foreign firm abroad. They did in point of fact sell and become liable to the purchasers for the delivery of the particular consignment in question respecting which the point as to the right of lien in this case arises. Now, having sold that consignment, as far back, I think, as October of last year by a contract to arrive they were bound to the purchasers of that cargo to furnish the goods therein named as soon as they same forward. In that state of facts the foreign firm of William Paats, Roche, and Co. sent to the defendants a letter in which they make mention of certain drafts which they have drawn in favour of the plaintiffs, and invite the protection of the defendants to these drafts, amounting in all to a sum of something like 9000*l.* By a letter dated a day or two afterwards, they forward bills of lading for one portion—that is, the portion in question in this case—of the consignments in respect of which they have by the letter I first referred to stated that they have drawn drafts in favour of the plaintiffs. I need only deal with the bill of lading embracing the particular consignment now in question. The bill of lading is forwarded fully indorsed in favour of the defendants, and it represents goods to the value of about 1800*l.* Now, it is said by Mr. Terrell that the obligation to accept all these drafts to the extent of about 9000*l.* was a condition precedent, as I understand him, to any right whatever on the part of the defendants to deal with this particular bill of lading indorsed to them and *primâ facie*, therefore, conveying to them the unincumbered property in and the right to deal with those goods. That seems a very extraordinary and unreasonable contention on the face of it. But I do not say that it would be impossible for the parties to agree that such were their rights. We have, however, got to find out—and we have only got the materials of the affidavits and documents before us—whether business was being done between the defendants in England and William Paats, Roche, and Co. out in Buenos Ayres on these terms. When you come to look at the defendant Augustus Philip Brandt's affidavit which Buckley, J. has adopted, it seems to me, if we believe it, to negative any such possibility. When on an application of this kind we are not finally deciding upon the rights of the parties, it seems to me to be quite reasonable to accept the statement of Augustus Philip Brandt in this matter, especially where it coincides with the common-sense view, and what one would anticipate ought to be the course of dealing between the parties. Just look at the position of the defendants. They have sold by the direction of the foreign firm of William Paats, Roche, and Co. this particular consignment. They have made themselves responsible to the purchasers. Are we to assume that they have agreed that their right to deal with the bill of lading, representing the parcel that they have sold in performance of a contract for which they have become personally liable at the instance of the vendors, is to be fettered by an obligation to make themselves personally liable by accepting bills to the extent of 9000*l.*? The contention, negatively put, as it was put by Mr. Parker, appears to me to be ridiculous. I cannot gather that out of the agreement between the parties; and, if I do not get it out of the agreement between the parties, I certainly do not get it as an inference of law from the method in which the bills of lading have been sent and the method in which the drafts which the defendants were invited to accept have been sent. We have not got here a case analogous to that of *Shepherd* v. *Harrison* (24 L. T. Rep. 857; 1 Asp. Mar. Law Cas. 66; L. Rep. 5 E. & I. App. 116) at all. *Shepherd* v. *Harrison* (*ubi sup.*) was a case between buyer and seller, and the seller sent to his own agent in England a bill of lading not indorsed over and in favour of the buyer, but indorsed generally. He sent it to his agent, and he sent along with it a draft for acceptance by the buyer. The seller having so protected himself and retained the *jus disponendi* by keeping the bill of lading in this form in the hands of his agent, the agent then by a letter sent the bill of lading and the draft for acceptance to the buyer. It was held by the House of Lords that the effect of that transaction was that the property did not pass; that the action of the agent in sending the bill of lading indorsed generally with the draft for acceptance,

made the acceptance of the draft a condition of the property passing to the buyer at all; and that therefore in that case the property did not pass. Here you have a case where it is essential to the original underlying obligation in the whole matter—that is, the obligation on the part of the defendants to deliver to the persons to whom they have contracted as principals to sell—that they should acquire the right to deal with the subject-matter of his contract (namely, linseed in this case) when it comes forward. A bill of lading, unfettered, passing the absolute property to them, is sent to the defendants, who have come under the obligation which I have named at the instance of the persons who send the bill of lading. You certainly cannot infer from that transaction that as a matter of law—apart from some general agreement which might or might not be found in other instances—that the right to deal with that bill of lading so sent is defeated because in another letter they have been apprised that drafts have been drawn in favour of the plaintiffs, embracing, among other things, the price of this particular consignment, or a sum in respect of this particular consignment. It seems to me that it certainly cannot arise as a matter of law. The conditions under which it arose in *Shepherd* v. *Harrison* (*ubi sup.*) do not arise here, and the surrounding circumstances negative any intention that it should arise. Having got that question of law, I look to the actual statements of the defendants on the one hand and the plaintiffs on the other, and I find that the defendant Augustus Philip Brandt's affidavit absolutely negatives any such arrangement. His affidavit is to the effect that the defendants had been at one time in the habit of accepting drafts drawn by the foreign firm of William Paats, Roche, and Co.; that they always had the right to consider whether any particular draft sent forward for their acceptance was one that in the state of dealing between them and William Paats, Roche, and Co. they would be justified in accepting; that that practice was afterwards at the defendants' instance and for their convenience modified to a certain extent by intimation being given in the communications from the agents abroad in respect of what consignments they wanted drafts accepted; but that the object of that was merely to apprise the defendants as to how they stood approximately when the question came before them as to whether they would or would not accept a particular draft; and that there was no obligation imposed on them to accept a particular draft in derogation of their general right of lien in their general account as between them and William Paats, Roche, and Co. That being so, the convenience of the defendants was considered and met by giving them better information, guiding them in the question whether they would or would not accept a particular draft. But it did not go further, and their contention and the assertion in the affidavit is that that was not meant in any way to modify, and did not modify, the defendants' general right to assert their general lien. Well, in this particular case William Paats, Roche, and Co. have got into difficulties, and are largely indebted to the defendants, and the defendants claim—and Buckley, J. has accepted their contention—that their right to deal with the proceeds of these goods in relief of the indebtedness of William Paats, Roche, and Co. to them is unfettered by whatever has happened in the correspondence, whereby they have been invited to accept these drafts in favour of the plaintiffs. The defendants have refused to accept those drafts, and they claim to hold these goods unincumbered by any lien on the part of the plaintiffs. I quite agree with Buckley, J.'s view upon the matter. I think that he was absolutely right in holding that the defendants' right is unfettered by anything that has happened between the plaintiffs and William Paats, Roche, and Co.

Now I come to the other side of the question. Even assuming—as Buckley, J. does—for the purpose of the second branch of the argument, that I am wrong upon that first point (though upon this point perhaps it would be unnecessary, feeling as strongly as I do on the first point, to give any opinion), nevertheless it does seem to me that Buckley, J. was right upon this point also. That is to say, I do not think that the facts here do amount to any specific appropriation of these goods in the defendants' hands for the benefit of the plaintiffs, because when you come to look at the agreement under which the plaintiffs claim their right, what does it amount to? It is an agreement whereby the plaintiffs undertake undoubtedly to finance, and do finance, William Paats, Roche, and Co.; that is to say, they give their acceptances by means of which William Paats, Roche, and Co. are able to procure goods abroad which they afterwards ship to England. And in letters which have been read they undertake in order to give security for these drafts—these drafts, I think, are drawn at ninety days—that within forty-five days they will give good bills on other persons; and, further, that, as to some of them, if not as to all of them, and as to good trade bills I think, they will put the defendants in possession of documents—give them documentary bills. That is their undertaking. But when William Paats, Roche, and Co. give the defendants the documents, the reason of their giving the documents with the bills is that they may be in a position to demand from the persons on whom those bills are drawn that they shall accept those bills. When, however, they have accepted the bills they part with the documents. With regard to the documents, as Mr. Parker pointed out, it merely was putting a weapon in the hands of William Paats, Roche, and Co. to make it a certainty that they would be able to secure that which was to be their real protection—namely, bills drawn on good firms in England. Now, that practice was pursued for some time, and no doubt when they had the documents they had a lien upon the goods represented by the documents. But after awhile that was found, for some reason or another—why, we do not know—to be inconvenient. It is suggested by Mr. Parker, and it seems the most reasonable explanation, that what they did want was the security of these good firms upon which the bills were drawn. That was their real security, and that they did not think it worth while to insist upon, having the intermediate lien upon the documents ancillary to and antecedent to their getting possession of the acceptances. But, anyhow, they ceased to insist, and, as they did not insist, they never got possession of the documents in this case. And they had ceased for some time apparently to demand or receive possession of documents. They waited in the

expectation, which appears to have been always realised, that they would get the acceptances, which was what they wanted as their security, on good firms. But not having got their documents, they certainly did not get the actual security of a lien. Now, how do they make out that they have nevertheless got a lien upon this particular consignment, in respect of which they never have had the documents? They had to get two things: they had to get an agreement that they were to have a lien upon this particular consignment, and they had to show that this particular consignment had been appropriated to that lien. The agreement was not merely a general agreement that consignments should be appropriated, but they had to get the agreement which I have mentioned, and then they had to get this particular consignment earmarked as specifically appropriated. Suppose they get a general agreement, which is what Mr. Terrell relies upon, where do they get the specific appropriation under that agreement of this particular consignment? It seems to me that the only thing which they can rely upon as giving them a specific lien upon this particular cargo or portion of a cargo is the fact that it does appear that particular bills were drawn purporting to be drawn against this particular cargo. It does appear in the correspondence between the defendants and William Paats, Roche, and Co. that the latter firm purport to draw bills against this particular consignment among others. But it has been held in the case of *Brown, Shipley, and Co.* v. *Kough* (52 L. T. Rep. 878; 5 Asp. Mar. Law Cas. 433; 29 Ch. Div. 848) that the drawing of a bill purporting to be drawn against a particular cargo does not operate to give a lien to the holder of that bill on that cargo. It is not an assignment; it is not an appropriation. It seems to me that in this particular case Mr. Terrell is not able to show that there has been a specific appropriation of this particular cargo for the benefit of his clients. It seems to me, therefore, that Buckley, J. was right on both grounds, and that this appeal ought to be dismissed.

STIRLING, L.J.—I come to the same conclusion. I desire to rest my judgment upon the first of the two grounds which have been dealt with by Collins, L.J.—namely, that it has not been made out that the defendants have not a right to deal with the goods and the proceeds of the goods in the way in which they intend to do I come to that conclusion partly upon the written documents and partly upon the affidavits—in fact, upon the evidence which is now before the court. And in anything that I say I am directing myself to that evidence as it now exists; and I do not desire in any way to prejudice the disposal of the action when matters may be investigated which have not yet been brought before the court and which, no doubt, require and will have investigation. Now, the position is this: William Paats, Roche, and Co. are a mercantile firm carrying on business in Buenos Ayres. The defendants are correspondents of theirs in London, and the plaintiffs are also persons in London who have dealings with William Paats, Roche, and Co. In the month of October of last year the defendants received instructions by telegraph from William Paats, Roche, and Co. to sell 500 tons of linseed at a specified price. They tell us that on the 17th Oct. 1900 they entered into a contract for the sale of that amount of linseed accordingly, and this is the transaction referred to as "linseed business No. 22." Then on the 19th of the same month a further telegram was received by the defendants with reference to 300 tons of linseed. The defendants succeeded in selling that in the same way, and that is a transaction which is referred to as "linseed business No. 23." In both cases, as I understand, the contracts entered into by the defendants were entered into with purchasers in their own names for the delivery of these quantities of linseed, amounting in one case to 500 tons and in the other to 300 tons. That being so, there was incumbent upon William Paats, Roche, and Co. the duty of forwarding to the defendants the proper amount of linseed to enable them to fulfil the contracts, and that began to be done in the month of January of the present year. On the 22nd Jan. 1901 William Paats, Roche, and Co. wrote to the defendants: "We confirm our respects of the 18th inst., and now beg to inform you that we have taken the liberty of drawing upon you against shipment of about 3000 tons wheat"—then they specify certain bills, amounting to 15,000*l.*, which do not relate to the present transaction at all. I merely refer to that to point out that they are stated to be against shipments of wheat by a particular steamer. Then the letter goes on: "And against linseed business No. 22, 5500*l.*, and against linseed business No. 23, 3500*l.*, as follows"; and then it specifies the bills—three bills in all. Then the letter goes on, "which we recommend to your protection on presentation to our debit" These, therefore, purport to be drawn against the linseed contracts. Three days afterwards, on the 25th Jan., William Paats, Roche, and Co. wrote again to the defendants: "We beg to confirm our letter of the 22nd inst., and to hand you inclosed bills of lading and invoices for the following linseed contracts"—one of these is No. 23, 2250 bags—"and request you to credit us with the following amounts." In respect of No. 23 is an amount of 1859*l.* 10*s.*, which I understand to be the price of the linseed as appearing by the invoice which was inclosed. I need not pursue the transaction further. That will be enough to bring out the point which arises in the present case. Those letters of the 22nd Jan. and the 25th Jan. both arrived in London on the 18th Feb. In the meantime, on the 16th Feb., William Paats, who was the head of the firm in Buenos Ayres, had suddenly died, and the defendants had become aware of that, and had also been informed that there was some question as to the financial position of William Paat's firm. The bills of lading were indorsed in favour of the defendants, and the defendants took possession of those bills of lading and applied them in satisfying, so far as they would go, the contracts of sale which they had entered into. They declined, however, to accept the bills for 9000*l.* which had been forwarded to them by the letter of the 22nd Jan., and they claimed to treat the proceeds of sale of this linseed as available for the payment of the general balance of account between themselves and William Paats, Roche, and Co.

The first question that we have got to decide is whether those claims are well founded. It has been strongly argued that this case very closely resembles, as in some of its features it does resemble, the case of *Shepherd* v. *Harrison* (*ubi sup.*)

in the House of Lords. In that case it was laid down that where a bill of exchange and a bill of lading come together, being sent by a vendor to a vendee, with a request that the vendee will accept the bill of exchange, the person who receives the letter and documents cannot avail himself of the bill of lading unless he accepts the bill of exchange. The general rule is stated very shortly by Sir George Mellish in the case which has been referred to of *Ex parte Banner; Re Tappenbeck* (34 L. T. Rep. 199; 2 Ch. Div. 278, at p. 289), and is this: "Every person who consigns goods to another has a right to give directions how the goods are to be disposed of, and a consignee to whom such directions are given must dispose of the goods in the way directed or else return them." The directions which are given in respect of these goods are contained strictly in the letter of the 25th Jan. 1901. The letter with regard to the bill of exchange is dated a day or two before, but I lay no stress whatever on the fact that the letters are separate. The directions might, in my view, have been contained in one and the same letter. And the question which we have got to decide upon the construction of these documents, and having regard to the course of business between the parties, is whether a condition was imposed on the defendants of accepting the bills of exchange before they availed themselves of any bill of lading of the linseed. Now, the fundamental point to be remembered is this, to which I have already called attention: the defendants had already on behalf of William Paats, Roche, and Co. entered into contracts for the sale of this very linseed in respect of which they were personally liable, and they were entitled, as I have already said, to receive from William Paats, Roche, and Co. a sufficient supply of linseed to enable them to fulfil that contract. No doubt they were, to a certain extent, in the hands of William Paats, Roche, and Co., and that firm, forwarding to them a bill of lading of linseed of which they estimated the value was 1859*l.* 10*s.* might nevertheless attach to that, if they saw fit, a condition that the person to whom it was sent should not avail himself of it unless he saw fit to accept bills of exchange to the amount of 9000*l.* It is quite possible, abstractly considered, that such a condition might be imposed, and, if it is imposed in express terms, then the rule which is stated by Sir George Mellish in *Ex parte Banner; Re Tappenbeck* (*ubi sup.*) applies. But that is not a natural state of things, and the court will not construe a correspondence between merchants in such a way as to throw such a responsibility upon the receiver of such documents unless it is clear beyond doubt that such is the meaning of the transaction. Now what do we find here? Let me look, first, at the letter of the 25th Jan. 1901: "We hand you inclosed bills of lading for the following linseed contracts," and so on, "and request you to credit us with the following amounts." That refers, first of all, to linseed contracts—contracts in respect of which the defendants had made themselves liable. They send the bills of lading which are to be applied to those contracts, and a bill of lading for a particular quantity of linseed which is to be applied to contract No. 23. The meaning of that direction I take to be, "Take the linseed which is represented by the bill of lading in question, and apply that in fulfilment of your duty toward the purchasers under No. 23 contract." Then what is to be done? They are to "credit us with the following amounts," and then comes the amount of the price appearing by the invoice. The effect of the direction is this: "In the account relating to that contract you are to credit us with that amount." What is to be done with the bills of exchange? They say that against the linseed contract No. 22, 5500*l.*, and against the linseed contract No. 23, 3500*l.*, are drawn, "which drafts we recommend to your protection on presentation to our debit." That was an invitation, no doubt, to accept those bills of exchange, and, if that was done, the defendants were authorised to debit those against the respective linseed contracts. Now that seems to me perfectly intelligible. It does not involve, as it seems to me, necessarily the imposition on the defendants of a condition to accept bills to the amount of 9000*l.* before they touch any linseed which is to be applied in fulfilment of contracts which have already been entered into. And, when we look at the surrounding circumstances, that seems to me to be quite clear, because one of the defendants, Mr. Augustus Philip Braudt, who has made an affidavit on behalf of the defendants, tells us this: [His Lordship read an extract from that affidavit as set forth in the judgment of Buckley, J., and continued:] Now, if that be a true account of the course of business between William Paats, Roche, and Co. and the defendants, it seems to me that this letter of the 22nd Jan. ought not to be treated as imposing upon the defendants an obligation to accept these bills before they can take advantage of the bills of lading which were forwarded. Mr. Augustus Philip Brandt also swears that he had no notice of any of the relations between the plaintiffs and William Paats, Roche, and Co. Under these circumstances it seems to me that the result at which Buckley, J. arrived was perfectly correct, and that this appeal must be dismissed. At present I say nothing on the second point which was argued by Mr. Terrell, as to the effect of the contract which was entered into between the plaintiffs and William Paats, Roche, and Co. Whatever it may be, it does not seem to me that that affects the present stage of the case between the plaintiffs and the defendants.

Appeal dismissed.

Solicitors for the appellants, *Druces* and *Attlee.*

Solicitors for the respondents, *Hollams, Sons, Coward,* and *Hawksley.*

May 22 *and* 23, 1901.

(Before Lord ALVERSTONE, C.J., SMITH, M.R., and ROMER, L.J.)

THE HEATHER BELL. (*a*)

Mortgage—Charter for use of ship by mortgagor—Wrongful seizure by mortgagee—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 34.

Where the mortgagor of a vessel entered into a charter or agreement for the use of the vessel with a third party (the plaintiff) whereby the plaintiff was to have possession of the ship for about six weeks, and was to run her on specified voyages between places in the United Kingdom

(*a*) Reported by BUTLER ASPINALL, Esq., K.C., and SUTTON TIMMIS, Esq., Barrister-at-Law.

and was to finance the vessel, being granted the highest charge and lien on the vessel the mortgagor could grant to secure any sums he might so disburse:

Held, that such a charter or agreement did not impair the value of the mortgagee's security, and that the latter was liable in damages to the plaintiff, the charterer, for taking possession of the vessel under his mortgage after default had been made by the mortgagor.

Where a mortgagee wrongly took possession of the mortgaged ship as against the charterer, and paid wages then due to the crew from the charterer, it was held that, in the circumstances, the charterer was liable to the mortgagee for the wages so paid.

Judgment of Sir F. Jeune, P. affirmed.

THIS was an appeal and a cross appeal from a judgment of Sir Francis Jeune, President, in favour of the plaintiff on the claim, and the defendant on the counter-claim.

The case is reported in the court below (*ante*, p. 192).

The material facts were shortly as follows:—

On the 4th July 1900 the defendant William Ward sold the steamship *Heather Bell* to the South Coast and Continental Service Limited for the sum of 2500*l.* Of this sum 625*l.* was paid in cash, and three bills for 625*l.* each at two, four, and six months respectively were given for the balance. To further secure the payment of the sums due upon the bills the purchasers mortgaged the *Heather Bell* to the defendant.

The plaintiff William Horton was the owner of the Rhos Abbey Hotel and of the pier at Rhos, Colwyn Bay, North Wales. In order to secure a service of passenger vessels between Liverpool and Rhos during the summer months he entered into an agreement on the 29th Aug., notice of which was given to the defendant, with the South Coast and Continental Service Limited. Previous to this the plaintiff had to some extent financed the *Heather Bell.*

The material parts of the agreement of the 29th Aug. were as follows:

Memorandum whereby the South Coast and Continental Service Limited, the owners of the *Heather Bell*, agree to charter her to William Horton, of Bryn Dinarth, Colwyn Bay, from the 29th Aug. until the 15th Oct. 1900 on the following terms: (1) The boat shall be delivered to William Horton, at Liverpool, forthwith as she now is . . . The vessel shall be used for passenger and merchandise traffic between Liverpool, Rhos-on-Sea, Llandudno, Menai Straits, Colwyn Bay, and Rhyl, and not otherwise without the consent in writing of the owners. (2) It is admitted that at the present time part of the machinery of the boat is held as a lien for the repairs thereto; and it has been agreed that the said William Horton will advance such amount as may be necessary to liberate such machinery, and shall add same to what is already due to him thereon. (3) The owners also admit that William Horton has advanced certain other sums in connection with the boat, for which sums it is agreed that the said W. Horton shall have a charge and lien on the boat, ranking in the highest position the owners are able to fix the same, having regard to existing circumstances. (4) The said W. Horton is hereby authorised to sell such of the effects on board the boat as may not be requisite or necessary for the use of the boat and the service aforesaid, but shall bring the proceeds into the accounts hereinafter mentioned. (5) The said W. Horton shall be in no way responsible . . . for any repairs which may be from time to time necessary or desirable, but any repairs he thinks fit to execute shall be added to his charge and lien. (7) The charterer shall keep true and exact account of all receipts . . . and of all payments and expenses of the service. The before-mentioned expenses shall be paid out of the before-mentioned receipts . . . and accounts shall be made up weekly. (8) The profits of the venture (if any) shall belong to and be divided into equal shares and proportions between the owners and the charterers at the expiration of the charter. (10) In case the mortgagees of the said vessel shall exercise their rights (if any), and thereby the charter hereby granted shall be affected, the owners shall not be responsible to the charterers in damages or otherwise in respect thereof.

In pursuance of this agreement the *Heather Bell* made daily trips between Liverpool, Llandudno, and Rhos until the 4th Sept., when she was taken in execution by the sheriff under a judgment which had been obtained against her owners.

On the 8th Sept. the sheriff withdrew from possession, but on the same day the *Heather Bell* was seized by the defendant under his mortgage, as the bill for 625*l.*, which fell due on the 4th Sept., had been dishonoured by the South Coast and Continental Service Limited.

The plaintiff then brought an action against the mortgagee to recover damages alleged to have been sustained by him owing to the withdrawal of the *Heather Bell* from the service in which she had been engaged.

The defendant denied liability and also counterclaimed for wages paid to the master and crew when he took possession. These wages had become due before the defendant took possession.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 34. Except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof.

Sir Francis Jeune gave judgment for the plaintiff on the claim and the defendant on the counterclaim.

The defendant and the plaintiff appealed.

Robson, K.C. and *Ernest Pollock* for the appellant.

Carver, K.C. (*Leslie Scott* with him) for the respondent.

The following authorities were cited:

Cory v. *Stewart*, 2 Times Rep. 508;
Collins v. *Lamport*, 11 L. T. Rep. 497; 2 Mar. Law Cas. O. S. 153;
Keith v. *Burrows*, 37 L. T. Rep. 291; 3 Asp. Mar. Law Cas. 481; 2 App. Cas. 636;
Brown v. *Tanner*, 18 L. T. Rep. 624; 3 Mar. Law Cas. O. S. 94; L. Rep. 3 Ch. 597;
The Celtic King, 70 L. T. Rep. 562; 7 Asp. Mar. Law Cas. 440; (1894) P. 175;
Laming v. *Seater*, 16 Ct. Sess. Cas. 4th series, 828;
Johnson v. *Royal Mail Steam Packet Company*, 17 L. T. Rep. 445; 3 Mar. Law Cas. O. S. 21; L. Rep. 3 C. P. 38;
The Ripon City, 78 L. T. Rep. 296; 8 Asp. Mar. Law Cas. 391; (1898) P. 78;
The Orchis, 62 L. T. Rep. 407; 6 Asp. Mar. Law Cas. 501; 15 P. Div. 38;
The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 34.

The court dismissed the appeal and the cross-appeal.

Lord ALVERSTONE, C.J.—I propose to deal with the cross-appeal first. The defendant, being the mortgagee of the vessel, took possession, as he was entitled to do, but subject to an agreement which, as we have already intimated, we think he was not properly entitled to set aside. Therefore he wrongfully took possession. If that was all that had happened and he had thought fit to pay the wages due, I think it would be very difficult to hold that there was an implied request. I express no opinion with regard to the second ground upon which the learned judge has decided in favour of the defendant. But after the seizure of the vessel the parties negotiated, and while that was going on the defendant says: "Wages are still going on; had we not better pay the crew off?" On two occasions he asked that and got no reply, and came to the conclusion that there was an implied request. We think it was quite open for him to come to that conclusion, and that therefore on that ground the counter-claim was right and the counter appeal must be dismissed. With regard to the costs, we think the order of the President, giving the plaintiff the costs, ought to stand, and the costs of the reference will be reserved. Now comes the main appeal of Mr. Robson and Mr. Pollock, which is that the mortgagee has a right to say that an agreement entered into on the 29th Aug. between the mortgagor and the plaintiff was invalid as against him. The purchase money, or an instalment of it, became due on the 7th Sept., and there is some evidence that the plaintiff suspected that under some circumstances that instalment would not be paid, and that the mortgagee might enforce his rights, but of course it does not follow that the mortgagee would take possession. We have to consider what are the rights of a mortgagor who is in possession of a ship, and the rights of the mortgagee depending upon the mortgage. I may say that I think no fraud was imputed or could be imputed on the evidence against Mr. Horton, who, as we are told, is a solicitor and a gentleman interested in developing his estate at Rhos, by running steamers to bring traffic and tourists from Liverpool during the summer months. In the first place, the position of mortgagee and mortgagor is defined by statute. Sect. 34 of the present Act, which is in all respects the same as the section referred to in *Collins* v. *Lamport* (*ubi sup.*), provides that except in so far as may be necessary for making such ship or share available as a security for the mortgage debt a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be the owner thereof. Now, of course, it is obvious that if the owner remains in possession he may enter into contracts in dealing with the ship. When that question came before Lord Westbury in *Collins* v. *Lamport* (*ubi sup.*), the only test which he laid down in the several passages which I read from the judgment, and which I will not read again, is whether the dealings will materially impair the security of the mortgagee. If not, then they are to stand. When that test was discussed in the House of Lords in *Keith* v. *Burrows* (*ubi sup.*), Lord Cairns used language in which I do not think he meant to go further, but which puts it in a somewhat different way. He says: "The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit." And later on, having referred to the incidents of contract, he says: "All those acts would be the ordinary incidents of the ownership of the mortgagor who remains the *dominus* of the ship with regard to everything connected with its employment until the moment arrives when the mortgagee takes possession" Now, the real question is, Was this contract of the 29th Aug. one which would impair the sufficiency of the security, or, to adopt the other phrase, impair the security? At first I confess I did not like the look of the transaction, and thought it required investigation. Now that I have heard all the evidence it amounts to this: No fraud imputed, no improper agreement, and the Sims' contract not having apparently provided a profit, and he not being able to pay the 850*l.* which he was to pay, Mr. Horton on the 29th Aug. said, "I will run the boat for half profits till the 15th Oct. if you will let me have it on those terms." I am not prepared to say, the boat being worth 2500*l.* odd and being insured for 1500*l.* odd, that the agreement to run her on half profits must impair or does impair the security. It does take the boat for a period of six weeks out of the power to earn freight, unless that freight is produced by the profits, but I cannot say that under the circumstances there might not be an honest apprehension, or expectation rather, that there would be profits. Therefore to undertake to run the boat at half profits seems to me not to be terms which either the mortgagor or the charterer might consider would do any wrong to the rights of the mortgagee. Several other clauses of the charter-party have been referred to, but I need not go through them. If under clause 4 the charterer or the mortgagor were attempting to sell part of the equipment of the ship, as at present advised I do not think they have any right to do it, but Mr. Robson has asked us to say that because those words are used in the agreement it must impair the security. I cannot say that the existence of that clause, though it might impair the rights of the parties if a sale of the equipment of the ship had been attempted, makes the charter-party such that it is not binding upon the mortgagee. Then, again, certain expenses are to be paid out of the receipts. It may be a perfectly proper arrangement under the charter-party, although, if under that Mr. Horton seeks to set off something else, when taking those accounts the question would have to arise whether the security was impaired. Then the only other point is that the ship is not insured. I quite agree that the mortgagee has a right to prevent the vessel being run unless she is properly protected against perils of the sea, but it cannot be contended that if a charter-party is otherwise binding on the mortgagee, the fact that he could have restrained her from running

until properly insured would justify him in setting aside the charter-party. Therefore, having regard to the judgments of Lord Westbury, and in the case in the House of Lords, I cannot find that this agreement was one to impair the security of Mr. Ward, and therefore, being entered into by the mortgagor under his powers as owner, as contemplated in the section of the Merchant Shipping Act, it is binding on the mortgagee. He is entitled to take the benefit of it, but he is not entitled to treat it as of no effect.

SMITH, M.R. and ROMER, L.J. concurred.

Appeal and cross appeal dismissed.

Solicitors for the appellants, *H. Forshaw* and *Hawkins*, Liverpool.

Solicitors for the respondents, *Whitley* and *Co.*, Liverpool.

April 17 *and May* 3, 1901.

(Before SMITH, M.R., WILLIAMS and ROMER, L.JJ.)

NICKOLL AND KNIGHT *v.* ASHTON, EDRIDGE, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Contract—Impossibility of performance—Implied condition—Agreement for shipment of goods by specified ship at specified time—Stranding of ship by perils of the sea.

The defendants contracted to sell to the plaintiffs a cargo of cotton seed to be shipped by the steamship Orlando *at Alexandria in Jan.* 1900, *for carriage to the United Kingdom, and by a clause in the contract it was agreed that in case of prohibition of export, blockade, or hostilities, preventing shipment, the contract or any unfulfilled part thereof was to be cancelled.*

After the making of the contract, but before Jan. 1900, *the steamship* Orlando *was stranded through perils of the sea, and was so damaged thereby that it was impossible for her to arrive at Alexandria in Jan.* 1900.

Held, by Smith, M.R., and Romer, L.J., Williams, L.J. dissenting (affirming the judgment of Mathew, J.), that the contract was subject to an implied condition that the parties should be excused if before breach performance became impossible by reason of the steamship Orlando *ceasing to exist as a cargo-carrying ship without the defendants' default.*

THIS was an appeal by the plaintiffs from the judgment of Mathew, J., at the trial of the action without a jury.

The action was brought to recover damages for breach of a contract to ship a cargo of Egyptian cotton seed.

The contract was dated the 24th Nov. 1899, and the material parts were as follows:

Sold this day to Messrs. Nickoll and Knight, the following Egyptian cotton seed, namely, a cargo to consist of from 1600 tons to 1900 tons, to be shipped at Alexandria, and (or) Port Said, and (or) Ismalia, during the month of Jan. 1900, per steamship *Orlando*, at 6*l.* 3*s.* 9*d.* per ton . . . the vessel to go to any safe floating port in the United Kingdom. . . .

Clause 5. In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled.

After this contract had been made the steamship *Orlando*, being then in the Baltic, was stranded by perils of the sea.

On the 20th Dec. the charterers gave notice to the plaintiffs of the fact that the ship was so badly damaged that it would be impossible for her to load before March.

On the 28th Dec. the defendants wrote to the plaintiffs that as the performance of the contract of the 24th Nov. was rendered impossible, they considered the contract as cancelled.

The plaintiffs in the following February commenced the present action for damages for breach of contract, and claimed the difference between the agreed price 6*l.* 3*s.* 9*d.* per ton and 7*l.* 13*s.* 9*d.* per ton, which was the market price on the 31st Jan. 1900.

At the trial of the action before Mathew, J. without a jury, the learned judge held that the contract of the 24th Nov. was subject to an implied condition that the performance of it was to be subject to the continued existence of the ship, and her fitness to take cargo, so that the performance was excused by its becoming impossible through loss or damage of the ship by sea peril; and he therefore gave judgment for the defendants.

The case is reported 82 L. T. Rep. 761; 9 Asp. Mar. Law Cas. 94; (1900) 2 Q. B. 298.

The plaintiffs appealed.

April 17.—*Joseph Walton*, K.C. (*Hollams* with him) for the plaintiffs.—There is no such implied condition in this contract as was held by Mathew, J. The contract is an absolute one—viz., to ship the cargo at a certain time by a certain ship at a certain place. As far as the express terms of the contract go, the agreement is an absolute one. The ship has not arrived at the agreed port by the agreed time, and there is therefore a breach of the contract, for which the plaintiffs are entitled to recover:

Shubrick v. *Salmond*, 3 Burr. 1637.

The question here is really one of delay. The ship did not arrive at the agreed time, and whether the delay be caused by default of the defendants, or adverse winds, or any other cause, is immaterial. There is no question here of the existence of the ship, and the case upon which the defendants rely (*Taylor* v. *Caldwell*, 8 L. T. Rep. 356; 3 B. & S. 826) does not apply here. Neither is it a case where the ship is one over which the defendants had no control, as if the agreement had been to ship by a certain vessel of the P. and O. Company. In such a case as that, a condition would probably be implied that if the ship did not arrive the performance of the contract would be excused. There is in the agreement a clause providing for the cancellation of it in certain circumstances, and the omission in that clause of any mention of stranding shows that such an incident as that was not intended to be considered as excusing performance. He cited also on this point:

Hills v. *Sughrue*, 15 M. & W. 253;
Ashmore and Son v. *Cox and Co.* (1899) 1 Q. B. 436.

Bray, K.C. (*Edward Bray* with him) for the defendants.—The principle applicable to this case is that which was laid down by Blackburn, J. in *Taylor* v. *Caldwell* (*ubi sup.*), thus: "The principle seems to us to be that, in contracts in which

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." And again he says that "in the absence of any warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." The principle there laid down has been approved:

Robinson v. *Davison*, 24 L. T. Rep. 755; L. Rep. 6 Ex. 269;
Howell v. *Coupland*, 30 L. T. Rep. 677; L. Rep. 9 Q. B. 462; 33 L. T. Rep. 832; 1 Q. B. Div. 258.

Here the steamship *Orlando* was the *certum corpus*, on whose continued existence as a cargo-carrying vessel the whole contract depends, and her stranding was caused by no default of the defendants. Though the ship did not actually cease to exist, yet her injuries were so great that, as far as the performance of this contract is concerned, she may be treated as non-existent. The fact that this contract depends on the existence of the steamship *Orlando* differentiates it from the case cited by the plaintiffs of *Ashmore and Son* v. *Cox and Co.* (*ubi sup.*). No definite ship was there named, the shipment was to be merely "by sailor or sailors," so that the impossibility of performance in that case was only an impossibility from a mercantile point of view. There was no *certum corpus* as there is in the present case. As to the argument founded on clause 5 of the contract, the matters there mentioned are simply things which might prevent the loading of the *Orlando*, supposing she had arrived at Alexandria. They belong to a different class of things from conditions having reference to the existence of the ship itself. The application of the principle laid down in *Taylor* v. *Caldwell* (*ubi sup.*) is so general that there is no reason in saying that the mention of the things named in clause 5 implies that the principle of *Taylor* v. *Caldwell* (*ubi sup.*) is to be excluded in construing this contract. He referred also to

Johnson v. *Macdonald*, 9 M. & W. 600.

Joseph Walton, K.C. replied.—The principle laid down in *Taylor* v. *Caldwell* (*ubi sup.*) applies only to cases of a certain person or thing ceasing to exist. If the court should dismiss this appeal, and hold that *Taylor* v. *Caldwell* applies to a case of mere delay, that will be a great extension of the principle laid down by Blackburn, J.

Cur. adv. vult.

May 3.—SMITH, M.R. read the following judgment:—This is an action for damages by the buyers of a cargo of Egyptian cotton seed against the sellers for not shipping the same pursuant to a contract dated the 24th Oct. 1899, and the question is whether upon its true construction the contract is a positive and absolute contract to ship the seed, or a contract subject to any, and what, implied condition. The contract upon which the question arises, so far as material, is as follows: "Sold this day to Messrs. Nickoll and Knight, the following Egyptian cotton seed—namely, a cargo to consist of from 1600 tons to 1900 tons, to be shipped by the steamship *Orlando* at Alexandria . . . during the month of Jan. 1900. (Signed) Ashton and Co." Clause 5 is as follows: "In case of prohibition of export, blockade, or hostilities preventing the shipment, the contract or any unfulfilled part thereof is to be cancelled." It is perfectly plain upon the face of the signed contract that the parties deliberately agreed that the shipment of the seed should not be in any ship or ships, but in one particular named ship, for the words in print "ship or ships" are obliterated, and the words "per steamship *Orlando*" are inserted in writing in their place; and it is equally plain that the contract could only be performed by the defendants shipping the seed contracted for in the steamship *Orlando* during the month of Jan. 1900, and in no other ship. Now, is a contract such as this a positive and absolute contract by the shipper to ship on board the named ship the contracted cargo, or is it a contract subject to any, and what, implied condition? I find in the judgment of Blackburn, J., delivering the unanimous judgment of the Court of Queen's Bench in the year 1863 in *Taylor* v. *Caldwell* (*ubi sup.*), which case has been followed and applied in the Exchequer Chamber in *Appleby* v. *Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651), and in the Court of Exchequer in *Robinson* v. *Davison* (*ubi sup.*), and in the Queen's Bench and Court of Appeal in *Howell* v. *Coupland* (*ubi sup.*), that a rule as to the construction of certain contracts has been laid down, which rule is as follows: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." In my judgment the contract in the present case falls directly within this rule, for, from the beginning, the parties must have known that the performance of the contract would become impossible unless the particular thing specified—that is, the steamship *Orlando*—continued to exist as a cargo-carrying ship down to and during the month of Jan. 1900; and I have no doubt that the true construction of the contract is that it is not a positive and absolute contract as contended for by the plaintiffs, but is a contract subject to the condition that the parties shall be excused if, before breach, performance becomes impossible by reason of the particular specified thing—that is, the steamship *Orlando*—ceasing to exist as a cargo-carrying ship without the defendants' default.

But it is argued that, although there may be this implied condition, it only applies if the particular thing actually perishes; for instance, it is suggested that if the roof of the music-hall in *Taylor* v. *Caldwell* (*ubi sup.*) had alone been destroyed and the hall itself not burnt to the ground, the judgment in that case would not have been given, even although with the roof off the hall could not have been used for the purpose for which it was let, and it is said that, as the steam-

ship *Orlando* did not actually perish, this case is not within the implied condition. I do not agree. In my judgment, if the ship ceased to exist as a cargo-carrying ship when the time for the performance of the contract arrived, so that it could not be used to ship the cargo in, the implied condition would attach. If the steamship had gone to the bottom before the month of January 1900, and remained there during that month, so as to be wholly unable to take in a cargo, would not the ship have ceased to exist, whereby the performance of the contract became impossible, the ship being then at the bottom of the sea? *Quoad* the performance of the contract, it would have perished; and what is the difference in principle between the ship being at the bottom of the sea and being stranded upon a rock in the Baltic, as the *Orlando* was, and thereby wholly unable to take in a cargo pursuant to the contract? In either case, in my opinion, the performance of the contract became impossible by reason of the particular specified thing—*i.e.*, the ship—ceasing to exist as a cargo-carrying ship, or, in other words, as regards that purpose having perished. This is not a case in which the thing contracted for is possible in itself, and the contracting party is only unable to perform it by causes beyond his own control, such as in the case of an unexpected sudden frost: (*Kearon* v. *Pearson*, 7 H. & N. 386). In such a case it is the party's own fault for undertaking unconditionally to fulfil a promise. In the present case, as before pointed out, he has not done so, for the promise he has made is conditional. It also seems to me that the suggested point of the detention of a ship by adverse winds clearly would not fall within the above rule, for in such a case the ship has not ceased to exist at all. It exists as a cargo-carrying ship, but is merely behind time on its voyage. The next point taken by the plaintiffs was, that by reason of clause 5 of the contract the implied condition of the continued existence of the ship was negatived, and that it was only the matters mentioned in that clause which excused tha performance of the contract. In my opinion the matters mentioned in clause 5 in no way negative the true construction of the contract, which is that the contract is not positive and absolute, and that clause 5 affords an excuse for the not shipping of the cargo, over and above the perishing of the ship, which is the implied condition. In my judgment it is not true to say that there is a warranty in this contract that the ship shall be in existence in Jan. 1900. I think that the judgment of Mathew, J. is correct, and that this appeal must be dismissed.

WILLIAMS, L.J. read the following judgment:—I regret to say that I have come to a different conclusion from that arrived at by the Master of the Rolls, with which I understand Romer, L.J. agrees. The question in this case is whether, according to the true construction of the cotton seed cargo contract, there was an absolute contract by the sellers, the now defendants, to load a cargo in January. In other words, did the sellers take upon themselves the risk of the ship declared by them under this contract being prevented by unforeseen circumstances beyond their control from loading a cargo at one of the ports of loading named in the contract during the month of Jan. 1900? It was argued by the plaintiffs that there was an absolute contract, and that the defendants did take the risk from which they had not in terms protected themselves. On the other hand, it was argued by the defendants that this was a case of a cargo to be shipped by a particular vessel at a named port at a particular time, and that the obligation to load was made to depend on the arrival of that vessel at that port at the proper time; and that the defendants had not warranted that the vessel should be able and ready to take the cargo on board at the stipulated time, and therefore that the defendants were, in the event which happened, of the disability of the ship through perils of the sea, without default of the defendants, to take the cargo at Alexandria at the proper time, relieved from further performance of a contract which assumed the continued existence and safe arrival of the vessel in a condition fit to take the cargo. The obligation to ship the cargo, the defendants argued, was not absolute, but, in common with every other obligation in the contract, was conditional on the arrival in proper time of the declared vessel at Alexandria. Now, it was settled by the judgment of Blackburn, J. in *Taylor* v. *Caldwell* (*ubi sup.*) that "where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Prior to the decision in *Howell* v. *Coupland* (*ubi sup.*) it used to be supposed that the doctrine as expressed by Blackburn, J., like the cases *de certo corpore* cited by him from the civil law, was based upon the assumption of the continued existence, at the date for the fulfilment of the contract, of something existing at the date of the making of the contract: which is obviously quite different from the present existence, at the date for fulfilment of the contract, of something to come into existence after the contract by the action of a party to it done in pursuance of the contract. The principle laid down in *Taylor* v. *Caldwell* (*ubi sup.*) was, however, somewhat widened in the case of *Howell* v. *Coupland* (*ubi sup.*); for in that case it was decided that on a contract for the sale of a specific crop on particular land the seller is to be excused if the performance is prevented by the subject-matter of sale ceasing to exist, without default of the promisor, before the time of performance, even though the subject-matter of the contract was not in existence at the time of the contract as is assumed, as it seems to me, in the principle as stated by Blackburn, J. The fact is that the answer to the question whether the obligation of the contract is dependent on the existence of some thing, or combination of things, at the time for fulfilment, or whether one party to the contract warrants the existence at that time of that thing, or combination of things, is always a question of intention of the parties to be gathered from the contract as

expressed, and the subject of it. Hannen, J. in *Baily* v. *De Crespigny* (19 L. T. Rep. 681; L. Rep. 4 Q. B. 180) thus expresses himself: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Can it be said that the non-arrival of the *Orlando* at Alexandria in January (the event which caused the impossibility) was not, or might not have been, anticipated and guarded against in the contract? Or can it be said that that event cannot be reasonably supposed to have been in the contemplation of the contracting parties, or that the general words were not used with reference to the possibility of the contingency which afterwards happened—namely, the non-arrival in time at Alexandria of the *Orlando* by reason of the perils of the sea? I do not think so, nor do I think business people would think so. The time of loading is a condition introduced into the contract for the benefit of the buyers. It is a condition which the buyers could waive. The event which caused the impossibility of loading in January is an event against which the sellers could have insured. The selection of the vessel, the terms of the charter of that vessel, the risk the vessel selected would have to run by reason of the length of the preliminary voyage, are all matters within the control of the sellers. The buyers have no voice in the matter. Is it unreasonable to read the general words as throwing on the sellers the risk of the non-arrival of the selected ship within the contract time? The sellers might have excepted this risk, or insured against it. It seems to me that, in order to prevent general words covering a particular obligation, which in terms the general words are wide enough to include, the particular obligation must be of the essence of the contract, and, further, must be of the essence of the contract in such sense that neither party can waive the obligation, or, to express it in other words, the condition must be such that to waive it would be to make a new and a different contract. No doubt, where a contract is made with reference to certain anticipated circumstances, and where, without default of either party, it becomes wholly inapplicable to any such circumstances, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made; but, where a party to a contract promises the other party to do a certain thing, or to have a certain thing done, at or before a specified time, and fails to perform his promise, in such case, even though the thing promised to be done is of the essence of the contract, and a condition precedent, so that the promisor cannot claim to have the promisee carry out his side of the contract, this does not put an end to the contract in such sense that neither party can enforce any obligation under it against the other, but only gives the promisee the option to rescind the contract, unless indeed the anticipated circumstance which has failed to occur or continue is of such a character as to put an end in a commercial sense to the commercial speculation entered upon by the parties to the contract; but a circumstance which one of the parties to the contract can waive without putting an end to the commercial speculation cannot be such a circumstance.

In the present case nothing has caused it to be impossible for the sellers to supply cotton seed of the contract quality, or to prevent them shipping it on board the *Orlando* at Alexandria. The sellers, according to my view, took upon themselves to promise that the owners of the *Orlando* should have her at Alexandria ready to take the cargo at a specified time. The peril of the sea has made it impossible for the owners of the *Orlando* to have her there at that time, and made it impossible, therefore, for the sellers to load the *Orlando* at Alexandria in January, but this event has not made it impossible that the contract should be carried out. On the contrary, if the buyers choose to waive the time condition, the contract can be performed by loading the *Orlando* at Alexandria. Nothing in the facts of this case suggests that the delay for repairs was so long as to put an end to the commercial speculation intended by the parties to the contract. By reason of the perils of the sea the *Orlando* did not arrive at the time the shipowner contracted it should arrive, but the delay was not such that the voyage was frustrated, neither was the contract of sale. It follows that the plaintiffs had a good cause of action on the failure of the sellers to load the cotton seed, even though the perils of the sea made it impossible for the *Orlando* to arrive at Alexandria at the specified time. I have thought it right to express my opinion on this matter (which unfortunately is contrary to that of my brothers), although it is not, for a reason which I will give, of very great practical importance with regard to the result of the action; for I entirely agree with the opinion of Mathew, J. as to the measure of damages in case the plaintiffs have a right of action; and according to this measure the sum paid into court, together with a denial of liability, is more than sufficient to satisfy the plaintiffs' cause of action.

ROMER, L.J.—A clear principle applicable to cases of this kind was laid down by Blackburn, J. in delivering the judgment of the Court of Queen's Bench in *Taylor* v. *Caldwell* (*ubi sup.*). The passage of the judgment in which that principle is stated has already been read. It was laid down after a review of all the previous cases, and after very careful consideration. That judgment has often been followed, and has never been dissented from. The principle there laid down is one which works complete justice between the parties to contracts of this kind. It is a principle which is easy to follow, and one which affords a certain guide in a doubtful and difficult branch of the law. It is most useful to business people to know clearly the law on such a subject, and therefore I think that it is important that the principle, as laid down in the case referred to, should be adhered to, and not rendered doubtful or weakened

by making exceptions to its application. The question is whether that principle applies to the present case. In my opinion it does. I think that the parties to this contract must from the beginning have known that it could not be fulfilled unless in Jan. 1900 the particular specified thing necessary for carrying it out—namely, the steamship *Orlando*—continued to exist; and therefore they must at the date of the contract have contemplated such continuing existence as the foundation of what was to be done under the contract. Then is there here any implied warranty by the defendants that the ship shall continue to exist? There is clearly no express warranty to that effect, and, in my opinion, no such warranty can be implied. Some liability on the part of the vendors in respect of the ship must, I think, be implied, and no doubt many difficult cases with regard to the extent of that liability might arise. But it is not necessary in this case to consider exactly the extent of that liability, for I think that a warranty cannot be implied that the ship in question should continue to exist in January. That being so, in my opinion the principle laid down in *Taylor* v. *Caldwell* (*ubi sup.*) applies. The only question that remains is whether the ship continued to exist in Jan. 1900 within the meaning of that principle. I think that she did not. She was not then in existence as a cargo-bearing ship or for the purposes of the contract. This point has been fully dealt with by the Master of the Rolls, and I need not add anything to what he has said in reference to it. I should perhaps add, with regard to the argument founded on clause 5 of the contract, that that clause does not in my opinion affect the view which I have expressed, for the different special circumstances dealt with in that clause all contemplate the existence of the ship. For these reasons I agree with the Master of the Rolls in thinking that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Hollams* and *Co.*
Solicitors for the defendants, *Tilleards* and *Co.*

Friday, June 7, 1901.

(Before SMITH, M.R., WILLIAMS and STIRLING, L.JJ.)

PRICE AND ANOTHER *v.* MARITIME INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance (marine)—Advances for disbursements—Charge given by master on freight—Insurance "warranted free of all average"—Conditional charge—Total loss of ship by perils of sea—Part of freight payable—Partial loss.

The plaintiffs advanced money for ship's disbursements to the captain of an Italian ship, who gave them a note by which he promised to repay the amount advanced ten days after the arrival of the ship at the port of destination, and he thereby pledged the vessel and freight, and directed the consignees at the port of destination to pay the amount from the freight received.

The plaintiffs then effected an insurance against perils of the sea of the advances so made, by a policy warranted free of all average.

By perils of the sea the ship became a constructive total loss on the voyage, and so never arrived at the port of destination. But part of the cargo being salved, freight became payable on it by Italian law, and was in fact paid.

In an action by the plaintiffs against the underwriters as for a total loss:

Held (affirming the decision of Bigham, J.), that, by reason of payment of part of the freight, there was no total loss, and the plaintiffs were therefore not entitled to recover upon the policy.

THIS was an appeal by the plaintiffs from the judgment of Bigham, J. at the trial of the action without a jury.

The action was brought upon a policy of insurance against sea perils, "warranted free of all average."

In Dec. 1898 an Italian barque, called the *Cinque*, was loading at Pensacola a cargo of timber for carriage to Southampton. For payment of his disbursements the master borrowed from the Citizens' National Bank of Pensacola a sum of 760*l.* 12*s.* 9*d.*, and gave them a document of which the following is a copy:

Pensacola, Fla., Dec. 30, 1898.—Ten days after arrival at port of destination of the steel barque, called *Cinque*, of which I am the master, now lying at Pensacola, Fla., loaded with P.P. sawn timber and lumber, and ready to sail for Southampton, I promise to pay to the order of myself the sum of 760*l.* 12*s.* 9*d.* British sterling in approved bankers' demand bills on London, value received for necessary disbursements of my vessel at this port; for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel. Any other draft or obligation by me drawn at this port on said freight to be secondary to this.—Signed in duplicate, one being accomplished, the others to stand void.—TOMMASO RITTORI, master of the steel barque *Cinque*.

This document was indorsed in blank by the master, and indorsed by the bank to the plaintiffs for collection.

The plaintiffs on receiving this document effected the policy sued on on behalf of the bank.

On the 15th Jan. 1899 the barque sailed from Pensacola, but, meeting with bad weather, put in for refuge at San Miguel, in the Azores, where she went ashore and became a constructive total loss.

The underwriters on cargo paid as on a total loss, but part of her cargo was salved and was sold. The purchasers paid to the master of the ship the sum of 790*l.* as "distance freight" which was due under Italian law, which governed the contract of affreightment.

The plaintiffs brought this action upon the policy, and the defence was that, by reason of the payment of the distance freight, the loss was not a total loss.

Bigham, J. at the trial of the action without a jury held that there had been no total loss of the freight, and therefore no total loss within the terms of the policy, and he gave judgment for the defendants.

The plaintiffs appealed.

Carver, K.C. and *Scrutton*, K.C. for the plaintiffs.—The document given by the captain is in the nature of a bottomry bond:

The Haabet, 81 L. T. Rep. 463; 8 Asp. Mar. Law Cas. 605; (1899) P. 295;
The Dora Forster (1900) P. 241.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The obligation is therefore conditional on the safe arrival of the ship. The ship never arrived, and there has therefore been a total loss of the security. Upon the true construction of the document the words imply that the obligation on the owners is conditional, just as the master's obligation is conditional, to pay on the arrival of the ship at the port of destination. The clause directing that the amount of the obligation is to be paid by the "consignees at the port of destination" also confirms this view of the meaning of the document. They cited also

The Karnak, 21 L. T. Rep. 159; 3 Mar. Law Cas. O. S. 276; L. Rep. 2 P. C. 505;
The Elpis, 27 L. T. Rep. 664; 1 Asp. Mar. Law Cas. 472; L. Rep. 4 A. & E. 1;
Lucena v. *Craufurd*, 3 B. & P. 75; 6 R. R. 623;
Lloyd v. *Fleming*, 1 Asp. Mar. Law Cas. 192; L. Rep. 7 Q. B. 299.

Joseph Walton, K.C. and *J. A. Hamilton*, K.C for the defendants.—The question is whether there has been a total loss. One of the things insured was the charge on the freight. The freight was not totally lost, because 790*l.* became due in respect of it and has been paid. On the true construction of the document signed by the master the liability on the owners was, we submit, not conditional. The words are perfectly plain as they stand, and there is no reason for implying any such condition as the plaintiffs seek to put in.

Carver, K.C. in reply.

SMITH, M.R.—This is an appeal from a judgment of Bigham, J., who decided in favour of the defendants in an action upon a policy of marine insurance. Certain bankers at Pensacola made advances to the amount of 760*l.* 12*s.* 9*d.* to the captain of an Italian ship in respect of disbursements made by him at that place where the ship was loading for a voyage to Southampton. It was in consideration of these advances that the captain signed the document of the 30th Dec. 1898. The bankers then, to protect themselves, effected the insurance which is now sued upon. The question is whether there was a total or only a partial loss. The document signed by the captain contains, first of all, a promise to pay the 760*l.* 12*s.* 9*d.* ten days after the ship's arrival at the port of destination, in approved bankers' demand bills, value received for necessary disbursements of the vessel; and for the payment of this sum he pledges his vessel and freight. That pledge is not made in any way conditional on the arrival of the ship. Then the document contains a direction to the consignees at the port of destination to pay the amount of the obligation from the first amount of freight received for account of the vessel. That clause does not, in my opinion, make the obligation conditional on the arrival of the ship, because the consignees would naturally be at the port of destination. Now, what security did the bankers obtain under that document? They had, firstly, the personal obligation of the captain, which was conditional on the arrival of the ship at the port of destination, then they also had the obligation lying on the owners, and then they had a charge on the vessel and freight. These they insured by a policy which is "warranted free of all average"—that is to say, the underwriters insured only against a total loss. The ship then left Pensacola and got as far as the Azores, where she became a constructive total loss. But by Italian law, which has to be applied to this case, a freight *pro ratâ itineris*, or distance freight, was earned, and paid, to the amount of 790*l.* Can it be said that, under these circumstances, there was a total loss of the subject-matter of the insurance? The obligation on the captain has been lost, and perhaps also the obligation on the owners. But there has not been a total loss of the freight. Consequently there has been only a partial loss, and as the policy was against a total loss only, the underwriters are not liable. For these reasons I think that the appeal must be dismissed.

WILLIAMS, L.J.—I agree. I do not propose to say anything as to the extent of the security obtained by the bankers under the document signed by the captain, nor as to the effect of the constructive total loss of the ship. I limit myself to the question of the charge given on the freight. In my opinion that charge was not conditional on the arrival of the ship at the port of destination, but was a charge which existed in any event. Then comes the question, What was the charge intended to secure? It was intended to secure repayment of the money advanced by the bankers. It was not limited to the obligation which the captain took upon himself, that he would pay on the arrival of the ship at the port of destination. That being so, it seems clear, in my judgment, that there has been no total loss of the security obtained by the bankers, because part of the freight—namely, 790*l.*—was not lost, but was received at the port of refuge. The only point which Mr. Carver could make on the construction of the document as showing a limit to the charge on the freight was the direction to consignees at the port of destination to pay the amount of the advance. But that direction seems to me to have been put in merely because in the ordinary course of business the consignees would probably be at the port of destination.

STIRLING, L.J.—I am of the same opinion. The question in this case seems to me to be one of the construction of a document upon the terms of which money was advanced for ship's disbursements by certain bankers to the captain of an Italian ship. By that document the captain promised to repay the amount of the advance ten days after the arrival of the ship at the port of destination. It is admitted that that promise is conditional on the arrival of the ship. But then come some words giving a charge on the vessel and freight, and the question is whether this charge is conditional in the same way as the captain's promise to pay. The actual words used in the document are "for the payment of which I hereby pledge my vessel and freight." It is contended that those words mean "for the conditional payment of which I hereby pledge," &c., or "for the payment of which, subject to the before-mentioned condition, I hereby pledge," &c. But the document contains here no words importing any condition. The word "which" naturally refers to the sum of 760*l.* 12*s.* 9*d.*, and I can see no reason why we should insert words to vary that natural meaning. There is a reason why the captain's promise to pay should be conditional on the arrival of the ship, but I can see no reason why the charge on the freight should be conditional. It was said that bankers advancing money in cases such as this would be placed in

great difficulties with regard to protecting themselves by insurance if, notwithstanding the non-arrival of the ship, a small amount of freight should become payable. But if they choose to insure against a total loss only instead of against a partial loss as well, that is their fault. Another point was taken—namely, that the direction to the "consignees at the port of destination" to pay the amount of the obligation out of freight shows an intention by the parties to the document that the pledge of the freight is only to take effect in the event of the vessel arriving at the port of destination. But, in my opinion, it would be a strain upon those words to construe them as meaning what is contended for, and I cannot accede to the contention. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Field, Roscoe,* and *Co.,* for *Batesons, Warr,* and *Wimshurst,* Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 22 *and April* 2, 1901.

(Before Bigham, J.)

Repetto *v.* Millar's Karri and Jarrah Forests Limited. (*a*)

Shipping—Bill of lading—Charter-party—Incorporation of charter-party with bill of lading—Signature of bill of lading by master—Right of master to sue for freight.

By a charter-party, containing the usual exceptions, an agreed rate of freight was to be paid on unloading and right delivery of cargo to be provided by the charterers. The captain was to sign bills of lading at port of loading, and the charterers' liability was to cease on vessel being loaded. The charterers loaded the cargo, and the master signed bills of lading which described the cargo as shipped by the charterers in the ship "whereof L. Repetto is master," and provided that the cargo should be delivered to the shippers or their assigns at the port of discharge, they paying freight as per charter-party. In an action by the master against the charterers to recover the balance of freight due:

Held, that the master signed the bills of lading, not as principal, but merely as agent for the shipowner, and therefore he was not entitled to sue for the freight.

Commercial cause tried before Bigham, J.

The facts appear in the judgment.

Scrutton, K.C. and *Leck* for the plaintiff.—The plaintiff is entitled as master of the ship who signed the bill of lading to sue for the balance of the freight due from the defendants. It is admitted by the defendants tha this balance is due, but they say they are entitled to set-off against the plaintiff's claim an amount alleged to be due to them on a prior transaction. This amount is not a mutual debt beween the plaintiff and the defendants, and cannot be set off against the plaintiff:

Isberg v. *Bowden,* 8 Ex. 852.

Although there is a cesser clause in the charter-party, by which the charterers' liability under the charter was to cease on the ship being loaded, yet as the bill of lading incorporates the terms of the charter-party, and as the plaintiff is suing on the bill of lading, which is the later document, the cesser clause does not prevent the plaintiff from recovering:

Gullichsen v. *Stewart Brothers,* 50 L. T. Rep. 47; 5 Asp. Mar. Law Cas. 130, 200; 13 Q. B. Div. 317.

The plaintiff is the party to the contract in the bill of lading; he signed the bill of lading and may either sue or be sued on it, and the two parties mentioned in the bill of lading are the plaintiff and the defendants. It is a contract made by an agent in his own name, and by the ordinary law of principal and agent he can sue or be sued on it (*Priestley* v. *Fernie,* 13 L. T. Rep. 208; 3 H. & C. 977); and, if he sued on it, his principal, the shipowner, cannot sue, as there is only one contract. The general rule applicable in such cases is well stated in the notes to the case of *Thomson* v. *Davenport* (9 B. & C. 78 in 2 Smith L. C., 10th edit., at p. 400: "That an agent who has made a contract in his own name for an undisclosed principal, may sue on it in his own name, is established by several cases, particularly *Sims* v. *Bond* (5 B. & Ad. 389)." The only difference here is that the defendants knew that there was a principal. Blackburn, J. in *Calder* v. *Dobell* (25 L. T. Rep. 129, at p. 133; L. Rep. 6 C. P. 486, at p. 500) says: "I apprehend that where a man is acting as agent, the principal is not the less bound because the contract is so drawn as to make the agent also liable." In such cases either the shipowner or the master can maintain an action for the freight:

Smith v. *Plummer,* 1 B. & A. 575;
Atkinson v. *Cotesworth,* 3 B. & C. 647;
Sims v. *Bond,* 5 B. & Ad. 389;
Jesson v. *Solly,* 4 Taunt. 52;
Cawthron v. *Trickett,* 9 L. T. Rep. 609; 1 Mar. Law Cas. O. S. 414; 15 C. B. N. S. 754;
Evans v. *Forster,* 1 B. & Ad. 118;
Allen v. *Coltart,* 48 L. T. Rep. 944; 5 Asp. Mar. Law Cas. 104; 11 Q. B. Div. 782;
Elbinger Actien-Gesellschaft v. *Claye,* 28 L. T. Rep. 405; L. Rep. 8 Q. B. 313;
Shepard v. *De Bernales,* 13 East, 565.

The fact that the bill of lading protects the plaintiff against his own negligence does not prevent the defendants from having a contract with him, and does not prevent him from recovering in this action:

Westport Coal Company v. *McPhail,* 78 L. T. Rep. 490; 8 Asp. Mar. Law Cas. 378; (1898) 2 Q. B. 130;
Jones v. *Nicholson,* 10 Ex. 28.

The plaintiff is also entitled to recover on an implied contract by the defendants to pay him the freight, arising from the fact that at their request he parted with the goods to them, and thereby parted with his lien:

Brouncker v. *Scott,* 4 Taunt. 1.

J. A. Hamilton, K.C. (*P. C. Morris* with him) for the defendants.—The defendants are not

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

liable to the plaintiff in respect of this balance of freight. The plaintiff is not the proper party to sue for the freight. The contract is not contained in the bill of lading alone, as the bill of lading expressly incorporates the charter-party, and both must be taken and read together, so that we have to look at the charter-party to see what the contract is, or with whom it is made. The charter-party must be regarded as constituting the contract:

Sewell v. *Burdick*, 52 L. T. Rep. 445; 5 Asp. Mar. Law Cas. 79, 298, 376; 10 App. Cas. 74;
Rodocanachi v. *Milburn*, 56 L. T. Rep. 594; 6 Asp. Mar. Law Cas. 100; 18 Q. B. Div. 67;
Wagstaff v. *Anderson*, 41 L. T. Rep. 227; 4 Asp. Mar. Law Cas. 163, 290; 4 C. P. Div. 283.

But even assuming that the bill of lading is the contract, it is a contract with the shipowners and not with the master. The master does not render himself personally liable upon it, nor is he entitled to sue upon it. It was not intended to introduce any fresh party other than the two parties to the contract in the charter-party—namely, the shipowner and the charterers (the defendants). The inference to be drawn from the documents and from the facts of the case is that the plaintiff signed the bill of lading, not as principal, but as agent for his principal, the shipowner, and, signing as agent merely, it follows that he could not have been sued, and it must also follow that he cannot sue in this action. In the next place, it is said that there is an implied promise on the part of the defendants to pay the freight to the plaintiff arising from their request to him to deliver the goods to them; but the defendants' request for the goods was made, not to the plaintiff, but to the London agents of the shipowner. He is therefore not entitled to sue upon that ground. He also referred to

Cock v. *Taylor*, 13 East, 399;
Moorsom v. *Kymer*, 2 M. & S. 303;
Steamship County of Lancaster v. *Sharpe and Co.*, 61 L. T. Rep. 692; 6 Asp. Mar. Law Cas. 448; 24 Q. B. Div. 158.

Leck, in reply, referred to

Shields v. *Davis*, 6 Taunt. 65.

Cur. adv. vult.

April 2.—Bigham, J. read the following judgment:—This action is brought by Lorenzo Repetto, the master of a vessel called the *Beecroft*, to recover a balance due for freight. The indorsement on the writ shows that the gross freight was 3383*l.* 6*s.* 5*d.*, and that this amount has been reduced by payments on account and by disbursements for the ship at the ports of loading and discharge to a sum of 256*l.* 17*s.* 10*d.* Since action brought, a further sum of 39*l.* 1*s.* has been paid, leaving 217*l.* 16*s.* 10*d.*, the balance sued for. The defendants do not dispute that they owe this balance, but they say that they owe it to the owner and not to the plaintiff, and that they have a set-off as against the former to the amount of the claim. The question I have to determine is whether the plaintiff (the master) can maintain the action. The facts are as follows: By a charter-party dated the 28th Aug. 1899, Fortunato Repetto (not the plaintiff) chartered the *Beecroft* to the defendants to bring a cargo of timber from Australia at an agreed rate of freight, the defendants undertaking to provide the cargo. The charter-party contained the usual exceptions. The freight was to be paid on unloading and right delivery of the cargo. Then there was the following clause: "The captain to sign bills of lading at port of loading at any rate of freight without prejudice to this charter, and, should the bills of lading for the entire cargo show less sum in the aggregate than the amount of freight due the ship under this charter (allowing for advances to the master), the difference to be paid at the port of loading in cash. The charterers' liability under this charter to cease on vessel being loaded. Ship to have an absolute lien on the cargo for freight, dead freight, and demurrage." The defendants loaded the cargo and presented bills of lading to the plaintiff for signature. These bills of lading described the cargo as shipped by the defendants in the *Beecroft*, "whereof L. Repetto is master." The exceptions were more extensive than those mentioned in the charter-party. The bills of lading provided that the cargo should be delivered to the shippers or their assigns, "they paying freight for the same as per charter-party dated the 28th Aug. 1899, all the terms and exceptions contained in which charter are herewith incorporated." These bills of lading the plaintiff signed as master of the ship. The ship then proceeded on her voyage, and on her arrival at the port of discharge the cargo was delivered to the defendants against presentation of the bills of lading. This action was then brought, and it was no doubt brought in the name of the master, Lorenzo Repetto, in the hope that the defendants might thereby be precluded from setting up the set-off which they allege they have against Fortunato Repetto. There are only two ways in which a promise can possibly arise on the part of the defendants to pay freight to the plaintiff. It can arise out of the bill of lading itself, or it can arise by implication from the delivery of the goods by the plaintiff at the request of the defendants. There can be no doubt that where a master signs a bill of lading without qualification—that is to say, without anything in the document to show that he does so merely as agent—he makes himself personally liable upon it to the shipper. The shipowner who has authorised the master to sign the bill of lading is also liable upon it. The one liability arises out of the representation on the document that the master is a principal; the other liability arises out of the circumstance that in truth the master has signed for the shipowner. The master is estopped from denying the truth of the representation which he has made—in other words, he is not allowed to give evidence to discharge himself from a liability which he has apparently undertaken; and the shipowner is bound by the contract because it has been entered into on his behalf and with his authority. Thus two separate liabilities are created for the performance of one contract. But no difficulty arises out of this state of things, for the shipper has not a concurrent remedy against both master and owner; he has merely a right to elect which of the two he will hold liable, and, having once finally elected, his remedy against the other is gone. And, as either master or owner may be sued, so either may sue, for the existence of the liability on the one hand involves the existence of the correlative right on the other. These rules apply not merely to contracts created by bills of lading, but to all simple contracts; they form part of the

law relating to principal and agent. Now, applying this law to the circumstances of the present case, one must look to see what it is that the master has signed. It is not a mere bill of lading in the ordinary form; it is a bill of lading which in express words incorporates all the terms of a charter already made between the master's owner and the charterers (the defendants). Thus the two documents must be read as one, and it is to the contract so created that the plaintiff has put his signature. Then, reading the two documents together, does it appear that in signing he did so as agent merely, or does it appear that he did so as principal? By the charter-party the shipowner promises the defendants that his servant, the master, shall sign bills of lading as presented. Why is this provision inserted? It is inserted with two objects; first, to enable the charterers, in case they ship their own goods (as they did in this case), to obtain a negotiable instrument which they can transfer by indorsement, and on which, if need be, they can obtain money; and, secondly, it is inserted to enable them, in case they ship the goods of other people, to hand to such other people bills of lading which in their hands can serve a similar purpose and which shall express the freight they may have agreed to pay. These are the only objects with which the provision is inserted, and in my opinion the plaintiff, when he signed the bills of lading sued on, did so merely in order to effectuate the first of these purposes and so to carry out the promise which his owner had made by the charter-party. I think this is the meaning to be put on the two documents when read together. It is neither apparent from the documents nor is it the fact that the master or the charterers intended that a new contracting party should be introduced into the business by the signing of the bills of lading. It is not necessary to stop to consider what the effect might have been if the bills of lading had been indorsed to third parties so as to pass the property in the goods. Here the charterers, the shippers, the consignees, and the receivers of the cargo are one and the same, and the Bills of Lading Act has therefore no bearing on the case. I come to the conclusion that the master's signature to the bills of lading must be read as the signature of a mere agent fixing a liability on his principal only. The master, therefore, could not be sued, and it follows as a consequence that he cannot sue. A point was taken during the argument that the master could not be taken to have intended to contract, inasmuch as he had excluded himself from the consequences of his own barratry; and it was said that it was absurd to suppose that the master could have contracted upon such a footing. I am not disposed to place much importance upon that point, for I think it very likely that the clause in the bill of lading, which is different from the clause in the charter-party by which the liability of the persons signing the bill of lading in respect of his own barratry is excluded, is in the bill of lading *per incuriam*. It is part of the print, and was probably overlooked and not struck out at all. Therefore I am not disposed to place any importance upon that point. But it was said that the master is entitled to sue, if not on the bill of lading, at all events on an implied contract to pay the freight. It is said that the master held possession of the goods in order to enforce the shipowner's lien, and that he had given up the possession at the request of the defendants, who were, as I have said, the consignees and receivers of the cargo, and that it must be implied from the request and from the fact that he had given up possession that the defendants had promised to pay the freight. I do not think there is anything in that point. It was not at the request of the defendants to the master that the lien was parted with and possession of the goods given up. The application by the receivers for possession of the goods was made only to Messrs. Clarkson, who were the agents for the shipowner, and it was the shipowner through them who gave up possession at the receivers' request. I find, as a fact, that there was no request for possession made to the master, and that therefore no implied contract has arisen to pay him. The question was argued as to what the position would be if the master stood in the relation in which the plaintiff contended he did stand—that is, as principal on the contract. It was said that, inasmuch as the charter-party contained a clause for cesser of liability, the defendants would not be liable to pay. I do not think this is right. The defendants would be liable, in my opinion, if the master could sue, and certainly would be liable if an action were brought by the shipowner for the freight mentioned in the bill of lading. I think the case of *Gullichsen* v. *Stewart Brothers* (*ubi sup.*) makes that clear. The bill of lading is supplemental to the charter-party and creates the liability which, but for the bill of lading, would probably be gone—namely, the liability to pay the freight. The two documents which must be read together are in a sense a contract, but the bill of lading, which is the later document, I think overrides the charter-party and makes the defendants liable to pay the freight; but the person to sue in this case is, in my opinion, the shipowner and not the master. I think this action must be dismissed, and dismissed with costs.

Action dismissed and counter-claim dismissed.

Solicitor for the plaintiff, *R. Greening.*

Solicitors for the defendants, *James White* and *Leonard.*

Tuesday, May 21, 1901.

(Before RIDLEY and PHILLIMORE, JJ.)

Re AN ARBITRATION BETWEEN MARGETTS AND OCEAN ACCIDENT AND GUARANTEE CORPORATION LIMITED. (*a*)

Marine insurance—Policy—Collision with "any vessel"—Anchor in bed of river attached by chain to vessel—Collision with anchor—Right of assured to recover as for collision with "vessel."

By a policy of marine insurance on certain tugs, the assured was protected against damage to any of the insured tugs "owing to actual collision between any such tug and any vessel, bridge, wharf, mooring pier, or similar structure."

One of the insured tugs struck against an anchor in the bed of a river and was damaged. The anchor was attached by some twenty or thirty

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

fathoms of chain to the bows of a schooner, the after part of which was lying on the bank of the river.

Held, that the anchor so attached to the schooner was a part of the schooner, and that collision with the anchor was a collision between the tug and a "vessel" within the meaning of the policy, and that the assured was therefore entitled to recover under the policy for the damage to the tug.

AWARD stated in the form of a special case.

By a policy of assurance, dated the 1st Dec. 1899, and made between P. Margetts, hereinafter called the assured, and the Ocean Accident and Guarantee Corporation Limited, hereinafter called the corporation, it was provided that should any difference arise between the corporation and the assured as to any question, matter, or thing concerning or arising out of that insurance, every such difference should be referred to the arbitration and decision of a neutral person.

A copy of the policy formed part of this case. The amount assured was 1000*l.*; the annual premium 126*l.* 5*s.*, and the policy was to be in force from the 21st Nov. 1899 to the 21st Nov. 1900, and was on the tugs of the assured set out in the list attached to the proposal form.

A difference having arisen between the assured and the corporation, it was provided by an order of a master dated the 20th Feb. 1901 that William Pickford, K.C. be appointed arbitrator to settle the difference between the parties.

The arbitrator accordingly heard the allegations and evidence of the respective parties, and at their request stated his award in the form of a special case.

By the policy of assurance, which was a river craft policy, it was provided that the corporation would pay to the assured, or to the persons to whom the assured might be held liable, the following sums in respect of damage occasioned during the period covered by the policy (*inter alia*).

The amount of any damage which shall be caused to any of the tugs belonging to the assured, and covered by this policy as aforesaid, owing to actual collision between any such tug and any vessel, bridge, wharf, mooring pier, or similar structure, but such damage shall not be taken to include any claims for detention or salvage.

The amount to be paid by the corporation under the policy for damages and costs was not to exceed 500*l.* in respect of any one collision or series of collisions, and not to exceed 1000*l.* during the twelve months.

The *Ada* was a tug belonging to the assured and covered by the policy.

At about 9.30 p.m. on the 13th Aug. 1900 the *Ada*, while coming up the river Thames on the north side of mid-channel, ported her helm to avoid a down-coming steamer, and struck upon an anchor in the bed of the river. The anchor was attached by about twenty or thirty fathoms of chain to a schooner called the *Excel*, which was lying on the north bank of the river with her after part on the mud, but attached to the anchor at her bows. In consequence of striking the anchor the tug sank and sustained considerable damage.

It was agreed before the arbitrator that the sum of 490*l.* was due from the corporation to the assured if the corporation were liable under the above circumstances.

It was contended on behalf of the assured that as the anchor was attached to the schooner it was part of the vessel, and that the striking of the anchor by the tug was an actual collision between the tug and a vessel.

It was contended on behalf of the corporation that the anchor was not a part of the schooner, and that the striking of it by the tug was not an actual collision between the tug and a vessel.

So far as it might be a question of fact for the arbitrator, he found that under the circumstances the anchor was a part of the schooner, and that the striking of the same by the tug was a collision between the tug and a vessel.

The question for the opinion of the court was whether upon the facts herein stated the corporation were liable to pay to the assured the amount of the damage to the tug. If the court should be of opinion in the affirmative, then the arbitrator found and awarded that the assured was entitled to recover against the corporation the sum of 490*l.* If the court should be of opinion in the negative, then the arbitrator found and awarded that the assured was not entitled to recover anything against the corporation.

A. E. Nelson (with him *Butler Aspinall*, K.C.) for the plaintiff (the assured).—The question raised is whether this anchor was part of the vessel to which it was attached by the chain. We submit that the anchor was part of the schooner. If the anchor had been hanging over the bows, instead of being attached to the bows by the chain, then it would be conceded that it would have been part of the vessel. The vessel must be taken as a whole, and no vessel is seaworthy unless she is provided with an anchor, which is, therefore, a necessary part of the vessel. This anchor was in the river as part of the vessel itself, and that was the only reason it was in the river. Collision between warp and warp of two ships, is a collision between ship and ship within the meaning of the words "collision" or "collision or otherwise" in the County Courts Admiralty Jurisdiction Acts 1868, s. 3, and 1869, s. 4:

The Warwick, 63 L. T. Rep. 561; 6 Asp. Mar. Law Cas. 545; 15 P. Div. 189.

That would show that the warp is part of the vessel. So, collision by a tug towing a vessel was held to be collision by the vessel itself, upon the ground as explained by Lords Selborne and Watson that the vessel and tug, being attached to each other for a common operation, must be regarded as one vessel:

McCowan v. *Baine and others; The Niobe*, 65 L. T. Rep. 502; (1891) A. C. 401; 7 Asp. Mar. Law Cas. 89.

Upon the same principle the anchor attached to the schooner must be regarded as part of the schooner. In *European and Australian Royal Mail Company Limited* v. *Peninsular and Oriental Steam Navigation Company* (14 L. T. Rep. 704; 2 Mar. Law Cas. O. S. 351), a damaged vessel used as a coal-hulk was held not to be a vessel, as it was not intended to be used again as a vessel; and the question was there treated as one of fact. The thing must be taken as a whole, and when so regarded the anchor is part of the ship. The ship could not go to sea, as a seaworthy ship, without it.

Spencer Bower for the corporation (the defendants).—The question is, whether an anchor to which a vessel is attached by a chain, and which is some distance away from the vessel, is part of the vessel for the purposes of being collided against. If the anchor had been hanging over the bows of the vessel, then it might be taken as part of the vessel; but if the anchor is allowed to trail behind the ship, then it could not be said that it is a part of the ship. The mere connecting of two things or objects by a chain does not make them one thing. In *Hoskins* v. *Pickersgill* (3 Doug. 222) it was held that, on a policy of insurance of a ship employed in the Greenland trade, on "ship, tackle, apparel, and furniture," the fishing tackle was not included. The case of *The Niobe* (*ubi sup.*) is distinguishable, as there is a very wide distinction between a tug actually towing a vessel, as in that case, and an anchor at some distance from the vessel, as in this case. The schooner and the anchor were two distinct things at two termini, the anchor at one end and the schooner at the other, connected by a chain. The anchor is not part of the vessel when in this position. It is in the position of a rock to which the ship might be fastened. There is no decision as to an anchor, but in this case the schooner and the anchor must be regarded as two distinct things connected by a chain. He referred to

The Romance, 83 L. T. Rep. 488; 9 Asp. Mar. Law Cas. 149; (1901) P. 15.

[PHILLIMORE, J. referred to *Gale* v. *Laurie* (5 B. & C. 156; 1 Hag. Adm. 109).]

RIDLEY, J.—I think that the question which is left to us by the arbitrator must be answered by saying that the corporation are liable to pay to the assured the amount of the damage to the tug. The facts are that the tug, the vessel in question, came into collision with an anchor, to which a schooner was riding, and the question we have to determine is whether the anchor was a part of the vessel. I think it must properly be regarded as part of that vessel, and therefore as being a vessel within the meaning of the clause in the policy of insurance, which is set out in the special case. I concede that at first sight, and in popular language, you might distinguish between an anchor and the vessel, and you probably would. If you were asked to describe what had happened you would say that the tug had come into collision with an anchor; you would not say, using ordinary language, that it had come into collision with a ship; you would describe the object which it had come into collision with as an anchor, but when one comes to look at the authorities and to consider what is the proper definition which this word bears, I think an anchor is to be regarded as a portion of the vessel. The question, it is quite true, has never actually been decided, because it has not been decided that that portion of the equipment of a vessel—namely, the anchor—must be regarded as part of the vessel itself. That is quite true, and counsel for the corporation has argued that it must be regarded as a different thing. Of course, it is true, when a vessel is riding to her anchor, the anchor may be a considerable distance from the vessel, but that does not make it less part of the vessel. I should suppose no one would argue that a grappling-iron, for instance, is not a portion of the balloon, which drags the balloon to the ground, and it is, to my mind, a similar question when you regard a ship and an anchor; but it cannot be said that a rock to which a vessel may be made fast is any part of it. The question has arisen for decision, not so much on the question of an anchor as on that of a tug towing a vessel, in the case of *The Niobe* (*ubi sup.*), where a tug which was towing a vessel had come into collision, and the ship which the tug was towing was held liable to pay the damages. There the House of Lords decided that it must be considered that the vessel herself, the *Niobe*, had caused the damage, although in point of fact physically it had been caused by the tug. It was necessary in that case to come to some conclusion as to the general way in which words of this kind are to be interpreted, and Lord Selborne and the other noble Lords came to the conclusion that the narrow construction of the word "ship" could not be accepted in which and by which only the actual hull would be included. Lord Selborne says: "But I cannot adopt so narrow a construction of those words. I should hold them to extend to cases in which the injury was caused by the impact, not only of the hull of the ship insured, but of her boats or steam launch, even if those accessories were not (as in this case) insured as being in effect parts of the ship." That seems to me to be the first thing one has to grasp as the ground of the decision in the case of *The Niobe* (*ubi sup.*), which is, to my mind, a much stronger one than the decision which we are arriving at to-day. That is the first position, namely, that the boats and steam launch and other gear, which are the equipment or the appurtenances of a ship, are to be regarded as the ship itself, and you have got, according to the case before the House of Lords, to this, that a tug was so regarded in that instance. Then it seems to me an anchor clearly must be so regarded, although it be at the end of a rope, and although the vessel had no contact with it except by the rope. But when you had got a tug which was not part of the equipment of the ship it was necessary to fortify the argument by showing that, for reasons apart from this case, and which do not exist here, the tug was to be regarded as part of the ship, and the majority of the noble Lords came to the conclusion that it was. I think, putting it shortly, one of them (Lord Morris) said: "I consider the tug part of the apparatus for moving the ship *Niobe*," and there are grounds for saying that it has for other purposes been found necessary to say that the tug and ship go together. Those reasons are not required here. It appears to me we need not go further than to say that this anchor must be regarded in the same way as the boats and the steam launch belonging to the ship would have been regarded in the case of *McCowan* v. *Baine* (*ubi sup.*) if they had been the actual object in collision.

Then counsel for the corporation says this does not apply because the damage in that case was not done by the anchor; but it was done by a tug towing the vessel. It appears to me that that is not a sufficient reason for dissenting from or distinguishing the reasoning in that case. I think we must follow that reasoning, and we must class that part of the vessel as a ship whether it causes the collision or does the damage, or has the damage done to it. The rest of the cases which have been cited are

a little further from the point than the one I have been quoting, but they all seem to be in the same direction. The cases with regard to fishing tackle, and fishing stores, appear to rest on a special finding as to whether or not they were part of the equipment of the ship, and I do not think they are immediately in point. But I am clear for the above reasons that we must answer this question in the affirmative.

PHILLIMORE, J.—I am of the same opinion. We have to consider whether there has been a collision with a ship. Now a collision with a ship cannot mean a collision with the whole ship in the sense of contact with every piece of the ship. There is a collision with a ship if there is contact with any portion of it. Now there are various movable portions of a ship which in one sense may be regarded as distinct from a ship, and treated possibly as appurtenances of a ship, and in another sense are parts of the ship. There is a narrow point of view in which you might say the hull, masts, and yards, and in the case of a steamer the funnel and bridge, and possibly the steering gear, are the ship; and the boats, marling spikes, cables, and anchors, and even the sails, because they can be unbent, are appurtenances of the ship. That is quite true in one sense, but in another sense all these articles are part of the ship. For instance, if there was a collision with a raked out jib-boom, or the studding sail boom, or a sail or the boat of a ship set in the skids or hung in the davits, or with the anchor a-cockbill, nobody would doubt that in all good sense that would be a collision with the ship. although in another sense you might say, "I did not actually touch the ship; I only touched her anchor, or her boat, or her sail." So, in the same way, about an anchor. A collision with an anchor, or a cable which serves as an anchor to the ship, is a collision with a part of the ship extended for this purpose. A ship very often does extend her area by putting up additional rigging or by swinging her boats over the side—I am not speaking of sending her boats away—or by casting out her anchor, or by casting out a tow-line with which she is fast to another vessel; those are all portions of the ship projecting for the same purpose as my arm may project from my side, but none the less are part of the ship. The decision in *The Niobe* (*ubi sup.*) is very much stronger than even this case, I think, because a tug towing a vessel was there held to be part of the vessel; and therefore a collision with the tug would be a collision with the ship. Nobody who knows anything about the decision in the House of Lords of *The Niobe* (*ubi sup.*) would have the slightest difficulty in coming to the conclusion that the learned Lords were decidedly upholding, and possibly more than decidedly upholding, the view that if the damage in that case had been done by the *Niobe* to the vessel *Valetta* by the rope out between the *Niobe* and the tug *Flying Serpent*, then the damage in that case would be held to be damage done by the *Niobe* within the meaning of the clause in that case. Now let me put it round the other way. The *Valetta* is insured against damage done by collision with a vessel, and she is injured by a rope from the *Niobe*, and instead of recovering against the *Niobe* she goes against her own underwriters, nobody would doubt she would be entitled after the decision of the House of Lords, if not independently of that, to recover as by reason of a collision with a vessel. That seems a stronger case than the present. I think some assistance is to be got from the case of *Gale* v. *Laurie* (*ubi sup.*) and the decision in the King's Bench. I do not lay much stress upon it. I think both upon the principle and the light given by the House of Lords we ought to have no hesitation in holding that this accident is within the policy and the plaintiff ought to recover.

Judgment for the plaintiff, the assured.

Solicitors for the assured, *Lowless* and *Co.*

Solicitors for the corporation, *William Hurd* and *Son.*

May 14 *and June* 13, 1901.

(Before Lord ALVERSTONE, C.J., LAWRANCE and PHILLIMORE, JJ.)

POLL v. DAMBE. (a)

Merchant shipping—Foreign ship in British port —Desertion of foreign seaman—Inducing such desertion—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 236 (1).

Sect. 236 (1), *which makes it an offence to persuade or attempt to persuade "a seaman or apprentice to . . . desert from his ship," does not apply to the persuading or attempting to persuade a foreign seaman to desert a foreign ship lying in a British port.*

P. was a foreign sailor serving on board a Russian ship. While the Russian ship was lying in a British port, A. persuaded him to desert. A. was afterwards prosecuted for an offence under sect. 236 (1) *and convicted.*

Held, that the conviction was wrong.

CASE stated by the stipendiary magistrate for the county borough of Cardiff.

The respondent was the master of the Russian ship *Lennox*, which at the time of the alleged offence was lying at the West Dock at Cardiff. The *Lennox* was not registered or owned in the United Kingdom, and was not a British ship but a foreign ship.

On the 25th Dec. 1900, one Johannes Pilder, who was then a foreign seaman lawfully engaged on the *Lennox*, met the appellant Poll, a boarding master living at Cardiff. At this interview the appellant persuaded Pilder to desert from the *Lennox* and to join another ship where he would receive better wages. Pilder did then desert from the *Lennox*, and on the following day was taken to the railway station at Cardiff by the appellant, who, after providing him with a ticket, saw him leave the station in a train for Bristol in the company of five other sailors and an agent of the appellant. Pilder was subsequently arrested, on a warrant, as a deserter from the *Lennox*.

Upon the hearing of the information, charging the appellant, under sect. 236 of the Merchant Shipping Act 1894, with having unlawfully persuaded Pilder to desert from his ship, it was contended on behalf of the appellant that the magistrate had no jurisdiction to hear and determine the case, the offence being charged in respect of a foreign seaman engaged on a

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

foreign ship, and that by sects. 260 and 261 of the Merchant Shipping Act 1894, Part 2 of the Act (under which head the section creating the offence is classified), was restricted in its application to those ships mentioned in those sections — viz., sea-going ships registered in the United Kingdom and sea-going British ships registered out of the United Kingdom.

The magistrate was of opinion that sect. 236 was applicable to foreign ships, that the words "his ship" in that section were as general as the words "any ship in the United Kingdom" in sect. 111, and that, as both sections are classified under Part 2 of the Act, the present case was governed by *Reg.* v. *Stewart* (80 L. T. Rep. 660). He therefore convicted the appellant, and fined him 5*l.* and costs, but stated this case for the opinion of the High Court.

Bailhache for the appellant.

H. Sutton for the respondent.

The arguments of counsel appear sufficiently for the judgment.

Besides the authorities therein mentioned, counsel cited

Thomson v. *Hart*, 18 Sc. Sess. Cas. 4th ser., Just. 3;
Bank of England v. *Vagliano*, 64 L. T. Rep. 353; (1891) A. C. 353;
The Fulham, 81 L. T. Rep. 19; 8 Asp. Mar. Law Cas. 425, 559; (1899) P. 251, at p. 259.

June 13.—Phillimore, J. read the following judgment of the court.—This is a case stated by the stipendiary magistrate for Cardiff, and upon it we have to determine whether it is an offence under the Merchant Shipping Act of 1894 to persuade in England a foreign seaman to desert from a foreign ship when such ship is lying in an English port. The language of sect. 236, sub-sect. 1, is as follows: "If a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding 10*l.*" By sect. 742 "seaman" includes every person (except masters, pilots, and apprentices, duly indentured and registered) employed or engaged in any capacity on board any ship. The language of the Act is thus wide enough to cover this case; but it is contended on behalf of the appellant that Part 2 of the Merchant Shipping Act, in which this section is found, applies only (except in certain specified places) to British ships, and the word "ship" in sect. 236 must be read as meaning British ship. Sect. 236, making it criminal to persuade desertion, may be looked upon as supplementary to the earlier sections, which made desertion itself punishable. They are sects. 221 to 224, both inclusive, and sect. 238. Sects. 221 to 224 are in equally general terms, and they follow upon sect. 220, which contains express words limiting its own application to the crews of British ships; there is, therefore, some ground for supposing that sects. 221 to 224 were not intended to be so limited. The sections as to the application of Part 2 are sects. 260 to 266, both inclusive. By sect. 260 this part "shall, unless the context or subject-matter requires a different application, apply to all sea-going ships registered in the United Kingdom, and to the owners, masters, and crews of such ships," with certain qualifications as to lighthouses, vessels, yachts, and fishing-boats, which are dealt with in sects. 262 and 263. By sect. 261 this part shall, unless as aforesaid, apply to all sea-going British ships registered out of the United Kingdom, and their owners, masters, and crews in respect of certain specified matters, one of which is discipline. It will be important to note that this specification of details occurs only in the section which deals with British ships registered out of the United Kingdom, and that there is the same arrangement in sect. 109 of the Act of 1854, which in substance corresponds with the two sects. 260 and 261 of the Act of 1894. This is not unimportant in view of some observations of Blackburn, J. in the case of *Leary* v. *Lloyd* (3 E. & E. 178). Sect. 264 enables colonial Legislatures to adopt any provisions of this part which do not otherwise apply, and sect. 265 provides for the case of an apparent conflict of laws "in any matter relating to a ship or to a person belonging to a ship." This section would meet the case of a conflict between the laws of different parts of His Majesty's dominions; but it might have a wider application in the case of any sections of Part 2 of the Act which apply to foreign ships. Sect. 266 is not material to this case. It is clear, therefore, that as a general rule this part of the Act is not to apply to foreign ships—that is to say, it is not to be enforced against foreign ships or owners of foreign ships, or persons on board foreign ships, or as to matters done or to be done on foreign ships. But it does not, therefore, necessarily follow that it does not apply to persons who have deserted from foreign ships or to English subjects who in England have abetted such desertion. A formidable argument, however, against the application of the section as to desertion from foreign ships is derived from sect. 238. By this section, where it appears to the Crown "that due facilities are or will be given by the Government of any foreign country for recovering and apprehending seamen who desert from British merchant ships in that country," the Crown may by Order in Council direct that this section shall apply, and where it applies and a seaman deserts when within any of the king's dominions from a merchant ship belonging to a subject of that country, "any court, justice, or officer that would have had cognisance of the matter if the seaman had deserted from a British ship shall, on application of a consular officer of a foreign country, aid in apprehending the deserter," and may "order him to be conveyed on board his ship or delivered to the master . . ." It is said that it is only under this section that desertions from foreign ships can be dealt with by an English court, and also that this section would be unnecessary if the general provisions of sects. 221 to 224 applied to foreign as well as British ships. The third sub-section of sect. 238 inflicts a penalty not exceeding 10*l.* for harbouring or secreting a deserter who is liable to be apprehended under this section. This is said to overlap the second sub-section of sect. 236. There is no sub-section in sect. 238 corresponding with sub-sect. 1 of sect. 236, under which the information in the present case is laid. The weight of this argument is to a certain extent lessened by the consideration that

the Act of 1894 is a consolidating Act, and includes not only the Act of 1854, but several other Acts. Sect. 238 is a re-enactment of the Foreign Deserters Act 1852 (15 & 16 Vict. c. 26), an earlier Act than the Act of 1854. It may well be that the Act of 1854 did make that of general application which had only limited application by the Act of 1852; and in some respects the special provisions of the Act of 1852, as reproduced in sect. 238, are different from the general provisions in the Act of 1894. Still, in our opinion, having regard to the terms of sect. 221, the general sections as to deserters, 221 to 224, do not apply to cases which come, or may come by the operation of an Order in Council, under sect. 238. The procedure is different; the seaman to whom sect. 222 applies is to be conveyed on board his ship, not by warrant of the court, but by the master or certain other persons, with or without the assistance of a police constable, and may require to be taken before a court to be dealt with according to law. More complicated provisions are applied to cases under sect. 223. But under sect. 238 there is to be a warrant under which the man is to be conveyed on board his ship, and when the warrant has been issued the seaman apparently has no direct right to have recourse to the court which issued it. The penalty for harbouring is different, and in sect. 238 there is a significant proviso to which we have not yet referred excepting the case of a seaman who is a slave. There is no such proviso in sects. 221 to 224. We therefore come to the conclusion that sects. 221 to 224 apply only to British ships, and that the offence of desertion from a foreign ship is punishable only under sect. 238, and where that section has been applied by Order in Council. Similarly, we must hold that the offence of harbouring a deserter from a foreign ship comes, if at all, under sub-sect. 2 of sect. 238, and does not come under sub-sect. 2 of sect. 236. Holding this, can we hold that sub-sect. 1 of 236 applies in respect of foreign ships? We think it is impossible so to hold. The words "seaman" and "ship" in sub-sect. 1 must have the same limited meaning as the same words in sub-sect. 2. This view is in accordance with the decision of the Court of Queen's Bench in the year 1860 in the case of *Leary* v. *Lloyd* (*sup.*) upon the parallel section (257) of the Act of 1854. We have, however, not held ourselves concluded by that decision, but have reconsidered the matter upon the following grounds: First, the case was only argued on one side; secondly, Blackburn, J. who delivered the judgment of the court, seems to have thought that there was something special in the sections about discipline limiting their application, though possibly not the application of the other section in the other part of that Act, to British ships, and we think this is not so. Thirdly, we think the case of *The Milford* (Swabey, p. 362) was not brought to the notice of the court. Now, the case of *The Milford* is certainly an authority for not restricting Part 3 of the Merchant Shipping Act 1854 to British ships. Dr. Lushington, in dealing with the argument that the 109th section of the Act of 1854 restrained the application of sect. 191, says, "The language there used, however, is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which extend to show that the court should not apply sect. 191 to foreign masters and seamen." This observation is perfectly general, and the authority of Dr. Lushington on shipping matters and on the construction of Acts was so high that it is unfortunate that *The Milford* case was not brought before the Court of Queen's Bench before it decided *Leary* v. *Lloyd* (*sup.*). It should be added that the law as decided in *The Milford* case has been accepted ever since, and that the remedies given by sect. 191 were, and those of the corresponding section (sect. 167 (1) of the Act of 1894 are, always afforded in proper cases to masters of foreign ships. On the other hand, it may be said Dr. Lushington's judgment may well be supported on other grounds as well, and that he relied on other grounds as well. The decision may rest upon the ordinary rule as to the application of the *lex fori*. Again, the effect of sect. 191 was to enable the master to sue in the Admiralty Court and thereby to obtain process *in rem* against the ship. By the ordinary maritime law as administered in the other countries he had this right always, just as a seaman had. The English law had been exceptional in denying him this remedy, and in denying it to him because of a point of internal jurisdiction. When sect. 191 brought the maritime law of this country into line with that of other countries it would have been absurd that the anomaly thus removed from municipal cases should have been left for foreign ones. These considerations certainly affect the weight of *The Milford* case as an authority in the present case. On the other hand, the case of *Cope* v. *Doherty* (2 De G. & J. 614) and the class of cases represented by *The Zollverein* (Swabey, 96) show that there were other parts of the Merchant Shipping Act 1854 which our courts have declined to hold to be applicable to foreign ships. We do not, however, decide this case upon the ground that no sections in Part 2 of the Act of 1894 apply to foreign ships. We agree with our brethren Darling and Channell in the case of *Reg.* v. *Stewart* (80 L. T. Rep. 660; 8 Asp. Mar. Law Cas. 534; (1899) 1 Q. B. 964) that there may be acts done in relation to foreign ships which when done by English subjects in England come as much under the present provisions of the Merchant Shipping Act 1894 as if they were done in relation to English ships. We think that the case they had to deal with was one of such cases. We ground our decision upon the fact that this part of the Act (Part 2) contains a special provision for the case of desertion from foreign ships, and has thus shown that its general provisions are limited to desertion from British ships. We hold, therefore, the appellant was not liable to conviction under sect. 236 of the Merchant Shipping Act 1894, and that the appeal must be allowed with costs.

Conviction quashed.

Solicitor for the appellant, *Hier Jacob*, for *Morgan Rees*, Cardiff.

Solicitor for the respondent, *Solicitor of the Board of Trade.*

May 16 *and June* 19, 1901.

(Before KENNEDY and PHILLIMORE, JJ.)

DAVIDSSON v. HILL AND OTHERS. (a)

Negligence—Injury causing death—Alien—Death of alien on foreign ship by collision on high seas—Negligence of British ship—Right of representative of alien to maintain action against English shipowner—Fatal Accidents Acts 1846 *and* 1864 (9 *&* 10 *Vict. c.* 93, *s.* 1; 27 *&* 28 *Vict. c.* 95, *s.* 1).

The provisions of the Fatal Accidents Acts 1846 *and* 1864 *extend to a case where the person in respect of whose death damages are sought to be recovered in an English court against the owner of a British ship was an alien, and was at the time of the negligent act which caused his death on board a foreign ship on the high seas; and therefore a foreigner, the widow of a foreign seaman killed on the high seas while on board a foreign ship by a collision with a British ship caused by the negligent navigation of the British ship, can maintain an action in England under these Acts against the English shipowner for the negligence of his servants in causing the death.*

Adam *v.* British and Foreign Steamship Company Limited (79 *L. T. Rep.* 31; 8 *Asp. Mar. Law Cas.* 420; (1898) 2 *Q. B.* 430) *dissented from and not followed.*

ARGUMENT of a question of law in an action on the following statement of facts:—

1. Between 2 a.m. and 3 a.m. on the 11th Aug. 1900 a collision occurred on the high seas between the defendants' steamship *Exeter City* and the Norwegian barque *Ratata*. Shortly after the collision and in consequence thereof the *Ratata* sank, and Johan Davidsson, a Norwegian subject employed as sailmaker on board the *Ratata*, and another man, also a Norwegian subject, were drowned.

2. The collision and the consequent drowning of Johan Davidsson were solely caused by the negligent navigation of the *Exeter City* by the defendants' servants.

3. The plaintiff, Josefina Davidsson, is the lawful widow of the said Johan Davidsson, deceased, and brings this action under the provisions of 9 & 10 Vict. c. 93 and 27 & 28 Vict. c. 95 on behalf of herself and the six children lawfully begotten of herself and the said Johan Davidsson, deceased, to recover compensation for his death. There is no executor or administrator of Johan Davidsson, deceased.

The question to be decided by the court was whether upon the facts stated above the plaintiff was entitled to recover damages in this action.

The Fatal Accidents Act 1846 (9 & 10 Vict. c. 93) provides:

Sect. 1. Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sect. 2. And be it enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, &c.

The Fatal Accidents Act 1864 (27 & 28 Vict. c. 95) provides (in sect. 1) that where there is no executor or administrator of the person deceased, or that, there being such executor or administrator, no such action as in the previous Act mentioned shall be brought by or in the name of such executor or administrator within six calendar months after the death of the deceased, then the action may be brought by or in the name of all or any of the persons for whose benefit the action might have been brought by the executor or administrator.

J. A. Hamilton, K.C. (*Henry Stokes* with him) for the plaintiff.—The question is whether the widow of the foreign seaman who lost his life on the high seas through the negligence of a British ship is entitled to maintain this action. A long series of cases assumed that the action could be maintained, but there is an express decision on the point by Darling, J. in *Adam* v. *British and Foreign Steamship Company Limited* (79 L. T. Rep. 31; 8 Asp. Mar. Law Cas. 420; (1898) 2 Q. B. 430), in which it was held that the action could not be maintained in this country. There is, however, a decision to the opposite effect by Sir Robert Phillimore in *The Explorer* (23 L. T. Rep. 604; 3 Mar. Law Cas. O. S. 507; L. Rep. 3 A. & E. 289). Coming to the Act, the preamble is very general, and in sect. 1 the plain words of the Legislature provide that if the person had been only injured and not killed, and if the injured person himself could have maintained the action in this country, then, in case of his death, the action may be maintained in this country by the widow. The words are as wide and as express as if the word "foreigner" had been used. The object of the Act was that the wrongdoer should not escape liability by killing a person instead of merely injuring him. In every case, therefore, it comes simply to this: Could the deceased person himself have maintained the action if he had been injured only and not killed? If so, in the case of his death the action can be maintained by his personal representative. In this case the deceased if he had been merely injured could clearly have maintained an action in this country against the defendants. Generally, to maintain an action of tort the act must be actionable by the *lex loci* and the *lex fori*; but in this case, as the accident took place on the high seas, no conflict of law arises, and the case is governed by the law maritime by which all torts on the high seas are actionable, apart from death. The plain words, therefore, and the plain policy of the Act cover this case. As the plaintiff is asking the court to dissent from the judgment of Darling, J. it is necessary to go through the cases. In *The Guldfaxe* (19 L. T. Rep. 748; 3 Mar. Law Cas. O. S. 201; L. Rep. 2 A. & E. 325) it was held by Sir R. Phillimore, though not without doubt, that the Admiralty Court had jurisdiction to entertain a suit under this Act by the representative of

(a) Reported by W. W. Gee, Esq., Barrister-at-Law.

a person killed in a collision between two vessels. In that case the injured person, whose representative was suing, was a British subject, and the wrongdoer was a foreigner—the converse case to the present. This decision was approved of by the same judge two years afterwards in *The Explorer* (*ubi sup.*), in which he held that this Act extended to the case of an alien killed on board a foreign vessel on the high seas, and that the Admiralty Court had jurisdiction under the Act to entertain a suit by the representatives of the alien so killed. The next case is *The Franconia* (36 L. T. Rep. 640; 3 Asp. Mar. Law Cas. 435; 2 P. Div. 163), afterwards overruled, in which it was held by the same judge and by the Court of Appeal (being equally divided) that the Admiralty Division had jurisdiction to entertain an action against a foreign ship for the death of the plaintiff's husband. Then we have *Harris* v. *Owners of the Franconia* (2 C. P. Div. 173), in which *Reg.* v. *Keyn* (2 Ex. Div. 63; 13 Cox C. C. 403) was held binding on all the courts and was followed. In *Seward* v. *Owner of the Vera Cruz; The Vera Cruz* (52 L. T. Rep. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59) it was held by the Court of Appeal and the House of Lords (overruling *The Franconia, ubi sup.*) that the Admiralty Division had no jurisdiction to entertain an action *in rem* for damages for loss of life under 9 & 10 Vict. c. 93. There the person suing was a British subject and the person sued was a foreigner and the owner of a foreign ship, and all that the court had there to decide or deal with was whether the Admiralty Division had jurisdiction *in rem* over these claims under Lord Campbell's Act, under the words in the Admiralty Court Act 1861, "any claim for damage done by any ship," and it was held that there was no such jurisdiction, though in the elaborate judgments of Lords Selborne and Blackburn language is used which clearly seems to assume that an ordinary action under the Act could have been maintained by a foreigner. Though statutes generally legislate for those who are subjects of this country, yet equally so they sometimes legislate for foreigners, and we contend that this is one of those cases; and if this Act is applicable at all to accidents on the high seas there is no legal principle which prevents a foreigner from suing. [KENNEDY, J. referred to *Glaholm* v. *Barker* (13 L. T. Rep. 653; L. Rep. 1 Ch. 223).] The object of the Act was to render the Englishman liable, and if it once be admitted that the Act is applicable to accidents on the high seas, then it can make no difference whether the person who is killed is a British subject or a foreigner. The decision of Darling, J. in *Adam* v. *British and Foreign Steamship Company Limited* (*ubi sup.*), in which he held that an action would not lie at the suit of an alien under this statute, is founded on a misconception, and, as there is a long line of authorities on the other side, it ought not to be followed. He also referred to

Colquhoun v. *Heddon*, 62 L. T. Rep. 853; 25 Q. B. Div. 129;

Jefferys v. *Boosey*, 23 L. T. Rep. O. S. 275; 4 H. L. Cas. 815;

Routledge v. *Low*, 18 L. T. Rep. 874; L. Rep. 3 H. L. 100;

The Bernina, 58 L. T. Rep. 423; 6 Asp. Mar. Law Cas. 257; 13 App. Cas. 1.

[PHILLIMORE, J. referred to *Le Mesurier* v. *Le Mesurier* (72 L. T. Rep. 873; (1895) A. C. 517).]

Balloch (*F. Laing*, K.C. with him) for the defendants.—The question resolves itself shortly to this, whether the language of this Act shows an express or clear intention to confer on a foreigner resident out of the jurisdiction a new right of action in respect of a wrong committed out of the jurisdiction. If the Legislature in this Act is to be assumed to be legislating for foreigners as well as British subjects, then the language is wide enough to include this case. But on the authorities it is submitted that the courts in construing such statutes as these must assume that our Legislature does not legislate for persons other than its own subjects, unless it shows a clear intention to do so. No such clear intention is shown in this statute. Before this Act was passed no such right of action as this was given either by the law of England or by maritime law, and therefore if the plaintiff has any right to maintain this action it must be under the statute. I must admit that if this man had been merely injured instead of having been killed he would have had a right of action—that is, a right *in personam*. This statute confers new rights, and the question is, Does it show a clear intention to confer upon and extend these new rights to foreigners over whom the courts of this country have no jurisdiction? The onus as to showing that is on the plaintiff. The person who is suing in this action is not the injured person, but another person suing under a new right, and the right so to sue must be given in express terms. There are two classes of cases which illustrate the principle. First, we have statutes limiting the liability of shipowners, such as sect. 504 of the Merchant Shipping Act 1854 and sect. 54 of the Merchant Shipping Act 1862. The words of sect. 504 were perfectly general; they were, "no owner of any sea-going ship" shall be liable to more than a specified amount with respect to certain things. The statute was therefore wide enough to give that right to every owner, whether British or foreign. There have been a number of decisions on these Acts which show that the provisions apply only to British ships, and that a foreigner could not limit his liability. In *Cope* v. *Doherty* (31 L. T. Rep. O. S. 173, 307; 4 K. & J. 367; 2 De G. & J. 614), decided on sect. 504, Wood, V.C. said: "I decide entirely upon those general principles that the Legislature was simply intending to regulate those rights which exist between its own subjects, unless otherwise actually expressed, and that there was no intention either to restrict or enlarge the rights of a foreigner." *The Wild Ranger* (7 L. T. Rep. 725; 1 Mar. Law Cas. O. S. 275; Lush. 553), *General Iron Screw Collier Company* v. *Schurmann* (4 L. T. Rep. 138; 1 Mar. Law Cas. O. S. 60; 1 J. & H. 180), and *The Amalia* (8 L. T. Rep. 805; 1 Mar. Law Cas. O. S. 359; Br. & Lush. 151) are to the like effect, and show that the statutes are not to be construed as limiting or extending the liabilities of foreigners unless they do so in express terms. The next class of cases is as to navigation, where the same principles are laid down:

The Zollverein, 27 L. T. Rep. O. S. 160; Swab. 96;
The Saxonia, 6 L. T. Rep. 6; Lush. 410.

In Story's Conflict of Laws (7th edit. 1872), p. 471,

s. 373*g*., the matter is dealt with, and the paragraph ends thus (p. 472): "But beyond that limit"—that is, the three miles limit—"anywhere upon the high seas, British statutes can have no legitimate operation, except under peculiar circumstances, their general force and operation ceasing at that limit." If the Legislature had intended to confer this right on a foreigner for an act done on the high seas, then it would also have imposed a like liability, which could only have been by giving a right of action *in rem*, and the fact that they have imposed no such liability is strong to show that they have conferred no such benefit. The point was decided against our contention in *The Explorer* (*ubi sup.*), but it was not raised again until it was raised before Darling, J. and decided in favour of the defendants' contention in *Adam* v. *British and Foreign Steamship Company Limited* (*ubi sup.*), which ought to be followed.

J. A. Hamilton, K.C. in reply. *Cur. adv. vult.*

June 19.—KENNEDY, J. read the following judgment:—In this case I am of opinion that the plaintiff is entitled to our judgment. If the deceased seaman, who came to his death through the negligence of the defendants' servants, had been a British subject, no doubt, in my view, could have arisen as to the right of the widow to maintain such an action as the present. The action is an action in tort. The defendants, whose servants occasioned the death, are British subjects, and were at the time navigating a British ship, the property of the defendants. Their negligence and the consequent death of the seaman by drowning, which give rise to the claim, both took place on the high seas, "which," to quote the language of Lord Esher (then Brett, L.J.) in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (48 L. T. Rep. 546, at p. 549; 5 Asp. Mar. Law Cas. 65, at p. 68; 10 Q. B. Div. 521, at p. 537), "is the common ground of all countries," and therefore, as he proceeds to state, the well-known rule in the case of actions of tort "with regard to the exclusive jurisdiction of a foreign country does not apply." Does it make any difference that the deceased was not a British subject, but a Norwegian subject? The contention put forward on behalf of the defendants is that the foreign nationality makes all the difference. Now, in considering how this stands, it is, I think, not irrelevant to point out that, if the deceased had been only damaged by the negligence of the defendants' servants and not drowned, he could have prosecuted an action for the negligence in the High Court of Justice if it be assumed, as it properly must be in order to test the right, that the presence of the defendants in this country, and therefore within the jurisdiction, had prevented any technical difficulty arising as to the service of the proceedings upon them. He could equally have maintained his action if, the circumstances being otherwise the same, the defendants, instead of being British subjects, had been foreigners: (see the judgment of Brett, L.J. in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, *ubi sup.*; and the judgment of Sir Robert Phillimore in *The Leon*, 44 L. T. Rep. 613; 4 Asp. Mar. Law Cas. 404; 6 P. Div. 148, citing the earlier decisions of Dr. Lushington in *The Wild Ranger* (*ubi sup.*) and *The Zollverein* (*ubi sup.*). If this be so, it would seem to be rather a strange thing that the foreign nationality of the sufferer by another's negligence in no way prejudices his right of action here if he is only hurt and not killed, yet that, if he is killed, it should form, the circumstances being otherwise identical, an absolute bar to any relief of the sufferer's family under these Acts. The Acts are Acts the express object of which is to create a liability in an action for damages at the suit of relatives who suffer from the death of the deceased person, whenever the act, neglect, or default which causes the death is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof. It is contended, however, by the defendants that such is the law, and the ground upon which it is based is that the Fatal Accidents Acts 1846 and 1864 (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95) must be understood as applicable only to British subjects and those persons, whatever be their nationality, who are actually within the territorial jurisdiction of the British Crown. The deceased man, Johan Davidsson, was a Norwegian subject, and, as I understand the statement of counsel, had his home with his family in Norway.

The defendants properly rely on a recent decision of my brother Darling in *Adam* v. *British and Foreign Steamship Company Limited* (*ubi sup.*), and there is no doubt we cannot decide in favour of the plaintiff in the present case without disagreeing from Darling, J. in regard to that judgment. It becomes, therefore, my duty respectfully to consider the grounds upon which it is based, and to state why I feel myself compelled to differ from his decision. The circumstances there were substantially identical with those of this case. The learned judge in his judgment agreed that "there can be no doubt that had the deceased man been an English subject this action would have lain, notwithstanding that the negligence and death both occurred upon the high seas." He decided against the plaintiff on the ground, as he stated (79 L. T. Rep., at p. 32; 8 Asp. Mar. Law Cas., at p. 421; (1898) 2 Q. B., at p. 432), that "it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refer to them." In a later passage in his judgment, at p. 434, the proposition is stated in a somewhat modified form: "The intention of the Legislature is to be collected from the statute, and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Vict. c. 93." In support of the proposition thus laid down my brother Darling cites passages from the judgments of Dr. Lushington in *The Zollverein* (*ubi sup.*), of Jervis, C.J. in *Jefferys* v. *Boosey* (*ubi sup.*), and of Lord Esher in *Colquhoun* v. *Heddon* (*ubi sup.*). I venture to think that it is very important, in order to judge rightly of the applicability of these expressions of judicial opinions to other cases, to pay careful attention to the kind of case which in each instance gave occasion for the utterance of them. Before proceeding in this direction I will only remark in passing that in *Routledge* v. *Low* (18 L. T. Rep., at p. 878; L. Rep. 3 H. L., at p. 119) Lord West-

bury expressed his dissent from the reasoning in *Jefferys* v. *Boosey* (*ubi sup.*), the sum of which he states to be "the conclusion that a British statute must be considered as legislation for British subjects only unless there are special grounds for inferring that the statute was intended to have a wider operation"; and that Lord Brougham in his judgment in *Jefferys* v. *Boosey* (23 L. T. Rep. O. S., at p. 275; 4 H. L. Cas., at p. 970) states the law in more guarded terms than those quoted from the judgment of the Chief Justice. "Generally," he says, "we must assume that the Legislature confines its enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may, without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments." If, now, we look at the cases in which the judicial dicta in question have been uttered, we find, in my opinion, that in each of them the statutory enactment under consideration was one which related to matter of a special and exceptional kind. In *Jefferys* v. *Boosey* (*ubi sup.*) the Act under consideration was 8 Anne, c. 19, creating the special and peculiar property in literary productions called copyright; in *Colquhoun* v. *Heddon* (*ubi sup.*) the statute was an Income Tax Act, and the particular question was the construction of the words "in or with any insurance company existing on the 1st Nov. 1844." In *The Zollverein* (*ubi sup.*) the principal statutory provision in view was sect. 296 of the Merchant Shipping Act 1854, which imposed a duty in regard to navigation, which has not been imposed by the maritime law, and could not be held in the Court of Admiralty to bind a foreign vessel, and the position is grounded upon the want of equity which there would be in a decision which allowed the foreigner to benefit by a breach of the municipal law to which he could not himself be held amenable. So, again, in the case of *Cope* v. *Doherty* (31 L. T. Rep. O. S. 307; 2 De G. & J. 614) the statutory provisions under consideration, the Merchant Shipping Act 1854, Part 9, were provisions of a peculiar character in so far as they placed a restriction, limiting liability, upon the general law of nations. Under that general law the owners of a ship injured by the negligent navigation of another are entitled to full damages; but to hold the provisions of the Act which created this peculiar restriction as intended to apply to foreigners would be, as Wood, V.C. puts it in his judgment, "an attempt on the part of the British Parliament to legislate for foreigners by taking away those rights and privileges which they enjoy by the general law, which gives full compensation for damages." And even in this case Knight Bruce, L.J., in his judgment on the appeal, reserved a question whether the Act might not apply if instead of both the plaintiffs' and the defendants' ships being foreign, one had been British. "I assume," he says (31 L. T. Rep. O. S. at p. 307; 2 De G. & J. at p. 621), "that the plaintiffs," the parties who were claiming the limitation, "would have been right if both the *Tuscarora* and the *Andrew Foster* had been British in ownership and character, all things else being the same; nor do I say whether the plaintiffs would have been right or wrong, if one only of the two ships had been of that description, or if the collision had happened in a British river or a British port." The law as to the limitation of liability is the same as applied to foreign ships as was afterwards dealt with by the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63).

It seems to me that the Fatal Accidents Acts, which are under our consideration in the present case, embody legislation which is of a very different character. The basis of the claim to which they give statutory authority is negligence causing injury, and that is a wrong which I believe the law of every civilised country treats as an actionable wrong. They create, no doubt, a new cause of action (see per Lord Selborne and Lord Blackburn in *The Vera Cruz* (*ubi sup.*), for previously the relatives of the deceased could not in England sue the wrongdoer. The measure of damages is not the same as in an action by the injured man, and his death is an essential constituent of the right of action. None the less, as I venture to think, is it true to say that in substance the purpose effected by the legislation is to extend the area of reparation for a wrong which civilised nations treat as an actionable wrong; indeed, the right of redress given is, in a sense, according to the decisions of the Queen's Bench (Blackburn and Lush, JJ.) in *Read* v. *Great Eastern Railway Company* (18 L. T. Rep. 822; L. Rep. 3 Q. B. 555) and the Queen's Bench Division in *Griffiths* v. *Earl of Dudley* (47 L. T. Rep. 10; 9 Q. B. Div. 357), so far identified with the right of the injured man that, if death ensues after he has sued and recovered damages, the relatives have no cause of action under this legislation. In Scotland (see Bell's Principles of the Law of Scotland) and in most of the American States (see *Ex parte Gordon*, 14 Otto, 515) the right of action in the relatives of the deceased person for compensation for his death by the negligence of another is recognised by the law, and I believe, though I cannot quote any authority upon the point, that it is also recognised by the law of France and Germany. It seems to me, under all the circumstances and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and certainly that as against an English wrongdoer the foreigner has a right to maintain his action under the statutes in question. It is not necessary to decide whether—assuming, of course, that no technical difficulty arises as to service of proceedings—the action could be maintained in the English courts, the death occurring through negligence in collision on the high seas, and both parties were foreigners, or where the wrongdoers were foreigners and the sufferer English. My present opinion is that an action could be maintained, but I desire to be understood as not expressing, as it is not necessary to express, a decided opinion upon this point. Here the plaintiff seeks to enforce her claim against a British subject, and I cannot see why she should not do so. If she has not the right, we should have the anomaly, as it seems to me, that if a foreigner and an Englishman serving on the same ship were both drowned on the high seas by the same collision negligently caused by an

English vessel, the widow of the one could, and the widow of the other could not, obtain by suing the owners of the ship in fault *in personam* that reparation which our Legislature in these statutes has declared to be a just reparation. Let me add that the view which I take has the weighty authority of Sir Robert Phillimore in *The Explorer* (*ubi sup.*), after argument by Mr. R. G. Williams. That decision was no doubt overruled by the Court of Appeal and the House of Lords in *The Vera Cruz* (*ubi sup.*), but, as I understand, the judgment of the House of Lords is upon a different point altogether—namely, that the Court of Admiralty had no jurisdiction to entertain an action *in rem* for loss of life under Lord Campbell's Act—and it will not be, I think, wholly undeserving of notice that in the case of *The Bernina* (*ubi sup.*), which was litigated in 1886 and 1887—that is, two years after the decision in *The Vera Cruz* (*ubi sup.*) was carried up to the House of Lords—one of the two successful claimants for damages under Lord Campbell's Act in an action *in personam*, against the owners of the wrongdoing ship, was, as I have ascertained from the Admiralty Registry, Habiba Toeg, of Bagdad, the mother (as appears from the statement in the judgment of Lord Esher in *The Bernina*, 56 L. T. Rep., at p. 259; 6 Asp. Mar. Law Cas., at p. 76) and administratrix of Moses Aaron Toeg, a passenger on a ship from London to Bushire and who had lost his life in the collision caused by the negligence of the defendants' servants in the course of the voyage, and who, as I presume from his name and from his mother's nationality, was a foreigner. No question of her right to recover on the ground of nationality either of herself or the deceased was raised by the defendants, and therefore the case is not in any sense a decision in favour of the right. But in a case contested so persistently as this was, it is difficult to suppose that the question would not have been raised, had it been one in which the point could be rightly and successfully taken. I am of opinion that judgment must be for the plaintiff.

PHILLIMORE, J. read the following judgment:—I agree with the judgment of my learned brother. We have here to determine whether a foreigner, the widow of a foreign seaman, killed on the high seas when navigating on board one of the ships of his own country by collision between his ship and a British ship, can maintain an action in England against the English owners of the British ship for the negligence of their servants in causing the collision and death. I start with the proposition that if the man had not been killed, but only injured, he during his life could have maintained an action for damages, such an action being maintainable by the *lex fori* and by the *lex loci delicti commissi*, whether the locus be regarded as English or British territory, or as the high seas over which maritime law, or maritime law as administered in this country, prevails. As regards English or British territory this is common knowledge. That such a tort would also be actionable by the law maritime as administered in this country is shown by *The Ruckers* (4 C. Rob. 73), and by other cases which I am about to cite. I have no doubt that other countries administer the law maritime in the same way. For some proof of it I cite the observations in the American cases of *The Belfast* (7 Wallace, 624) and *Ex parte Gordon* (14 Otto, 515). This not being an action *in rem*, it is not necessary to show that the High Court of Admiralty would, while there was such a separate court, have had jurisdiction. But I have no doubt that it would. The principle of the decision in *The Zeta* (69 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468), and the reasoning of Lord Herschell, in whose judgment all previous cases are cited, the language of my brother Bruce in *The Theta* (71 L. T. Rep. 25; 7 Asp. Mar. Law Cas. 480; (1894) P. 280), and the settled practice of the Admiralty Division to allow in proper cases such actions *in rem*, have concluded this question, the true key to which might have been found long ago in the language of Dr. Lushington in *The Sarah* (Lush. 549). I have hitherto not considered one possible *lex loci*, the law of the foreign ship, in this instance that of Norway. If such a tort were not actionable by the law of Norway, it would be necessary to consider which was the law applicable, whether that of the British ship on which the act of negligence was committed, or that of the Norwegian ship on which the act was felt, or whether, as the death of the deceased seaman was in the sea by drowning, general maritime law, or maritime law as administered in the English courts, should apply. This matter underwent great discussion in *Reg.* v. *Keyn* (*ubi sup.*). It will be found treated of in the separate judgments of Lindley, J. at p. 98 (2 Ex. Div.); of Denman, J. at pp. 101 to 107; Brett, J. at p. 148; Bramwell, J. at p. 150; Lord Coleridge, C.J. at p. 158; and of Cockburn, C.J. at pp. 232 to 238. It would be necessary also to consider the case of *The Leon* (*ubi sup.*). But till it is otherwise pleaded and proved, I take the law of Norway to be the same as our own.

Having thus established my first proposition that an injured man could have maintained during his life an action for damages in such a case as the present, I come to apply the Fatal Accidents Act 1846. This statute enacts as follows: [His Lordship read sect. 1, and proceeded:] These words (of that section) are wide enough, and no one doubts that they apply to foreigners in England, or to British seamen as against a British shipowner on the high seas. There is the *lex fori*, and, if the tort be held to be done on the British ship, the *lex loci*. It has not been pleaded that the law of Norway differs in this respect from ours; and I leave, as before, the possible consequences of such a state of things out of consideration. If the *lex loci* be the law maritime, I am not sure that it must not now be held that the injury done to the relatives of a dead man by killing the bread-winner is to be deemed an actionable tort by the law maritime. The reasoning of the Supreme Court of the United States in the case of *Ex parte Gordon* (*ubi sup.*), already cited, and the fact that by the law of Scotland, and I believe now by the law of many civilised countries, for example, the United States (*ubi sup.*), France (see Zachariae, edit. 1878, vol. 4, p. 17), and Germany, as I am informed, this action lies, lead me to think that if at one time this tort was not actionable by the law maritime, it may yet well be actionable now. I have still to consider the decision and reasoning of my brother Darling in *Adam* v. *British and Foreign Steamship Company Limited* (*ubi sup.*). That decision is in point, and, if we decide now in favour

of the plaintiff, we must disagree with it. It rests mainly, I think, upon the principle that Acts of Parliament are to be deemed not to apply to non-resident aliens unless the court is compelled so to apply them. There are a number of decisions upon the construction of the Merchant Shipping Act of 1854, which set forth this principle as applicable to the construction of statutes imposing a burden upon a foreigner. Perhaps the strongest of these is *Cope* v. *Doherty* (*ubi sup.*); but even in that case the reservation of Knight Bruce, L.J. (31 L. T. Rep. O. S., at p. 308; 2 De G. & J., at p. 621) would make me pause. On the other hand, where it is a case of giving a remedy to a foreigner, the decision of Dr. Lushington in *The Milford* (31 L. T. Rep. O. S. 42; Swab. 362), and the constant practice which has followed upon that decision, is the other way. This latter position is, I think, sound. Our courts are not only open, but open equally, to foreigners as to British subjects; and foreigners who have the benefit of the English common law have also the benefit of English statutes. At any rate, where a statute brings the English law into harmony with the law of the foreigner, as in the case of *The Milford* (*ubi sup.*), I think this must be so. If an Englishman on board a foreign ship, or a foreigner on board a British ship, is run down by a British ship upon the high seas, it seems almost certain that an action would lie. Are the representatives of a foreigner on board a ship of his own nationality, whose national law would probably give them at least as good a remedy as that given by the Fatal Accidents Act, to be deprived of their right to recover because they must have recourse to statute law instead of to unwritten common law? I think not. Is the law to be different for a Scotch owner of a British ship and the English owner of a British ship, and can it be that as against the owner in this case, if he were a Scotchman, the foreigner could maintain an action because the law of solatium is part of the common law of Scotland, but as against an English owner he cannot, because the Fatal Accidents Act is a statutory addition to the common law of England? I think not. There must be judgment for the plaintiff with costs.

Judgment for plaintiff on the question of law, with costs.

Solicitors for the plaintiff, *Stokes* and *Stokes*.

Solicitors for the defendants, *Ince, Colt,* and *Ince*.

June 18 *and* 21, 1901.

(Before MATHEW, J.)

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* THE KING. (*a*)

Seamen—Lascars—Ship registered in the United Kingdom — Crew space — Merchant Seamen (Indian) Act No. 13 *of* 1876—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60).

The crew space required for Lascars, who are British subjects and natives of India, upon ships registered in the United Kingdom, and trading between England and Australia and England and India, is regulated by the Merchant Shipping Act 1894, *and not by the Merchant Seamen (Indian) Act No.* 13 *of* 1876.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

PETITION OF RIGHT.

The petitioners are a corporation owning ships trading between England and India, China and Australia respectively, and have for many years employed to navigate their steamers a class of British subjects, natives of India, called Lascars.

Such Lascars have been shipped for many years in British India under agreements in the form approved by the Governor-General of India in council.

For many years the crew space provided for such Lascars has largely exceeded the crew space required to be provided for Lascars by the Indian Act of 1876 (1876, No. 13, s. 9) in cases to which that section is applicable, but has fallen short of the crew space required to be provided for seamen by sect. 210 of the Merchant Shipping Act 1894 in cases to which that section is applicable.

Two of the petitioner's ships, registered before the passing of the Merchant Shipping Act 1894 in the United Kingdom, in conformity with the Merchant Shipping Act 1854 and the Acts amending the same, traded between England and Australia and England and India, carrying a crew of Lascars accommodated as stated above, and shipped under an agreement as stated above.

A surveyor of ships appointed by the Board of Trade inspected the crew space occupied by the Lascars on the two ships, and alleged that the provisions of sect. 210 of the Merchant Shipping Act 1894 had not been complied with, and reported such failure to the appropriate chief officer of Customs, who thereupon altered the registered tonnage of the ships, and disallowed the deduction of the crew spaces from the tonnages.

The petitioners admitted that if Lascars were seamen within the meaning of that word in sect. 210 of the Merchant Shipping Act 1894, the space required by that section had not been provided for such seamen.

It was submitted by the petitioners that in taking such action the surveyor acted on an erroneous construction of the statutes applicable to such Lascars and their crew space and the registered tonnage of the ships, and wrongly considered that the English Acts and not the Indian Acts regulated the crew space to be provided for the Lascars.

A declaration was accordingly asked for that the crew space provided for such Lascars complied with the statutes in that behalf if it exceeded the crew space required by sect. 9 of the Indian Act 1876, No. 13.

By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 288:

If the Governor-General of India in Council, or the respective legislative authorities in any British possession abroad, by any Acts, ordinances, or other appropriate legal means, apply or adapt any of the provisions in the third part of this Act contained to any British ships registered as trading with, or being at any place within their respective jurisdiction, and to the owners, masters, mates, and crew thereof, such provisions, when so applied and adapted as aforesaid and as long as they remain in force, shall in respect of the ships and persons to which the same are applied be enforced, and penalties and punishments for the breach thereof shall be recovered and inflicted throughout Her Majesty's dominions, in the same manner as if such provisions had

been hereby so adopted and applied and such penalties and punishments had been hereby expressly imposed.

And by sect. 290:

If in any matter relating to any ship, or to any person belonging to any ship, there appears to be a conflict of laws, then, if there is in the third part of this Act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provision, and if there is no such provision the case shall be governed by the law of the place in which such ship is registered.

These sections are re-enacted verbatim in sects. 264 and 265 of the Merchant Shipping Act 1894.

By the Merchant Seamen (Indian) Act No. 1 of 1859:

Sect. lxx. A place or places of shelter shall be provided below, well caulked and substantial, for the men engaged under this Act; such place or places shall be arranged as to allow for the men the following spaces: (1) For each European seaman or apprentice or other person shipped on the same footing as a European seaman nine superficial feet, if the place be not less than six feet in height from deck to deck; or fifty-four cubic feet if the height from deck to deck be less than six feet. (2) For each Lascar or native seaman or other person shipped on the same footing as a Lascar, four superficial feet, and if the place allotted be under the top-gallant forecastle, such forecastle deck shall be not less than 4ft. 6in. above the one below it. Every such place shall be kept free from stores or goods of any kind not being the personal property of the crew during the voyage, and if any such place in any ship is not in the whole sufficiently large to give such space for each seaman and apprentice as hereinbefore required, or is not properly caulked and in all other respects securely and properly constructed and well ventilated, the owner shall for each such failure to comply with the provision of this section, incur a penalty not exceeding 200 rupees; and if any such space as aforesaid is not kept free from goods and stores as aforesaid the master shall, for every such failure to comply with the provisions of this section, incur a penalty not exceeding 100 rupees.

Sect. cxviii. The following words and expressions in this Act shall have the meaning hereby assigned to them, unless there be something in the section or context repugnant to such construction, that is to say: The word "seaman" shall include every person (except master, pilots, and apprentices) employed or engaged in any capacity on board any ship.

By the Merchant Seamen (Indian) Act No. 13 of 1876, sect. 9:

And whereas it is expedient to increase the space required by the said Act, No. 1 of 1859, sect. 70, to be allowed for European seamen and apprentices and for Lascars or native seamen. It is hereby enacted as follows: Such section shall be read as if for the expressions "nine superficial feet," "fifty-four cubic feet," and "four superficial feet," the expressions "ten superficial feet," "sixty cubic feet," and "six superficial feet" were respectively substituted, and as if in the third paragraph of the same section after the word "superficial" the words "thirty-six cubic" were inserted.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 77:

(1) The tonnage of every ship to be registered, with the exception hereinafter mentioned, shall, previously to her being registered, be ascertained by rule 1 in the 2nd schedule to this Act, and the tonnage of every ship to which that rule 1 can be applied, whether she is about to be registered or not, shall be ascertained by the same rule. . . . (3) For the purpose of ascertaining the register tonnage of a ship the allowance and deductions hereinafter mentioned shall be made from the tonnage of the ship as aforesaid. (4) In the measurement of a ship for the purpose of ascertaining her register tonnage no deduction shall be allowed in respect to any space which has not been first included in the measurement of her tonnage.

And by sect. 79:

(1) In measuring or remeasuring a ship for the purpose of ascertaining her register tonnage the following deduction shall be made from the space included in the measurement of the tonnage—namely: (a) In case of any ship (i.) any place used exclusively for the accommodation of the master and any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto. The regulations referred to are those contained in the 6th schedule above set out.

By sect. 742:

In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them—that is to say: "Seaman" includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.

And by sect. 210:

(1) Every place in any British ship occupied by seamen or apprentices and appropriated to their use, shall have for each of those seamen or apprentices a space of not less than seventy-two cubic feet, and of not less than twelve superficial feet measured on the deck or floor of that place, and shall be subject to the regulations in the 6th schedule of this Act, and those regulations shall have effect as part of this section; and if any of the foregoing requirements of this section is not complied with in the case of any ship, the owner of the ship shall for each offence be liable to a fine not exceeding twenty pounds. (2) Every place so occupied and appropriated shall be kept free from goods and stores of any kind not being the personal property of the crew in use during the voyage, and if any such place is not so kept free, the master shall forfeit and pay to each seaman or apprentice lodged in that place the sum of one shilling for each day during which, after complaint has been made to him by any two or more of the seamen so lodged, it is not so kept free.

And by the 6th schedule:

Regulations to be observed with respect to accommodation on board ships: (1) Every place in a ship occupied by seamen or apprentices appropriated to their use shall be such as to make the space which it is required by the second part of this Act to contain available for the proper accommodation of the men who are to occupy it, and shall be securely constructed, properly lighted and ventilated, properly protected from weather and sea, and, as far as practicable, properly shut off and protected from effluvium which may be caused by cargo or bilge water. (2) A place so occupied and appropriated as aforesaid shall not authorise a deduction from registered tonnage under the tonnage regulations of this Act unless there be in the ship properly constructed privies for the use of the crew, as such number and of such construction as may be approved by the surveyor of ships. (3) Every place so occupied and appropriated as aforesaid shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors of ships under this Act, who shall, if satisfied that the same is in all respects such as is required by this Act, give the collector of Customs a certificate to that effect, and if the certificate is obtained but not otherwise, the spaces shall be deducted from the register tonnage. (4) No deduction from tonnage as aforesaid shall be authorised unless there is permanently cut in a beam and cut in or painted on or over the doorway or hatchway of every place so occupied and appro-

priated the number of men which it is constructed to accommodate with the words "Certified to accommodate seamen." (5) Upon any complaint concerning any place so occupied and appropriated as aforesaid, a surveyor of ships may inspect the place, and if he finds that any of the provisions of this Act with respect to the same are not complied with, he shall report the same to the chief officer of Customs at the port at which the ship is registered, and therefore the registered tonnage shall be altered, and the deduction aforesaid in respect of space disallowed, unless and until it be certified by the surveyor, or by some other surveyor of the ships, that the provisions of this Act in respect of the place are fully complied with.

The Merchant Shipping Act 1867 (30 & 31 Vict. c. 124), in sect. 9, contained similar provisions to those in the Merchant Shipping Act 1894, ss. 79, 210, and sched. 6.

Sir *Robert Reid*, K.C. (*Bray*, K.C. and *Scrutton*, K.C. with him) for the Peninsular and Oriental Steam Navigation Company. The point raised here is whether certain provisions of the Merchant Shipping Act 1894, relative to the crew space on ships, are applicable to the case of Lascars. What we contend is that by virtue of statutory provision in Imperial Acts, followed by statutory provision in Indian Acts, the amount of accommodation required by Lascars is regulated by the Indian statues, and is not regulated by the Merchant Shipping Act 1894. The rules as to space laid down by the Indian Government have been complied with. Before the year 1867 there was no provision in any British Act regulating the crew space in any ship. The first statute is 4 Geo. 4, c. 80, passed in 1823, and in accordance with sects. 25 and 26 of that Act an Indian Act of 1850 was passed, which is now repealed, that required compliance with certain regulations in the employment of Lascars and Indian servants in British ships to be complied with, though it was not until seventeen years later that a British Act dealt with the question of crew space. He referred to the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 288, 290. These sections are reproduced in the Merchant Shipping Act 1894, but there are provisions in 1854 authorising the Governor-General to apply and adapt any provisions in this statute. [Mathew, J.—Does this Act deal with crew space?] No. There is no crew space dealt with until 1867. Taking the Act of Geo. 4 and this Act of 1854, as early as 1854 regulations could be made in India for the accommodation of Lascars, and there was power to adapt the provisions of the British Act in regard to them, but this Act did not include crew space. The next statute to be considered is the Merchant Seamen (Indian) Act No. 1 of 1859. The preamble of that statute refers to the Merchant Shipping Act 1854, and by sect. 70 crew space has to be provided for European seamen and also for Lascars. It is in that Act that the first step is made to provide for crew space in any Indian legislation. In 1867 the Merchant Shipping Act of that year was passed (30 & 31 Vict. c. 124), and by sect. 9 certain crew space is required in British ships. In 1876 the Merchant Seamen (Indian) Act No. 1 of 1876 was passed, and by sect. 9 the Indian Act of 1859 was amended. We say that we have supplied the accommodation necessary under the Indian Acts, and that is the accommodation required. Both the Merchant Shipping Acts of 1854 and 1867 have been repealed by the Act of 1894, and we contend that, having regard to sect. 38 of the Interpretation Act 1889, whatever rights we had under those statutes are still existing unless they are expressly repealed. [Mathew, J.—But there was nothing but the Indian Acts to affect you. These other statutes do not appear to have touched you in any way.] That is what we say—namely, that the provisions as to crew space in the Act of 1867 were concurrent and always subject to the Indian legislation affecting Lascars. Although the Act of 1854 has been repealed, yet the Indian Acts made in pursuance of that statute were, and still are, operative, unless expressly or necessarily repealed by subsequent legislation. I submit that they have never been repealed. It is said that the legislation that makes it wrong for us to proceed under the Indian Acts is the Merchant Shipping Act 1894. I am aware that there is a provision in that statute which deals with the conflict of laws, and which says that in such a case the British Act will apply, but I contend that there is no conflict of laws so far as Lascars are concerned. The laws are concurrent, and each applies to its own subject-matter. He referred to the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 77, 79, 125, 210, 260, 261, 264, 265, 735, 742, sched. 6. If the Indian Act of 1876 had been passed in 1895 it would have been valid under sect. 264, unless there was a conflict. In this way I am assisted by the Interpretation Act 1889, and enabled to treat the Indian Act of 1876 as though it had been passed in 1895 in India, or which is the same proposition, but in a reverse manner, the Act of 1894 of Great Britain as though it had been passed in 1875. If there is a conflict, it is obvious that the Imperial Act will prevail; or if there is no provision relating to the subject, because the ships are registered in Great Britain. But here there is a general enactment passed with reference to the existing legislation, the statute of Geo. 4, and also with reference to the previous British Act of 1854 and the Indian legislation made in pursuance of the undoubted legal powers which were given. There can be no conflict in such a case. A conflict can only arise where you cannot reconcile the two provisions. The Act of 1894 requires crew space for a "seaman," not "British seaman." The fact is that the conflict does not arise, because by virtue of statutory provisions the subject matter is capable of being dealt with under the jurisdiction of the Governor-General of India in Council. The question is whether the Act of 1894 necessarily expresses an undoing of that which has been lawfully done by the Indian legislation.

The *Attorney-General* (Sir R. Finlay, K.C.) (the *Solicitor-General*, Sir E. Carson, K.C., and *Sutton* with him) for the Crown.—In the first place these vessels are registered in the United Kingdom, while in the various Acts to which the other side have referred provision is made for local legislation where the vessel is registered in British possessions abroad. Again, the contentions raised are not confined to vessels trading in Indian ports, but must extend to the vessels wherever they are, and must apply not only to the Lascar crew space but also to the crew space for Europeans. He referred to

4 Geo. 4, c. 80, ss. 2, 20, 25, 26.

The other side are in error in supposing that

the Indian statutes were regulations made under sect. 26. They were legislation made quite apart from any Imperial Act. The recitals of the Indian Acts show this, for they do not refer to the Act of Geo. 4. He referred to

Navigation Act 1849 (12 & 13 Vict. c. 29), ss. 7, 8.

In that year, 1849, Lascars became British seamen for the purpose of the Navigation Acts. The first relevant Act is the Merchant Seamen (Indian) Act, No. 1, 1859. When one looks at the preamble and the following sections it is clear that these are not regulations made under the Act of Geo. 4. It is an Act of the Indian Legislature passed with reference to sect. 288 of the Merchant Shipping Act 1854, which it recites at length. That Act contained no provision as to crew space, but in the Indian Act there is a regulation as to crew space in sect. 70 which relates to both European seamen and Lascars. I submit that that shows that the Indian Act does not contain regulations made in pursuance of 4 Geo. 4, and the only British legislation in reference to which it is passed is sect. 288 of the Act of 1854, and part 3 of that Act to which sect. 288 relates. That shows that European sailors and Lascars for this purpose stand on the same footing, and so if the Indian Act prevails as to Lascars it must do so as to European sailors. He referred to

Merchant Shipping Act 1867, 30 & 31 Vict. c. 124, s. 9.

That is the first Imperial statute that requires crew space. It is to be read as a part of the Merchant Shipping Act 1854, and by sect. 2 of that Act "seaman" is defined to mean "every person (except masters, pilots, and apprentices duly indentured and registered) engaged in any capacity on board any ship." When the Act of 1867 was passed, it provided that as regards every British vessel there should be a certain crew space for the seamen. No distinction is to be made between Lascars and other seamen. He referred to

Merchant Shipping Act 1894, 57 & 58 Vict. c. 60, ss. 77, 79, 113, 125, 210, 260, 264, 265, 735, 742, sched. 6;

Interpretation Act 1889, 52 & 53 Vict. c. 63, s. 18.

I submit that so far from the context otherwise requiring in the case of sect. 210 of the Act of 1894 and the incorporated 6th schedule, everything in the context points to the fact that the same space is to be provided for all seamen on board British ships. The position taken up by the Board of Trade in this matter has not been shaken by the argument of the other side, and these provisions as to crew space apply in the case of all seamen in British vessels. It has not been made out that the vessels in question, which have been registered here in the United Kingdom, are protected by the Indian Acts.

Sir *R. Reid* in reply. *Cur. adv. vult.*

June 21.—Mathew, J.—This was a petition of right presented by the Peninsular and Oriental Steam Navigation Company under the following circumstances: The petitioners are owners of ships trading between England, Australia, and India, and among their ships are the *Australia*, trading between England and Australia, and the *Oriental*, trading between England and India. The crews of those ships are composed of European seamen and a class of British subjects, natives of India, who are known as Lascars. The agreements with the Lascars, these native seamen, are entered into in British India, and are in accordance with sect. 125 of the Merchant Shipping Act 1894. The petitioners sought for a declaration that the crew space provided for the Lascars in their ships was regulated by the Indian Act of 1876, with which they alleged they had complied, while it was contended for the Crown that the subject-matter was regulated by sect. 210 of the Merchant Shipping Act 1894. These ships were registered in the United Kingdom in accordance with the provisions of the Merchant Shipping Act 1854 and the statutes amending the same. Now, the first statute to which my attention was called was 4 Geo. 4, c. 80, s. 25, and by that section, contained in the Act which threw open trade between the British possessions and India, the Governor-General of Fort William in Council was required, as soon as may be, to make, ordain, and publish rules and regulations to be observed by masters and owners of ships trading under the authority of this Act. Ships trading under the authority of this Act "were ships trading between any of the British possessions and India, the crews of which ships or vessels shall be wholly or in part composed of Asiatic sailors, for the due supply of provisions, clothing, and other necessary accommodation for such sailors." Sect. 26 provided that all such rules and regulations, until they shall be repealed or altered, shall be observed and performed according to the true intent and meaning thereof, in like manner as if they had been inserted in and had formed part of the Act. Now, it was contended by the counsel for the petitioners that the Governor-General was given absolute power under that statute for the time being, to exercise an exclusive jurisdiction for the protection of Lascars. It was provided, as I have said, that if any regulations were made by the Governor-General, they were to have the effect of being inserted in the statute, and therefore to have statutory operation; but it was not disputed, and it could not be disputed, that any such regulations being made, Parliament would have the power to modify and alter them. Now, the argument of the learned counsel for the petitioners was this, that that Act authorised the subsequent Indian legislation, to which I shall have to refer, as to Lascars, and that those subsequent Acts were to be traced to that statute and the authority given by that statute, and that an independent code of regulations was contemplated in consequence for Lascars as distinguished from other seamen on board these ships. I am satisfied that the Indian legislation did not spring from the statutes in question, and that the statute of Geo. 4 had no relation to the Indian Acts, and that these statutes spring out of the Merchant Shipping Act of 1854. Now, on turning to that Act it is clear, in the first place, that it applied in terms to such ships as the petitioners', to their crews, and on turning to the definition of seaman in that Act, it included all persons employed in any capacity on board any ship within the meaning of the Act; and no distinction was drawn between any parts of the different crews, between Lascars and European seamen. There seems to be no reason why any such distinction should be made, and, as I have said, the definition clearly indicated that there was no intention to make

any such distinction. The statutes contained various provisions in Part III. as to the crews of the ships referred to in the statute. There was no provision, and that was agreed, as to the spaces to be appropriated to any of the crew, and in the third part of the Act really the only provisions which had any reference to the accommodation of the crew was that contained in sect. 231, and that appeared to be confined to sleeping accommodation only. The statute contains two important sections which are set out in the plea and answer. By the first of those sections, 288, it was provided that "If the Governor-General of India in Council or the respective legislative authorities in any British possession abroad, by any Acts, ordinances, or other appropriate legal means, apply or adopt any of the provisions in the third part of this Act contained to any British ships registered at, trading with, or being at any place within their respective jurisdictions, and to the owners, masters, mates, and crews thereof, such provisions, when so applied and adopted as aforesaid, and as long as they remain in force, shall, in respect of the ships and persons to which the same are applied, be inforced" as provided for in Part 3. Sect. 290 went on to provide that "If in any matter relating to any ship or to any person belonging to any ship there appears to be a conflict of laws, then, if there is in the 3rd part of this Act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provisions; and if there is no such provision the case shall be governed by the law of the place in which such ship is registered." Now, the effects of that appear to be perfectly plain. Any legislation in India or elsewhere, as described in the section, is kept under the control of the Imperial Parliament. Where the law of the ship is in conflict with any ordinance made by the Governor-General in India, the law of the ship is to prevail. That statute having been passed, the first Indian Act which relates to this matter was passed by the Governor-General of India in Council in 1859. Now that Act, as appears from the preamble, was clearly passed under the powers conferred by sect. 288. I need not read the section, which is set out in the preamble to that statute. This Indian Act provided for the first time, and very imperfectly, for spaces to be appropriated to the sailors on board, and sect. 70 contained these provisions: "A place or places of shelter shall be provided below a well caulked and substantial deck for the men engaged under this Act; such place or places shall be so arranged as to allow for the men the following spaces," and then for each European seaman a provision was made, and for the Lascars in the same way a very scanty provision was also made. That statute was acted upon, and I am told continued to be acted upon down to the passing of the amending Act in the year 1876. Meanwhile, by the Merchant Shipping Amendment Act of 1867, further provision was made for spaces to be appropriated to the sailors on board such ships as these. I need not refer to the provisions of that statute, because they are repeated with certain additions by the Act which repealed the Act of 1867—namely, the Merchant Shipping Act of 1894. In the Merchant Shipping Act of 1894, under sect. 210, there is the provision as to the spaces to be appropriated to the members of the crew, and there is a schedule, and both statute and schedule are set out in the plea and answer. Now, when that Act was passed, there can be no question that the Indian Act was in conflict with the Imperial Act. The provisions made by the one, scanty and inadequate as it certainly was, was entirely set aside, and better accommodation provided under the provisions of the Act of 1894, and in those circumstances it appears perfectly clear that in the conflict the Imperial Act must prevail. Sect. 265 of the Act of 1894 repeated the provisions of sect. 288 of the Act of 1854. It preserved, therefore, the enactment that in case of conflict the Imperial Act should prevail, and that appears to me to be abundantly clear as the result of the different enactments, and there would appear to be no doubt as to position of the petitioners and of the Crown with reference to this matter.

I ought to add, though perhaps it is not very important, that after this Act of 1859 and after the Act of 1867 an amending Act was passed by the Indian Legislature, and the provisions of that Act did expand and did extend to some extent the provisions of the earlier Act, but left the British seaman and the native alike in a much worse position than they would have been under Imperial Legislation. Now, how was this contention on the part of the Crown, which appears to me to be right, sought to be met on the part of the petitioner. The argument was an extremely subtle one, but it appears to me an entirely untenable one. It was said you must go back to the Act of George IV., and that initiated a series of provisions confined to Lascars, and that they were therefore intended to be dealt with by that independent legislation, and where you find the word "seaman" in an Imperial Act *in pari materiâ* you must insert the words "except Lascars." I see no ground whatever for any such contention. As I have said, it appears to me the Act of George IV. was not the source of the subsequent statutes and that they had a different origin. I see no indication whatever of any intention that a separate and exclusive system of legislation should be maintained with respect to the Lascars who constitute part of these crews. But the object of the argument, of course, was to make out that the legislation by the Indian Acts and by the Imperial Act were not in conflict, but ran parallel to each other. As I said, I see no ground whatever for any such suggestion. Attention was called to one section of the Act of 1894—sect. 260—and, if I follow the argument correctly, what was attempted to be made out was this: That section related to the application of Part 1 of the Act, which related to the crews, among other matters, and provided, "This part of this Act shall, unless the context or subject-matter requires a different application, apply to all sea-going ships registered in the United Kingdom, and to the owners, masters, and crews of such ships." Now, it was said the crews of those ships, where they consisted of Lascars and Europeans, required an application according to the subject-matter. The subject-matter was partly, therefore, Lascars, and the interpretation of that section points to the interpretation contended for by the learned counsel for the petitioners, that there was intended to be separate legislation starting with the Act of

George IV., and that that section recognised the existence of that intention. Again, it seems to me to be impossible to act upon any such far-fetched argument, and the case appears to me to be a perfectly plain one. It follows that the Crown is entitled to the declaration asked for: That the petitioners since 1867 have been, and are now, bound to appropriate to the use of the Lascars the accommodation for seamen specified in sect. 210 of the Act of 1894 and the 6th schedule as part of that section. Further, that by sect. 265 of the Act of 1894 the provisions of that Act relating to the accommodation for seamen must govern that matter, and not those of the Indian Acts. That was the one point which was discussed before me, and which it was arranged should be disposed of in the first instance, and on that point my judgment is in favour of the Crown.

Judgment accordingly.

Solicitors: *Freshfields; Solicitor to the Board of Trade.*

May 9 and June 15, 1901.

(Before BIGHAM, J.)

ROYAL EXCHANGE ASSURANCE CORPORATION v. SJÖFORSAKRINGS AKTIEBOLAGET VEGA. (a)

Marine insurance — Time policy — Continuation clause—Policy for twelve months with continuation clause—Policy for more than twelve months — Validity — Contract executed abroad but negotiated in England—By what law governed—Stamp Act 1891 (54 & 55 *Vict. c.* 39), *ss.* 92, 93.

A policy of marine insurance contained the following continuation clause: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the continent of Europe at a pro ratâ *daily premium to the within." At the expiration of the twelve months the vessel, having been damaged, was in a port abroad, and her owners intended to bring her home under temporary repairs. While on the voyage home she was lost.*

In an action on the policy in respect of the loss which had thus occurred after the twelve months:

Held, that the policy, by reason of the continuation clause, was a policy for more than twelve months, and, being a time policy, was therefore invalid under sect. 93, sub-sect. 3, of the Stamp Act 1891, *and could not be given in evidence in respect of the loss which had occurred after the expiration of the twelve months.*

The defendants were a Swedish company, and the policy was executed in Sweden, but it was negotiated in London by the London agent of the defendants. It was in the English language, and was on an ordinary Lloyd's form, and there was a provision that if there were any dispute the defendants agreed to be bound in all things by the jurisdiction and decision of the English law courts.

Held, that the contract was a contract made in England, and should be governed by English law as the intention of the parties was that it should be so construed according to English law.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

FURTHER CONSIDERATION by Bigham, J. in a commercial cause in which the plaintiffs claimed 750*l.* and interest under a marine policy of reinsurance subscribed by the defendants.

By a policy dated the 20th Oct. 1898 Messrs. Pickford Brothers, brokers at Lloyd's, effected on behalf of the owners of the steamship *Merrimac*, with Messrs. Gray, Dawes, and Co., an insurance for 4200*l.* on the hull and machinery of the *Merrimac* against all risks "for and during the space of twelve calendar months commencing at noon 18th Oct. 1898; and ending at noon 18th Oct. 1899." At the foot of the policy were the words: "Including printed clauses as attached." Attached to the policy was a printed slip, headed "Elder, Dempster, and Co. Time clauses." No. 7 of these clauses provided:

Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until her arrival at her port of final destination in the United Kingdom or on the continent of Europe at a *pro ratâ* daily premium to the within.

By a policy, dated the 24th Oct. 1898, Gray, Dawes, and Co. reinsured with the plaintiffs 1050*l.* of the 4200*l.* against the risk of total or constructive total loss only, and this policy was expressed to be "a reinsurance of Gray, Dawes, and Co., underwriters, subject to terms, *pro ratâ* returns, continuation, valuation clauses, and conditions of the original policy or policies, and to pay as may be paid thereon." This policy was for the same period as the first policy—namely, "for the space of twelve calendar months from noon 18th Oct. 1898 to noon 18th Oct. 1899."

By the policy now sued upon, dated the 22nd Oct. 1898, the plaintiffs reinsured with the defendants, a Swedish company, 750*l.* of the 1050*l.* reinsured by them, and this policy was executed in Stockholm. It was against risk of total and (or) constructive total loss only, and was for the same period as the other two policies—namely, "for and during the space of twelve calendar months commencing at noon on the 18th Oct. 1898, and ending at noon on the 18th Oct. 1899." This policy contained these clauses: "Continuation clause as per original policy," and it was expressed to be a:—

Reinsurance to the Royal Exchange Assurance Corporation, subject to all the same clauses, terms, conditions, continuations, &c., that do or shall attach to the original policy and (or) policies, and to pay and (or) receive as may be paid and (or) received thereon, anything herein to the contrary notwithstanding. All claims and (or) losses payable in London. In the event of claim the Vega Company agree and undertake to pay upon the claim note of the Royal Exchange Assurance Corporation stating such claim to have already been settled by same. In case of any dispute under this policy the Vega Company agree to be bound in all things by the jurisdiction and decision of the English law courts.

During the currency of these policies the *Merrimac* sustained heavy damage, and put into Quebec for temporary repairs. Temporary repairs were effected in Quebec with the intention of bringing the vessel home for permanent repairs.

On the 25th Oct. 1899, after the expiration of the twelve months for which the vessel was insured, the *Merrimac* sailed from Quebec, and was totally lost on that voyage home.

At the trial before Bigham, J. the policy of reinsurance sued on was tendered in evidence. The policy was not stamped, and the learned judge at the trial took the objection, according to his previous decision in *Charlesworth* v. *Faber* (5 Com. Cas. 408), that the policy being a time policy, and being for a period exceeding twelve months, was invalid by reason of the provisions in sect. 93, sub-sects. 2 and 3 of the Stamp Act 1891, but he reserved the point for further consideration.

The sections of the Stamp Act 1891 applicable to the case are set out in the judgment of the learned judge.

Joseph Walton, K.C. and *A. H. Chaytor* for the plaintiffs.—The policy of re-insurance upon which the plaintiffs sue is a valid policy. The question is whether it can be stamped, or whether by reason of the continuation clause which is incorporated into it, it is a policy for more than twelve months, and therefore invalid as a time policy for more than twelve months. The same question arose in *Charlesworth* v. *Faber* (5 Com. Cas. 408), as to the effect of the continuation clause, and was decided against the contention of the plaintiffs in this case. It was there decided that the re-insurance policy, being, by reason of this continuation clause, for a period exceeding twelve months, was invalid. The point was not there argued, and it is submitted that that decision was wrong. Even if that case was rightly decided, the present case is distinguishable. In that case the policy was issued in London, and was governed by English law; whereas here the policy is issued in Sweden, and is to be construed according to Swedish law. There is therefore this question to be considered, whether these provisions of the Stamp Act 1891 apply to this policy at all. The contract must be governed by Swedish law, so far at least as relates to the form of the contract, and if the form of the contract is such that it would have been valid according to Swedish law, then it can be enforced in this country although there may be a non-compliance with the provisions of the Stamp Act. By Swedish law this continuation clause would have been free from any objection. Speaking generally, the legality of a contract is to be determined by the law of the country where the contract was made; where, however, the question is merely one of procedure, then it is determined by the law of the country where it is sought to be enforced. If the question relates to the right and validity of the contract itself, then it is governed by the law of the country where the contract was made; but as to procedure it is otherwise. This was clearly laid down in *Leroux* v. *Brown* (20 L. T. Rep. O. S. 68; 12 C. B. 801), where it was held that an action would not lie in the courts of this country to enforce an oral agreement made in France (and valid there), which, if made here, could not, by reason of the Statute of Frauds, have been sued upon. But if the section of the Statute of Frauds there applicable had made the contract invalid altogether, then the law of France would, by that decision, have applied and the action could have been maintained in this country. In accordance with this view, in the converse case of *Bristow* v. *Sequeville* (5 Ex. 275), it was held that a document, which, by the law of a foreign country is not admissible in evidence for want of a stamp, may, nevertheless, be admitted in this country; but where, by the foreign law, the want of a stamp renders the contract void, it cannot be enforced here. The cases of *Guepratte* v. *Young* (4 De G. & S. 217) and *Branley* v. *South-Eastern Railway Company* (6 L. T. Rep. 458; 12 C. B. N. S. 63) are to the same effect. Applying these principles to the present case, the Stamp Act 1891, in sect. 93, says that the policy, being a time policy, and being for a period exceeding twelve months, is invalid altogether. That does not deal with procedure only, but the essential legality of the contract. Therefore, although this policy could not have been sued upon if made here, it can be sued upon because it was made in Sweden. Secondly, even assuming that the Stamp Act does apply, yet this policy can be stamped after execution upon paying the penalty. The contract was not one contract for a period exceeding twelve months; it was really two contracts, one for time—namely, for the twelve months—and the other for a voyage, and the termini of that voyage would be the place where the ship might be at noon on the 18th Oct. 1899 and her port of final destination. In that view of the case the policy would come within sect. 94 of the Act, which provides that: "Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time." Under that section the policy may be regarded as constituting two contracts, one for time and one for the voyage, and it would be good on being stamped accordingly.

Theobald Mathew (*Scrutton*, K.C. with him) for the defendants.—The policy is governed by English and not by Swedish law. The parties clearly intended the contract to be construed according to English law. The policy was on an ordinary Lloyd's form, as the previous policies were. It was negotiated in London, and claims were to be payable in London, and there was an express stipulation that the defendants were "to be bound in all things by the jurisdiction and decision of the English law courts." The contract was not really made in Sweden, but even if it were, it does not follow that it must be interpreted by Swedish law. *Primâ facie* the *lex loci contractûs* governs the construction of the contract. The court, however, may look at the evidence for the purpose of seeing whether the parties intended otherwise:

Re Missouri Steamship Company Limited, 61 L. T. Rep. 316; 6 Asp. Mar. Law Cas. 423; 42 Ch. Div. 321.

Here the whole facts show that the parties intended English law to apply. By clause 7 of the time clauses an obligation was imposed to issue a continuation policy. The whole time covered by the policy would be therefore more than twelve months, and the policy would be invalid under sect. 93 of the Act. He referred to *Gedge* v. *Royal Exchange Assurance Corporation* (5 Com. Cas. 229), and Bigham, J. referred to *Buchanan and Co.* v. *Faber* (4 Com. Cas. 223).

Joseph Walton, K.C. in reply.

Cur. adv. vult.

June 15.—BIGHAM, J. delivered the following judgment:—The only question in this action to be dealt with by me at present is as to the admissibility in evidence of the policy sued on. The facts so far as they are material are as follows: On the 20th Oct. 1898 Messrs. Gray, Dawes, and Co., effected a policy of insurance on a vessel called the *Merrimac* for the space of twelve calendar months from the 18th Oct. 1898 to the 18th Oct. 1899. That policy was to run, therefore, for twelve months from the 18th Oct. 1898 to the 18th Oct. 1899. The policy was in the ordinary Lloyd's form, and it contained at the bottom of it the words: "Including printed clauses as attached"; and there was attached to the policy a slip containing a number of stipulations headed: "Time clauses." One of the stipulations, the 7th, was as follows: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom, or on the Continent of Europe, at a *pro rata* daily premium to the within." The amount of the policy was for 4200*l.* That was a policy which was clearly an English contract, governed exclusively by English law. Subsequently, the present plaintiffs, the Royal Exchange Assurance Corporation, reinsured for Gray, Dawes, and Co., a part of that risk, namely, 1050*l.* That reinsurance policy purported to be on its face: "A reinsurance of Gray, Dawes, and Co., underwriters, subject to terms, *pro rata* returns, continuation, valuation clauses, and conditions of the original policy or policies, and to pay as may be paid thereon." That policy is also on the ordinary Lloyd's form, and like the first policy is an English policy governed exclusively by English law. Those two policies being in existence, the present plaintiffs effected a third policy reinsuring part of the risk which they had already reinsured. They reinsured 750*l.*, and they reinsured it with the defendants in this way. The defendants are a foreign company with their head office in Sweden, and, as I understand, they are a corporation constituted according to the Swedish law. Their business is to insure marine risks, and for the purpose of carrying on that business they have in London an agent named Guttman, who solicits orders and business on behalf of the defendant company, and having obtained offers of business he submits these offers to the defendants in Stockholm, and they either accept them or reject them. If they accept them they then issue a policy. In this case Guttman submitted this reinsurance on behalf of the Royal Exchange Corporation to the defendants. The defendants accepted the offer and then issued the policy which is now sued on. This policy sued on is also on the ordinary Lloyd's form. It is for all practical purposes, word for word, the same as the two previous policies. It is for the space of twelve months commencing at noon on the 18th Oct. 1898, and ending at noon on the 18th Oct. 1899, the same period as in the two other policies, and it contains these words: "Continuation clause as per original policy." That continuation clause is the clause to which I have already referred, and it appears *in extenso* in the first policy. Then this policy contains the following memorandum, which is not to be found in the first two policies: "Being a reinsurance to the Royal Assurance Corporation, subject to all the same clauses, terms, conditions, continuations, &c., that do or shall attach to the original policy and (or) policies and to pay and (or) receive as may be paid and (or) received thereon anything herein to the contrary notwithstanding. All claims and (or) losses payable in London. In the event of claim the Vega Company agree and undertake to pay upon the claim note of the Royal Exchange Assurance Corporation stating such claim to have already been settled by same. In case of any dispute under this policy the Vega Company agree to be bound in all things by the jurisdiction and decision of the English law courts." Then the document is sealed or executed according to the law of Sweden. When the twelve months expired —that is to say, when the period from the 18th Oct. 1898 to the 18th Oct. 1899 had come to an end, the ship was in Quebec. She had been seriously damaged apparently. As to this I have had no evidence so far, but it was said that she was seriously damaged at that time, and the shipowners proposed to bring her home under temporary repairs. The defendants declined to be bound by the risk which would be involved in bringing her home in that condition, and they accordingly defend this action. They thought—rightly or wrongly—that their policy, even with the continuation clause, did not oblige them to undertake a risk of that kind. The ship came home under temporary repairs after the twelve months had been run out, and she was lost. She went to the bottom and thereupon this action was brought. It came on for trial before me on the 9th May, and the plaintiffs then tendered in evidence the policy which I have just described, the third policy in the series, the policy issued by the defendants. It is not stamped, and the question I have to decide is whether I ought to admit the document in evidence, and, if I ought, then on what terms as to penalty or otherwise.

The provisions of the Stamp Act 1891 with reference to policies are as follows. Sect. 14 provides: "(1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee, of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds." Then sub-sect. 4 of the same section provides: "Save as aforesaid, no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed." Those provisions are general provisions applicable to all documents which are required to be stamped. Then there are a certain number of provisions of the Act, beginning with sect. 92, which relate

exclusively to policies of sea insurance. Sect. 92 defines what a policy of sea insurance is. It says: "For the purposes of this Act the expression 'policy of sea insurance' means any insurance (including re-insurance)"—and therefore including a policy of the kind sued upon in this action—"made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of or any other interest which may be lawfully insured in or relating to any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance." Then sect. 93 provides: "(1) A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act 1862) shall not be valid unless the same is expressed in a policy of sea insurance." That means to say that there must be a writing. Then sub-sect. 2 says: "No policy of sea insurance made for time shall be made for any time exceeding twelve months." Then sub-sect. 3 of sect. 93 provides as follows: "A policy of sea insurance shall not be valid unless"—and I think here the words "if it be a time policy" must be read in—"unless, if it be a time policy, it is made for a period not exceeding twelve months." Therefore by sect. 93 it is perfectly clear that a policy made for more than twelve months is not valid, whatever that expression may mean. Then sect. 95, sub-sect. 1, says: "A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following, that is to say," the first refers to a mutual insurance and need not be here mentioned; then "(*b*) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only." Then sub-sect. 2 of that section says: "Provided that a policy of sea insurance shall, for the purpose of production in evidence, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of one hundred pounds." Now the first question is whether this policy of reinsurance now sued on is a policy for more than twelve months, because if it is, it is invalid. I am of opinion that it is a policy for more than twelve months. It is made for a time exceeding that period. It is true that the risk may possibly not continue beyond the period of twelve months, for the vessel may be in a home port when the twelve months expires; but in my view the mere fact that the policy is only to extend beyond the twelve months in certain events does not prevent it from coming within the enactment. It was suggested that I might regard the document as containing two separate contracts of insurance, one for time, namely, for twelve months, and another for a voyage, under clause 7 of the "time clauses," and then, upon payment of the penalty mentioned in sub-sect. 2 of sect. 95, the document would be admissible in evidence to prove the insurance of the voyage—in this case the voyage from Quebec home—as distinguished from the time. I do not, however, think this contention is sound. I should be obliged to say if it were sound, that there was one contract of insurance to which no implied warranty of seaworthiness attached, namely, the time policy, and another to which such a warranty did attach, namely, the voyage policy, and that both contracts were to be discovered in the one document. Moreover, the voyage is not in any way specified; the termini are not named. There is therefore no description of the particular risk insured within the meaning of sub-sect. 3 of sect. 93 of the Act, which says: "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure." It is clear that a voyage policy which does not specify the termini of the voyage is not a valid policy at all. The risk in a policy of insurance must be defined, and if it is a voyage policy the voyage must be described by its termini. It must state where the voyage commenced and where it ends; it need not do more; it need not specify what route is to be followed, or what ports of call may be put into during the voyage itself, but it must at all events specify the place where the voyage is to commence and the place where it is to end; and so with a time policy. A time policy must specify the date when the risk is to commence, and must also specify the date when the risk is to end. I therefore am of opinion that this document cannot be regarded as constituting two policies of insurance, one for time and another for the voyage; nor do I think it can be regarded as constituting two separate policies of insurance for time—that is to say, one for twelve months and another for an undetermined time commencing at the end of the twelve months and finishing nobody knows when. Therefore I come to the conclusion that it is one contract for more than twelve months, and therefore invalid within the meaning of the statute; but I do not mean to decide, nor is it necessary for me to decide, that this policy is not perfectly good as a time policy for twelve months. I think if the loss had occurred during the twelve months the policy could have been given in evidence against the defendants, because I think it would be competent for the court to reject the 7th (or continuation) clause altogether as forming a part of the contract which was not good in law and being a separate part which could be rejected. I may refer to what was said by Willes, J. in *Pickering* v. *Ilfracombe Railway Company* (17 L. T. Rep. 650, at p. 652; L. Rep. 3 C. P. 235, at p. 250): "The general rule is that, where you cannot sever the legal from the illegal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." And therefore I think, though it is unnecessary to decide it in this case, that if this loss had occurred during the twelve months the policy could have be en put in evidence. It is in my view a perfectly good policy for twelve months, but it is not a good policy for anything longer, it is an invalid policy.

But it was said that even if it was invalid according to English law, yet it was admissible in evidence in our courts, because it was to be construed by Swedish law. No doubt, as a rule, the law to be applied in construing and enforcing a contract is the law of the

country where the contract is made, but this is only because, in the absence of other circumstances, our courts assume that such was the intention of the parties. If it should clearly appear from other circumstances that the parties intended that their rights should be ascertained and determined by some other law, our courts will give effect to such intention. The law relating to the subject is fully dealt with in the comparatively recent case of *Re Missouri Steamship Company Limited* (61 L. T. Rep. 316; 6 Asp. Mar Law Cas. 423; 42 Ch. Div. 321). It is sufficient to say that, in my opinion, that case is an authority for the proposition that I have just laid down. In this case the circumstances do, in my opinion, clearly show an intention that the contract should be governed by English law, and not by Swedish law. It is a reinsurance of a reinsurance of an original insurance effected at Lloyd's. The original insurance is on the old Lloyd's form and is a contract made in England to which English law alone is applicable. So is the first reinsurance. Then comes the policy now sued on. It is no doubt executed by the defendants in Sweden, but it was in every business sense made in London. It was negotiated here by the resident agent of the defendants; it is drawn upon the common Lloyd's form, as are the other policies from which it springs, and it contains the additional clause which I have already read, whereby it is provided that all claims and losses shall be payable in London—that is to say, the place of performance is to be in London; that payment shall be made on the claim note of the Royal Exchange Assurance Corporation—that is to say, upon a claim note settled by the Royal Exchange Assurance Corporation in accordance with English law, and that in case of any dispute the defendants shall be bound in all things by the jurisdiction and decision of the English law courts. In face of these facts I can have no doubt but that both parties intended that the contract should be construed and dealt with as an English contract, and I am convinced that if at the time the negotiations for the contract were going on, it had been suggested to the Royal Exchange Assurance Corporation that they were reinsuring with reference to Swedish law a risk which they had undertaken with reference to English law, they would at once have repudiated the suggestion, and so too would the defendants. But, even assuming that the policy is to be interpreted with reference to Swedish law, I should still be of opinion that it could not be admitted in evidence. The statute makes such a contract invalid; that means no more than that it is a contract which cannot be put in suit. It is not illegal, it is not immoral, and there is no reason why the contract should not be entered into; but it is invalid in the sense that it cannot be put in suit. The case therefore falls within the authority of *Leroux* v. *Brown* (20 L. T. Rep. O. S. 68; 12 C. B. 801). The document is shut out because it would be contrary to our procedure to admit it. For these reasons I think that this is a policy which cannot be stamped at all and cannot be admitted in evidence, and the misfortune cannot be cured by the payment of any penalty. I must therefore hold that the plaintiffs are unable to make out their case, and I must give judgment against them. It is only right that I should say that this point was not taken by the defendants. It was taken by me as I thought I was bound to take it. The defendants did not desire to, nor did they attempt to argue the point. Their desire was that the case should be tried on the merits, as distinguished from the point with which I have dealt. In my view the case cannot be tried on its merits in this court, because the case cannot be launched; but if the parties are willing to go to arbitration—which can only be done by consent—I see no reason why their differences cannot be settled without reference to the point which I felt bound to take, and which decides the action, as perhaps the arbitrator would not feel himself bound to take it, although I must point out that the provisions of the statute may in his opinion oblige him to take the same point.

Judgment for the defendants.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 15, 16, *and* 29, 1901.

(Before GORELL BARNES, J.)

THE VERITAS. (a)

Priorities of liens — Salvage — Damage to property of harbour board—Maritime lien—Action in rem—*Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 7.

There is a maritime lien under sect. 7 *of the Admiralty Court Act* 1861 *for damage done by a ship to the works of a harbour authority, although they may be within the body of a county.*

A lien for damage done by a ship takes precedence of a prior lien for salvage, and an award for salvage cannot be recovered against the res *to the detriment of a claimant in respect of subsequent damage.*

THESE were motions by the owners of the tugs *Prairie Cock* and *Sea Cock*, the Mersey Docks and Harbour Board, and the owners of the steamship *Caledonian*, respectively, for payment out of court of the sum of 927*l.* 9*s.* 2*d.*, the proceeds of the Norwegian steamship *Veritas*.

The facts of the case fully appear in the judgment. The collision action between the *Devonian* and the *Veritas* there referred to is reported in 84 L. T. Rep. 675; 9 Asp. Mar. Law Cas. 158; (1901) P. 221.

Sect. 11 of the Mersey Docks Act 1874 (37 & 38 Vict. c. 30) gives the dock board power to raise and remove any wreck which, in their judgment, may be an obstruction to navigation, and it also gives them power to sell such wreck and retain the expenses of raising it, "rendering the overplus (if any) to the person or persons entitled to the same."

Sect. 94 of the Mersey Docks Consolidation Act 1858 (21 & 22 Vict. c. 92) is as follows:

In every case in which any damage shall be done to any lock, gate, bridge, pier, landing-stage, jetty, platform,

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

quay, . . . or other work belonging to the board through the misconduct, negligence, or default of the master of any vessel, or any other person on board of any vessel . . . such vessel may be detained until such damage shall have been paid for or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the board for the estimated amount of the damage so done by such vessel.

Sect. 6 of the Admiralty Court Act 1840 (3 & 4 Vict. c. 65) is as follows:

And be it enacted that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, and in respect of which such claim is made.

By sect. 7 of the Admiralty Court Act 1861 (24 Vict. c. 10):

The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

Carver, K.C. and *Batten* for the owners, masters, and crews of the tugs *Prairie Cock* and *Sea Cock*.—It is contended by the Mersey Docks and Harbour Board that they have a possessory lien under sect. 94 of the Mersey Docks Consolidation Act 1858. A possessory lien does not override a maritime lien; therefore sect. 94 is of no avail to them:

The Gustaf, 6 L. T. Rep. 660; 1 Mar. Law Cas. O. S. 230; Lush. 506.

Nor have they a maritime lien under sect. 7 of the Admiralty Court Act 1861; for a maritime lien can only be enforced by the court, and here they could not at the time enforce their lien, if they had any, because the *res* had been sold under their statutory powers, and not by order of the court. A maritime lien is not operative unless there is a judgment *in rem*. Here there is no judgment *in rem*. There is nothing which gives the Mersey Docks and Harbour Board a higher claim than the salvors. It is true it is stated in Williams and Bruce's Admiralty Practice, p. 80, and other text-books, that a damage lien takes priority of the lien of a salvor for services rendered prior to a collision, but the authorities cited do not support this proposition:

The Cargo ex Galam, 9 L. T. Rep. 550; 1 Mar. Law Cas. O. S. 408; Br. & L. 167; 2 Moo. P. C. C. 216;
Attorney-General v. *Norstedt*, 3 Price, 97; 17 R. R. 554.

They also referred to

Marsden's Collisions at Sea, 4th edit., p. 91;
Maclachlan on Shipping, 2nd edit., pp. 652, 653, and 6th edit., pp. 740, 741;
The Admiralty Court Act 1840, s. 4.

Bailhache and *W. S. Glynn* for the owners, master, and crew of the steamship *Caledonian*.—The owners of the tugs *Prairie Cock* and *Sea Cock* have no claim for salvage. The collision between the *Devonian* and *Veritas* was, at the trial, held to be partly caused by the negligent exhibition of improper lights by the tug *Prairie Cock*, and the subsequent services were rendered necessary on account of the collision. The tug *Sea Cock* belongs to the same owners as the *Prairie Cock*, and the owners at any rate are not entitled to profit by the result of their own negligence:

The Ripon, 52 L. T. Rep. 438; 5 Asp. Mar. Law Cas. 365; 10 P. Div. 65;
The Devonian (*ubi sup.*).

Aspinall, K.C. and *Maurice Hill* for the Mersey Docks and Harbour Board.—Priority of dates of judgment does not give priority in the absence of laches on the part of the person seeking to take advantage of his lien:

The Africano, 70 L. T. Rep. 250; 7 Asp. Mar. Law Cas. 427; (1894) P. 141.

The Mersey Docks Consolidation Act 1858, s. 94, and the Mersey Docks Act 1874, s. 11, give the harbour board a priority over the other claimants. They would at any rate have had a maritime lien if the damage had been done at sea:

The Sarah (1862), Lush. 549.

See also

The Sara, 61 L. T. Rep. at p. 28; 6 Asp. Mar. Law Cas., at p. 415; 14 App. Cas., at p. 216;
Currie v. *McKnight*, 75 L. T. Rep. 457; 8 Asp. Mar. Law Cas. 193; (1897) A. C. 97;
The Zeta, 69 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468.

There is a maritime lien although the damage has been done in the body of the county:

The Bold Buccleugh, 19 L. T. Rep. O. S. 235; 7 Moo. P. C. C. 267.

With regard to the question of priorities, a right *ex delicto* takes priority over prior salvage. This is laid down in all the text books. See

Maude and Pollock's Law of Merchant Shipping, 4th edit. vol. 1, p. 619;
Coote's Admiralty Practice, p. 138;
Kennedy's Law of Civil Salvage, p. 7;
The Aline (1839) 1 W. Rob. 111.

It may be that the cases cited are not directly in point, but it is submitted that the proposition is, nevertheless, a correct one. The reason why a lien arising *ex delicto* should take precedence of a lien *ex contractu* is that the person who suffers damage has involuntarily received an injury, whereas a salvor, or other person who has a lien *ex contractu* or *quasi ex contractu*, voluntarily does the work or renders the service which gives rise to the lien. He takes the risk of the *res* being sufficient to pay him. They also referred to the following cases:

The Merle, 31 L. T. Rep. 447; 2 Asp. Mar. Law Cas. 402;
The Immacolata Concezione, 50 L. T. Rep. 539; 5 Asp. Mar. Law Cas. 208; 9 P. Div. 37;
The Robert Pow, 9 L. T. Rep. 237; 1 Mar. Law. Cas. O. S. 392; Br. & L. 99;
The Mary Ann, 13 L. T. Rep. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8;
The Benares (1850), 7 No. of Cas. Supp. 538;
The Two Ellens, 26 L. T. Rep. 1; 1 Asp. Mar. Law 208; L. Rep. 4, P. C. 161;
Westrup v. *Great Yarmouth Steam Carrying Company*, 61 L. T. Rep. 714; 6 Asp. Mar. Law Cas. 443; 43 Ch. Div. 241;
The Heinrich Bjorn, 55 L. T. Rep. 66; 6 Asp. Mar. Law Cas. 1; 11 App. Cas. 270;
The Vera Cruz (No. 2), 52 L. T. Rep. 474; 5 Asp. Mar. Law Cas. 386; 9 P. Div. 96; 10 App. Cas. 59;
The Madonna d'Idra (1811), 1 Dodson, 37;
The Selina (1842), 2 No. of Cas. Supp. 18.

Carver, K.C. in reply.

The following cases were also referred to:

The Elin, 49 L. T. Rep. 87; 5 Asp. Mar. Law Cas. 120; 8 P. Div. 129;
The Linda Flor, 30 L. T. Rep. O. S. 234; Swa. 309;
Barraclough v. *Brown*, 76 L. T. Rep. 797; 8 Asp. Mar. Law Cas. 290; (1897) A. C. 615;
Ballantyne v. *McKinnon*, 75 L. T. Rep. 95; 8 Asp. Mar. Law Cas. 173; (1896) 2 Q. B. 455;
Abbott on Shipping, 13th edit., p. 871.

Cur. adv. vult.

July 29.—BARNES, J.—There are three motions in this case for payment out of court of certain sums out of the proceeds of the Norwegian steamship *Veritas* which amount to 927*l.* 9*s.* 2*d.* The motions are made in these circumstances. In October last year the *Veritas*, laden with a cargo of ice for Liverpool, was in distress outside the Mersey, and salvage services were rendered to her by the steamship *Caledonian*, by which she was brought into and anchored in the Mersey. The services of the tug *Prairie Cock* were then engaged, and, while that tug was being made fast to the *Veritas*, a collision occurred between the *Veritas* and the steamship *Devonian* in consequence of which the *Veritas* began to fill, and salvage services were rendered to her by the tugs *Prairie Cock* and *Sea Cock*, with the result that she was brought to a place alongside the dock wall to the south of the Liverpool landing stage, From this place she drifted against the said stage, doing damage to the boom and other connections of the stage, and sank, and her cargo of ice perished. She was removed by the Mersey Docks and Harbour Board under the powers conferred upon them by the 11th section of their Act of 1874. The board had also the right to detain her in respect of the damage under the 94th section of their Act of 1858. On the 15th Oct. an action was instituted in this court by the owners, master, and crew of the tugs against the *Veritas* in respect of the salvage services rendered by them, and on the same day she was arrested in the suit. The board intervened in that suit, and on the 19th Oct. an order was made, by consent, for the release of the *Veritas*, the interveners undertaking to furnish the plaintiffs with an account of receipts and expenditure in dealing with the wreck under statutory powers, and to lodge the overplus in court to the credit of this action to abide further order, without prejudice to liens, rights, or priorities of any claims on the *Veritas* or proceeds of sale. The vessel was accordingly released and afterwards sold on the 23rd Oct. by the board, and, after deducting the expenses of the board, the net proceeds amounted to the sum of 927*l.* 5*s.* 2*d.*, which was brought into court to the credit of the action. On the 23rd Nov. an action was instituted in this court against the proceeds of the *Veritas* by the owners, master, and crew of the *Caledonian* in respect of the salvage services rendered by them, and on the 7th Dec. a caveat against the payment out of court of the proceeds was entered in the first action on behalf of the last plaintiffs, who afterwards intervened in the first action, though not until after judgment was obtained in it. On the 14th June 1901 judgment was obtained by the plaintiffs in the action in respect of the salvage by the *Prairie Cock* and *Sea Cock* in the sum of 320*l.* and costs, without prejudice to claims on the funds in court, and reserving all questions of priorities. On the 29th April 1901 judgment was given for the plaintiffs in the action in respect of the salvage by the *Caledonian* for 400*l.* and costs, all questions of priorities being reserved. On the 8th Feb. 1901 an action was instituted in this court by the board against the proceeds in respect of the damage done to the stage, in which the plaintiffs in the two salvage actions intervened, and on the 1st July 1901 judgment was given for the plaintiff for 600*l.* and costs, all questions of priorities being reserved. The owners of the *Prairie Cock* and *Sea Cock* appeared at the hearing. By their defence, as interveners, they had raised (*inter alia*) the question of whether or not the damage sustained by the board was due to the negligence of those on board the *Veritas*, and the judgment appears to have proceeded on the ground of such negligence being found by the court, and no point was raised before me that this was not so. [His Lordship, having read the formal judgment in the action brought by the Mersey Docks and Harbour Board, proceeded:] It is to be observed that all these judgments were conditional, and, as the funds are still in court, the claims have to be dealt with on their respective rights to priority: (*The Africano, ubi sup.*). A collision action was also tried between the *Devonian* and the *Veritas* in which the *Devonian* was on the 7th Feb. 1901 held to blame for a bad look-out, and the *Veritas* also to blame on the ground that the tug *Prairie Cock*, while alongside of her, was exhibiting only under-way lights, and had not a second masthead light for towing.

The board claim to have a maritime lien on the said proceeds for their damage, and to take priority over the salvors. This claim is disputed by both of the salvors. The *Prairie Cock* and *Sea Cock* claim to have priority over the damage claim, and over the claim of the prior salvors. The first salvors claim to have precedence over the second, and dispute the right of the second to claim salvage in the circumstances. These rival claims give rise to some questions of general importance and considerable difficulty which were very well argued by counsel before me. The first question to determine is with regard to the claim of the board. It was first argued by the salvors that the board had waived any right against the *Veritas* and the proceeds by selling the *Veritas* under the powers conferred by the said Acts. This point was principally made by the *Prairie Cock* and *Sea Cock*, who were parties to the consent order, though the owners of the *Veritas* and the *Caledonian* were not. The answer to the point appears to be that the board have recovered judgment against the proceeds in their action, to which both sets of salvors had become parties by intervening, and that the judgment is binding and conclusive, at any rate so far as it establishes a right on the part of the board to proceed for their damage against the proceeds: (*Ballantyne* v. *Mackinnon, ubi sup.*). Every possible point appears to have been raised in the defence put in on behalf of the tugs, but in their rejoinder these interveners withdrew their defence, except as to the question of priorities, and stated that they were willing that the board should have judgment for 600*l.* against the proceeds. The judgment reserved the question of priorities. Further, as showing that the board had not waived any right it may have to proceed against the fund,

it is to be observed that, in selling under the powers aforesaid, the board do not extinguish the claimants' claims altogether against the proceeds, but hold the same subject to such rights as could be enforced against the *res*. By the 11th section of the Act of 1874 they are to render the overplus (if any) to the person, or persons, entitled to the same. This sale would not affect such rights as the salvors have against the proceeds, and there seems to me to be nothing inconsistent in the board also being allowed to enforce, by proceedings against the proceeds, any rights which they may have in respect of damage done by the *Veritas* to their property; and, although they had an option to detain the wreck until their damage was paid, or a deposit made for the same, that appears to be only an additional right, and, if not exercised, that does not prevent the board from enforcing by action any claim they may have to recover for the damage done to the stage and its connections. The case of *Barraclough* v. *Brown* (*ubi sup.*) which was cited does not apply in my opinion. That case was dealing with a liability only imposed by the Act referred to in the case. The second point raised by the salvors was that the board had not a maritime lien for their damage. That the board had a right to proceed *in rem* under the 7th section of the Admiralty Court Act 1861 is clear, and the judgment in favour of the board was no doubt under this section: (*The Beta*, 20 L. T. Rep. 988; L. Rep. 2 P. C. 447; *The Uhla*, 19 L. T. Rep. 89; 3 Mar. Law Cas. O. S. 148; L. Rep. 2 A. & E. 29, note; *The Sylph*, 17 L. T. Rep. 519; L. Rep. 2 A. & E. 24; *The Malvina* (1862), Lush. 493; *The Merle*, *ubi sup.*; *The Zeta*, *ubi sup.*). The judgment in favour of the board must, at least, have proceeded on this ground, though it would not necessarily proceed on the ground that there was a maritime lien for damage. It was argued by counsel for the salvors that although the board might have a right to proceed *in rem*, yet they had no maritime lien for the damage. As the damage came last in this case it is very questionable if it matters whether the board had a maritime lien or not, because, the board having a right to proceed *in rem* for their damage, the question rather is whether the salvors' claims are to have precedence of the right of the board to enforce payment of the damage done by the *Veritas*. But I will deal with the salvors' rights later on. However that may be, in my opinion, if it be material to decide the point (the case was argued as if it were), as the law now stands, the board had a maritime lien for the damage. The question is one upon which a great deal of argument may be expended, but the ground is now mostly covered by authority. It was decided in the *Bold Buccleugh* (*ubi sup.*) that a maritime lien arises in the case of damage done by one ship to another in favour of the injured party. The important passage from the judgment delivered by Sir John Jervis in that case is as follows: "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Story, J. (1 Sumner, 78) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by proceeding *in rem*, and indeed it is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and, whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached." That this reasoning is not strictly correct is shown by more recent decisions, where it has been held that there may be rights to proceed *in rem* without a maritime lien (*The Heinrich Bjorn*, *ubi sup.*), and there is no lien on a foreign ship under sect. 6 of the Act of 1840 for necessaries. In *The Two Ellens* (*ubi sup.*) it was held there was no lien for necessaries under sect. 5 of the Act of 1861, and in *Westrup* v. *Great Yarmouth Steam Carrying Company* (*ubi sup.*) that there was no lien for towage. In all these cases a proceeding *in rem* lies. Dr. Brown, in his work on Civil Law, published in 1802, at p. 143, has the following passage: "The torts of the master cannot be supposed to hypothecate the ship; nor, in my humble judgment, in strictness of speech, to produce any lien on it." I do not know of any English case earlier than the *Bold Buccleugh* (*ubi sup.*) in which the doctrine that collision gives rise to a lien is to be found: (see the notes collected by Mr. Marsden, at p. 187 of his work on Collisions at Sea, 4th edit.). The growth of the idea of maritime lien is also referred to in the President's judgment in *The Dictator* (67 L. T. Rep. 563; 7 Asp. Mar. Law Cas. 251; (1892) P. 304). The decision in *The Bold Buccleugh* (*ubi sup.*) has, however, whether rightly founded or not, been now acted on for fifty years, and in the case of *Currie* v. *McKnight* (*ubi sup.*) Lord Watson made the following remarks: "The principle of that decision has been adopted in the American courts; and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage, and seamen's wages, and upon bottomry bonds." He then proceeds to consider the case of *The Bold Buccleugh* (*ubi sup.*), and, further, he says: "And in my opinion it is a reasonable and statutory rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her, and may be without the means of making due compensation." So far these observations relate to damage in collisions between ships, but the principle seems to be substantially the same so far as regards damage done by a ship, which, if done on the high seas, would formerly have been within the jurisdiction of the Admiralty Court: (*The Sarah*, *ubi sup.*, and Lord Herschell's judgment in *The Zeta*, *ubi sup.*, where, after examining the cases, he came to the conclusion that it is impossible to maintain the proposition that

the word "damage" was, according to the well-understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships). Under the 7th section of the Act of 1861 the court has jurisdiction over any claim for damage done by any ship, and therefore has jurisdiction over this claim by the board. Even if it be said that the damage in question was not done on the high seas, some of the cases I have already referred to above are in point. In my opinion it follows from the decision in *The Bold Buccleugh* that there is a maritime lien for this kind of damage if it had occurred on the high seas, and it seems to follow that it was intended the law should be the same as to damage done by a ship elsewhere, and therefore whether the damage in question was done in the body of a county or not is immaterial, and I need not enter upon that question. This is the manner in which the 6th section of the Act of 1840 has been regarded, so far as damage received by a ship in the body of a county is concerned: (see *The Bold Buccleugh, ubi sup.*, where the collision occurred in the river Humber; the judgment of Lord Bramwell in *The Heinrich Bjorn, ubi sup.*; and the judgment of Lord Halsbury in *The Sarah, ubi sup.*). It is not, in my opinion, inconsistent with these views that, while there is a lien on the ship for the damage done by her, there may be no lien in favour of an injured ship in cases like *The Zeta* (*ubi sup.*), where the reasons which have led to the recognition of a lien on a ship are not applicable.

The next and, in my opinion, the real question in the case is whether the claim of the board has precedence over the prior lien of the salvors. That salvors have a lien was not disputed. In the cases for a very long time past where a lien for salvage is spoken of it is always treated as if there was no question but that there is a maritime lien for salvage. It is probably natural that the idea of this lien should have developed more readily than that of a lien for damage. There is no reported case, so far as I am aware, in which the question has been raised and considered whether a lien for damage takes precedence of a prior lien for salvage or not. There is, however, the passage from Lord Watson's judgment in *Currie* v. *McKnight* (*ubi sup.*) which I have quoted above. It is possible that Lord Watson had not fully considered this point, but his judgments are always so full of learning and care that I do not think he would have expressed himself in these terms if he had felt any doubt about the matter. All the text-writers to whose works I have been referred give the precedence to the claim for damage: (see Williams and Bruce's Admiralty Practice, 2nd edit., p. 80; Maude and Pollock's Merchant Shipping, 4th edit., by Pollock, B. and Bruce, J., p. 619; Maclachlan on Merchant Shipping, 6th edit., pp. 740-741; Coote's Admiralty Practice, p. 138; Abbott on Shipping, 13th edit., by Bucknill, J. and Mr. Langley, p. 871, and Admiralty Jurisdiction and Practice in County Courts, by Dr. Raikes and Mr. Kilburn, p. 123). I have referred to several American text-books, but cannot find any discussion of the point I have mentioned in them. In some of the works I have mentioned the following cases are cited: *The Aline* (*ubi sup.*), *The Benares* (*ubi sup.*), *The Cargo ex Galam* (*ubi sup.*), *Attorney-General* v. *Norstedt* (*ubi sup.*), but none of these cases appear to me to be in point on the proposition in question for which they are cited. There is therefore this consensus of English text-writers, and no case to be found in which damage has ever been postponed to prior salvage. It would seem clear that maritime liens may be divided into two classes: first, liens arising *ex delicto*; and, secondly, liens arising *ex contractu*, or *quasi ex contractu*. It is almost obvious that liens of the latter class must, in general, rank against the fund in the inverse order of their attachment on the *res*. They are liens in respect of claims for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests. Thus in the present case (subject to a point which will be dealt with hereafter) the second set of salvors are preferred to the first because the first share in the later benefit conferred on the common subject of the liens. It is also clear that liens arising *ex delicto* take precedence over prior liens arising *ex contractu*. The reasons for this are pointed out by Dr. Lushington in *The Aline*, at p. 118. The principal one appears to be that the person having a right of lien *ex contractu* becomes, so to speak, a part owner in interests with the owners of the vessel. He has chosen to enter into relationship with the vessel for his own interests; whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come first, otherwise the injured party might be unable to satisfy his claim out of the *res* without paying off prior claims which arise in such circumstances that the claimants may be considered to have chosen to run the risks of subsequent events affecting their claims. It has even been held that the maritime lien for damage takes precedence of the lien of seamen for wages earned by them since a collision: (*The Elin, ubi sup.*). It was argued before me that salvage claims were not on the footing of claims arising *ex contractu*, and that, on grounds of public policy, they should have precedence over subsequent damage claims. The right to salvage may, but does not necessarily, arise out of contract. As the late Lord Hannen said: "It is a presumption of law arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it should make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject": (*The Five Steel Barges*, 63 L. T. Rep. at p. 501; 6 Asp. Mar. Law Cas. at p. 582; 15 P. Div. at p. 146). To this may be added that salvage is not governed merely by a regard to benefit received, but also, on grounds of public policy, by a due regard to the interests of commerce and humanity. At the same time the right to proceed against the *res* is to obtain payment of the reward given for services rendered, and the salvors have had the option of rendering their services, and in deciding to render them are in a position to consider the risks they may run in recovering their reward, and whether or not it is advisable to render the services. From the time of rendering the services they are practically in the same relative position as a creditor who has obtained a lien strictly *ex contractu*, and while taking precedence over prior claims *ex con-*

tractu and prior salvage, in my opinion, the considerations I have referred to show that their claims should be postponed to subsequent damage claims; and, in my judgment, it is in the best interests of careful navigation that this should be so. I can see no satisfactory ground on which the claims of an injured party should be postponed to the claim of one who seeks to obtain a benefit for prior services rendered to what is in the court commonly spoken of as the "wrongdoing" vessel. Such principles as can be applied and general considerations are, in my judgment, the other way, and even if the damage in this case did not give rise to a maritime lien, but only to a right to proceed *in rem*, it seems to me that the latter right should be enforceable in priority to the salvage claims. For all practical purposes in a case where the damage comes last the position of the injured party, so far as regards claims arising prior to the damage, is much the same, whether he has a lien or only a right of process. I may sum up these remarks thus: There is a right to arrest a ship to obtain reparation for damage done by her which is not affected by prior claims against her arising from hypothecation which creates interests in her along with those of her owners. This right was no doubt enforced by the High Court of Admiralty before the doctrine was entertained in the case of *The Bold Buccleugh* that there was a maritime lien for damage, and, as regards such prior claims, the right would not seem to depend on the existence of a maritime lien for damage. A salvage claim may be regarded as if there had been a hypothecation to secure the reward of the salvors for services rendered, and that reward ought not to be recovered against the *res* to the detriment of a claimant in respect of subsequent damage. The matter is of importance when it is not possible or convenient to proceed against the owners personally, and it would be unreasonable and inequitable to satisfy out of the *res* a claim for a reward for prior salvage services which the salvors elected to render, in preference to a claim in respect of damage done.

The last point to deal with is that relating to the claims of the salvors *inter se*. Unless there is something to prevent the principles aforesaid from applying, the claim of the tugs is to be preferred to that of the *Caledonian*. But counsel for the latter vessel contended that in consequence of the decision in the case of *The Devonian* (*ubi sup.*) the claim of the *Prairie Cock* could not have precedence over that of the *Caledonian*, and that, as the *Sea Cock* belongs to the same owners as the *Prairie Cock*, the claim of the *Sea Cock*, so far as her owners are concerned, also could not have such precedence. To succeed in this contention it was practically admitted that it must be shown that the owners of the *Prairie Cock* and *Sea Cock* and the master and crew of the former could not recover salvage against the *Veritas*. But the tugs have recovered judgment for their services in their suit, the question of priorities only being reserved, and the owners, master, and crew of the *Caledonian* did not raise any objection in that suit to the plaintiffs therein recovering judgment. They did not intervene until after judgment, although they had previously entered a caveat against payment out of the proceeds. The judgment appears to conclude them now. The ground upon which it was sought to make out the point for the *Caledonian* was by applying the decision of the court in the case of the collision between the *Devonian* and the *Veritas* that the *Veritas* was to blame by reason of the wrong exhibition of lights on her tug the *Prairie Cock*. I do not consider it necessary to examine the decision at any length. It is sufficient to notice that there was no finding that the absence of the second masthead light in fact contributed to the collision, and, unless it did, the fact that the *Veritas* was held to blame under sect. 419, subsect. 4, of the Merchant Shipping Act 1894 does not appear in the circumstances to make the tug guilty of negligence which caused the collision so as to deprive the tug of the right to salvage for subsequent services when the vessel was being moved with the object of beaching her. As the control rested with the pilot of the *Veritas*, whatever were the strict statutory obligations, it would have been rather hard in the circumstances to hold the tug responsible to the tow for negligence as between the tug and tow. I need not, however, go into this question any further owing to the finding of the court being as above stated, and the fact that the judgment was recovered by the tugs without any objection by the *Caledonian*. The result is that in my judgment the claim of the Mersey Docks and Harbour Board comes first; then the claim of the tugs; and, lastly, that of the *Caledonian*; and payment out must be made accordingly.

Solicitors for the second salvors, *J. H. Thompson* and *McMaster*, Liverpool.

Solicitors for the first salvors, *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the Mersey Docks and Harbour Board, *Rowcliffes, Rawle*, and *Co*, agents for *W. C. Thorn*, Liverpool.

Feb. 12, 13, 14, *and* 15, 1901.

(Before Sir F. JEUNE, President, and TRINITY MASTERS.)

THE OVINGDEAN GRANGE. (*a*)

Collision—Contributory negligence—Thames Bye-laws 1898, *bye-law* 47.

The steamship F., *proceeding down the river Thames against the tide, committed a breach of bye-law* 47 *of the Thames Bye-laws in neglecting to wait at B. point until the steamship* O. G. *which was coming up with the tide, and which, at the time, was turning in the river preparatory to entering the West India Dock, had passed clear. A collision occurred.*

Held, that although the O. G *was to blame for not keeping a proper look-out and conducting the turning without proper care, the* F. *was also to blame for hindering the manœuvres of the* O. G. *by not obeying the rule, and so contributing to the collision.*

THIS was a collision action brought by the owners of the Norwegian steamship *Forsete* against the owners of the steamship *Ovingdean Grange*.

The *Forsete* was a wooden steamship of 526 tons gross register, and at the time of the collision was on a voyage from London to Grimsby in ballast. The *Ovingdean Grange* was a steamship

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

of 2413 tons gross register, and was on a voyage from Antwerp to Buenos Ayres *viâ* London with a general cargo and two passengers.

The collision occurred on the 22nd Aug. 1900, about 8.30 a.m., off Blackwall Point, Blackwall Reach, river Thames. The weather at the time was clear, the wind a fresh breeze from the S.W., and the tide one-third flood of the force of about two knots. The *Forsete* was coming down river, keeping to the southward of mid-channel, making four to five knots through the water; the *Ovingdean Grange*, having previously sounded four blasts on her whistle as a signal that she was about to turn in the river and then three more as her engines were put astern, was swinging under a port helm with a tug towing on her starboard bow.

The movements of the *Forsete* were hampered by a sailing barge coming up river, which passed close under her stern and struck her, and prevented the *Forsete* from porting and going under the stern of the *Ovingdean Grange*. The *Forsete* struck the *Ovingdean Grange* on the port side about the main rigging.

The plaintiffs charged the defendants (*inter alia*) with turning improperly and at an improper time and place, and in going astern and not ahead, as she should have done when the *Forsete* approached, so as to keep her stern well to the north of mid-channel.

The defendants charged the plaintiffs (*inter alia*) with improperly starboarding and neglecting to wait above Blackwall Point until the *Ovingdean Grange* had swung clear, in breach of bye-law 47 of the Thames Bye-laws.

Bye-law 47 of the Bye-laws for the Regulation of the River Thames 1898 is as follows:

> Steam vessels navigating against the tide shall before rounding the following points, viz. . . . Blackwall Point, wait until any other vessels rounding the point with the tide have passed clear.

Aspinall, K.C. and *Stubbs* for the plaintiffs, the owners of the *Forsete*.

Laing, K.C. and *Dawson Miller* for the defendants, the owners of the *Ovingdean Grange*.

The arguments of counsel sufficiently appear from the judgment.

The following cases were referred to:

> *Cayser, Irvine, and Co.* v. *Carron Company; The Margaret*, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 371; 9 App. Cas. 873;
> *The Monte Rosa*, 68 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 326; (1893) P. 23.

The PRESIDENT [after reviewing the evidence said:]—The conclusion to which I have come is that the story of the *Forsete* has in it the substantial element of accuracy, by which I mean that, in all probability, what happened was that the *Ovingdean Grange* in turning brought herself to the south side of mid-river, and that the collision took place to the south and not to the north of mid-channel. It is common ground that the *Ovingdean Grange* was in about mid-river when she commenced to turn. She had been stopped ten minutes, according to the evidence of the engineer, and after that her engines were put full speed astern. The effect of that would be, in the opinion of the Elder Brethren, with which I agree, not only to destroy any headway which she had, but to give her sternway. Then assuming that she had been stopped without headway in about mid-channel, and given her action of reversed engines, I confess I see no answer to the statement that in these circumstances she must have come to the south of mid-river. There are other indications which point in the same direction. The blow was a right-angle blow. I think there is no doubt about that. If that be so, then it is very difficult indeed to understand how the collision could have taken place to the north of mid-channel, because we know where the *Forsete* was when, if the suggestion is true, she started to come out. [The learned judge then dealt with the collision between the *Forsete* and the barge, and continued:] On the whole, the balance of evidence, taking the admitted facts, points to the conclusion that the story of the *Forsete's* is the true story, and that the *Ovingdean Grange* got across to the south side of the river. How she did so is, I think, clear. She did not go ahead soon enough and kept her screw working astern for too long, and so, partly owing to that and partly owing to the action of the barge in preventing the *Forsete* from porting and keeping close to the point, and so passing close under the stern of the *Ovingdean Grange*, this collision came about. Therefore I am unable to absolve the *Ovingdean Grange* from blame. I do not say and I do not wish to say anything about whether the *Ovingdean Grange* was turning in an improper place. The Elder Brethren tell me it is not an unusual or improper place to turn in for the purpose of going into the West India Dock, and I confess I should not have thought it was an improper place. But if vessels take upon themselves to turn at that point they must do so with all due caution. It seems to me as if there was want of proper look-out on the *Ovingdean Grange*. I do not lay more stress upon that than this, that it explains why the *Ovingdean Grange* conducted her turning, not in an improper place, but not with that proper care which should have been shown.

Now I have to deal with the case of the *Forsete*, and more difficulty presents itself. The rule which applies in this case—rule 47 of the Thames Bye-laws appears to me to have been broken by the *Forsete*. It is clear, according to that rule, that as she was navigated against the tide she should have waited until vessels navigating with the tide had passed clear. The evidence indicates some action on her part which might be urged as some compliance with that rule, because she says that at a particular point she stopped when she heard three blasts from the *Ovingdean Grange*. I think, however, that the evidence of the engineer's log shows that the stopping was not a stopping in compliance with that rule, but merely part of the order to go full speed astern, as she afterwards did. Therefore she did not comply in any sense with that rule, which compels her to wait. Now comes the further question: If that be so, can it be said she ought to be held liable for any part of this collision, or ought it to be said that although she broke the rule she did not cause the collision, and that the *Ovingdean Grange*, notwithstanding breach of the rule by the *Forsete*, by ordinary care could have avoided the collision, and is therefore solely liable? I have considered that with the assistance of the Elder Brethren, to which I attribute considerable importance, because I think every case must turn upon its particular circumstances. I have been referred to

the case of *Cayzer, Irvine, and Co.* v. *Carron Company* (*ubi sup.*), in which the law is elaborately laid down. The point of the whole matter appears to me to be expressed in the judgment of Lord Watson (52 L. T. Rep. at p. 364; 5 Asp. Mar. Law Cas. at p. 375; 9 App. Cas. at p. 886), when he says that "a vessel which is proved to have disregarded these precautions"—that is rule 23 (now 47)—"must accept the onus of showing that the neglect of them did not contribute to any collision or damage which may have occurred at the time or subsequently." Then he says: "If that conduct on the part of the *Clan Sinclair* had been such as to place the *Margaret* at this disadvantage, to throw her into difficulties and make it doubtful what course she ought to pursue, then I could hardly have excused the *Clan Sinclair* from contribution to the collision in the present case. But the fact was not so . . . and the ground of my judgment is shortly this, that assuming there was a breach of the rule and culpable neglect, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*." The above passage expresses the law, and one has to apply it to the facts in this case. In that case some of the judges thought that ordinary care on the part of the *Margaret* would have prevented any collision even though the *Clan Sinclair* broke the rule and was therefore in a place where she ought not to have been. But the facts in the present case appear to me to be different. By not obeying this rule the *Forsete* brought herself into a position where she otherwise would not have been; that is to say, she got herself into the place where the collision occurred instead of being a considerable distance above. That, however, is not enough to condemn her. But then comes the question, by her being there did she hamper the course or the manœuvres of the *Ovingdean Grange*, or did she not? I think the *Ovingdean Grange* had a right to turn at the point she did, and the very object of rule 47 in this case appears to be that the vessel coming up to the point to turn round shall have the river clear from the approach of vessels coming down. That object not having been attained in this case, circumstances of difficulty arose, partly in connection with the *Ovingdean Grange* herself and partly in connection with the barge, which would not have arisen if the *Forsete* had obeyed the rule. Under those circumstances it appears to me and to the Elder Brethren that the *Forsete* by what she did enhanced the difficulties of the situation in which the *Ovingdean Grange* was placed, and threw upon her the difficulty of taking more than ordinary care in doing what she did. Therefore, although the *Ovingdean Grange* was to blame for not exercising more care than she did, I cannot say that there was not placed upon her a greater difficulty than there should have been placed upon her, by reason of the *Forsete* coming improperly into the position she did. It was not due entirely to the *Ovingdean Grange*, because no doubt the barge hampered the *Forsete*, but then the *Forsete* ought not to have been in that place, because by coming there she found herself hampered by the barge, and the *Ovingdean Grange* found herself confronted by difficulty to which she would not have been exposed had not the *Forsete* been in that place hampered by the barge. For that state of things the *Forsete* is responsible, having broken the rule, and therefore the conclusion to which I have come is that the *Forsete* and the *Ovingdean Grange* are both to blame for this collision.

Solicitors: for the plaintiffs, *Thomas Cooper* and *Co.*; for the defendants, *William A. Crump* and *Son*.

March 28 *and* 29, 1901.

(Before Sir F. JEUNE, President, and TRINITY MASTERS.)

THE SWIFT. (*a*)

Jurisdiction—Damage done to oyster bed and oysters—Admiralty Court Act 1861 (24 *Vict. c.* 10), *ss.* 7, 35—*Sea Fisheries Act* 1868 (31 *&* 32 *Vict. c.* 45), *ss.* 51, 53, 54.

An action in rem *will lie under sect.* 7 *of the Admiralty Court Act* 1861 *for damage done by a ship to an oyster fishery.*

Where a vessel was so negligently navigated that in passing over an oyster bed, although due notice had been given of it, she took the ground and damaged the bed and oysters on it:

Held, that the owners of the fishery were entitled to recover damages for the injury to the bed and the oysters.

THIS was an action *in rem* brought by the Whitstable Oyster Fishery Company against the defendants, who were owners of the Norwegian brigantine *Swift*, for damages for injuries done to their oyster bed and oysters.

The material facts were as follows:—

About 12.30 p.m. on the 30th Sept. 1900, the *Swift*, while on a voyage from Fredrikstad to Faversham with a cargo of boards, was making for the East Swale, at the mouth of the river Thames. The weather was fine and clear, the wind a fresh breeze from the S.W., and the tide about two hours before high-water ordinary neaps, and the *Swift*, which was drawing 12ft. 2in. aft, was standing in on the starboard tack over the defendants' oyster bed towards the Whitstable shore, when she touched the ground aft in 12ft. of water. She then fell off slowly before the wind, came round under a starboard helm, and as she filled on the port tack dragged over the ground. Finally she got away to the northward and anchored in deep water.

About the middle of the north or sea boundary of the oyster beds a watch-boat was stationed, and the *Swift* was boarded by the crew, who made a complaint and subsequently reported that the master of the *Swift* had neglected to keep away when hailed by them that there was not sufficient water for her at the then state of the tide.

Evidence was called by the plaintiffs that the oyster beds had been injured by the grounding of the defendants' ship, and that large quantities of oysters had been destroyed.

The defendants did not dispute the title of the plaintiffs to the ownership of the oyster beds (*b*),

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

(*b*) The oyster fishery and beds lying below low-water mark are parcel of the Manor of Whitstable. For a full account of the fishery and its history see *The Free Fishers of Whitstable* v. *Foreman*, 16 L. T. Rep. 747, at p. 748; L. Rep. 2 C. P. 688, at pp. 694 to 704. The company was reconstituted by the Whitstable Oyster Fishery Act 1896 (59 & 60 Vict. c. xli.).

but contended that the *Swift* was being lawfully navigated without negligence at the mouth of a tidal river; that the ordinary user of the river as a public highway involved the right of grounding; that the master of the vessel, being a foreigner, had no knowledge, or in fact notice, that there was property under the water which would be injured by attempting to pass over it at that particular state of the tide; that there was no indication on the published charts of the existence of the oyster beds, nor were the limits of the fishery property marked by buoys and beacons. They also alleged that the chief purpose of the watch-boat being stationed where it was, was to prevent the oysters being stolen, and only a few of the beacons which should have indicated the boundary of the beds were standing above water, so that there was no proper indication of what the limits of the fishery were. It was further contended by the defendants that an action *in rem* in respect of the alleged damage to the oysters would not lie, for, at the time of the passing of the Admiralty Court Act 1861, there was no property in oysters as they were *animalia feræ naturæ*, so that this could not be such "damage done by a ship" as was contemplated by that statute. Further, that when the Sea Fisheries Act 1868 gave property in oysters by sect. 51, it provided a remedy in sect. 53, and limited that remedy to personal proceedings against the master of the ship or other person actually committing an offence against the Act.

By sect. 7 of the Admiralty Court Act 1861 (24 Vict. c. 10):

The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

Sect. 35 is as follows:

The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or proceedings *in personam*.

Sects. 51, 53, and 54 of the Sea Fisheries Act 1868 (31 & 32 Vict. c. 45) are as follows:

Sect. 51. All oysters . . . being in or on any private oyster bed which is owned by any person independently of this Act, and is sufficiently marked out or sufficiently known as such, shall be the absolute property of . . . such owner . . . and in all courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, shall be deemed to be in the actual possession of . . . such owner. . . .

Sect. 53. It shall not be lawful for any person other than the . . . owner of any such private oyster bed, his agents, servants, and workmen, within the limits of such bed . . . except for a lawful purpose of navigation or anchorage:—To disturb or injure in any manner, except as last aforesaid, any oyster . . . bed, or oysters . . . or the oyster . . . fishery. And if any person does any act in contravention of this section he shall be liable to the following penalty, namely, to a penalty not exceeding two pounds for the first offence, and not exceeding five pounds for the second offence; and not exceeding ten pounds for the third and every subsequent offence; and every such person shall also be liable to make full compensation to the . . . owner . . . for all damage sustained by . . . him by reason of his unlawful act, and in default of payment the same may be recovered from him by the . . . owner . . . by proceedings in any court of competent jurisdiction (but not in a summary manner), whether he has been prosecuted for or convicted of an offence against this section or not.

Sect. 54. Provided always, that nothing in the last foregoing section shall make it unlawful for any person to do any of the things therein mentioned . . . (*b*) In the case of a private oyster bed owned by any person independently of this Act, if it is not sufficiently marked out and known as such.

Aspinall, K.C. and *A. E. Nelson* for the plaintiffs.

Laing, K.C. and *H. Stokes* for the defendants, the owners of the *Swift*.

The arguments of counsel sufficiently appear above and in the judgment.

The following Acts and cases were referred to:

The Admiralty Court Act 1861 (24 Vict. c. 10), ss. 7, 35;
The Sea Fisheries Act 1868 (31 & 32 Vict. c. 45), ss. 51, 53, 54;
Mayor of Colchester v. *Brooke*, 7 Q. B. 339;
The Vera Cruz, 52 L. T Rep. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59;
The Octavia Stella, 57 L. T. Rep. 632; 6 Asp. Mar. Law Cas. 182.

The PRESIDENT.—This is an action *in rem* brought in the Admiralty Division for damage done to oyster beds and to oysters, the property of the Whitstable Oyster Fishery Company, and it is brought against the owners of the brigantine *Swift*. The first question is one of law, namely, whether any such action can lie. I am perfectly clear that it can. Before the Fisheries Act 1868 I confess I should have thought it clear that an action would lie, because, apart from the authority of the decided cases, and the very well-known case of *Mayor of Colchester* v. *Brooke* (*ubi sup.*), I should have thought that where a person has property in the soil of a river and has a right of fishery, if anybody came and disturbed that soil and killed some of the oysters placed there by the owner of the fishery, an action at common law would lie against him, certainly for disturbing the soil, which appears to me to be a case of trespass with its peculiar damage, and, I should have thought, also in respect of the oysters, for they had become the subject of property in the ordinary way, having become reduced into possession. When we get to the Fisheries Act, the matter is perfectly clear. There the law, beyond all question, makes these things property, and therefore under the Fisheries Act we have persons owning property, whose property has, it is alleged, been damaged. The question left for consideration is whether the Admiralty Court gave jurisdiction of this particular kind—namely, to arrest the vessel and proceed afterwards in the Admiralty Court. It gave jurisdiction *in rem* and *in personam*, and the question is whether this is damage done by a ship within the meaning of the Admiralty Court Act. Against that view the case of *The Vera Cruz* (*ubi sup.*) has been cited; but it appears to me a wholly different case. I can well understand that in the case of the *Vera Cruz* it may have been held, as it was held, that there was no damage done by a ship within the meaning of the Admiralty Act. Lord Campbell's Act gave an action, for the first time, to the executors or representatives of a person whose death had been caused by negligence, in respect of that negligence—that being, for the first time, a cause of action according to law, and the question was whether afterwards, when the Admiralty Court Act passed, the Admiralty Court obtained jurisdiction over such matters. I can understand that that would not

be so, because the claim was damage done by a ship, and the House of Lords clearly thought that the damage in that case was not the sort of damage which was contemplated by the Admiralty Court Act. Lord Watson puts the matter simply on that very narrow basis. He said: "I entertain no doubt that a right of action such as that given by Lord Campbell's Act . . . is not damage done by a ship." When the learned judgment of Lord Selborne is read, it is seen that there is good reason for saying that although in the broad sense it was damage done by a ship, it was not damage done by a ship within the meaning of the Admiralty Court Act. "No one can say," Lord Selborne says, "that Lord Campbell's Act relates expressly to claims for damage done by ships; and this section in the Act of 1861 relates to that and to nothing else—maritime damage by ships is the subject of that legislation; general injuries resulting in loss of life by wrongful acts, and so forth are the subject of the other. It is not very likely that when the legislation goes on such different lines it should be intended indirectly to affect by the one legislation, and in a peculiar manner, a particular case which may or may not arise under the other legislation." That by no means exhausts the very learned judgment which he delivered, but it appears to me that "damage done by a ship" was exactly what the damage in this case was; and, apart from the special property created in oysters by the Fisheries Act, it appears to me clear that the moment you say that you may have an action, either *in rem* or *in personam*, for damage done by a ship, you do bring in damage done not only to other ships but to other property. No doubt the fact that damage was done to piers was mainly had in view when actions for damage done by ships to other kinds of property were introduced, and in principle there appears to be no difference between damage done to fishery grounds belonging to persons or damage done to oysters upon those grounds, belonging to persons, and damage done to piers. Therefore I think it is clear that an action lies in respect of this particular matter.

Then, what is the ground of the action? There is no doubt that this particular area, although owned by the plaintiffs, and although they have a right to lay down oysters in it, is still subject to the ordinary rights of navigation. That was the view expressed in *Mayor of Colchester* v. *Brooke* (*ubi sup.*), and it is sufficiently clear that although you may have a grant of rights of fishery and ownership of the soil, still such rights are not in derogation of the general rights of navigation which exist anterior to and independently of such special and private rights. Therefore the right to own this soil in this particular condition and to keep oysters there is a right which is subject to the ordinary purposes of navigation, and there is no power to exclude ships from passing over that area in the ordinary course of navigation. Indeed, one may go one step further, because if it can be shown that in the ordinary course of navigation it was necessary or proper to touch the soil, whether with the vessel herself or by anchors, in that case there would be such a right of grounding or anchoring, notwithstanding the ownership in the soil or in the oysters upon it. That was decided in the Colchester case, because there what was proved was that in the ordinary course of navigation it was necessary for vessels to ground at least once before getting up to Colchester, because the distance could not be done, as a matter of time, on a single tide. Therefore it was held that the ordinary rights of navigation, in spite of there being an oyster fishery, gave a right to ground under proper circumstances and at a proper time. So, if it could be shown that there was a right of grounding in the ordinary and proper course of navigation that would have been another matter, but in this case it is clear that the grounding was not—it is not suggested that it was—a grounding in the ordinary course of navigation. The master of the *Swift* never intended she should ground. How far he was negligent may be another matter, but it is clear that this act cannot be justified as an exercise of the ordinary rights of navigation. Under those circumstances was there negligence on his part? It is said that he had no knowledge and no sufficient notice, and need not necessarily have had any, that this was an oyster fishery. I agree it must be proved, not that he actually knew, but that he ought to have known; in other words, you could not show there was negligence, for this purpose, in his touching the ground at any place unless you can show that he knew, or ought to have known, that that was an area within which oysters were or were likely to be placed. In this case was there such knowledge? A great deal has been said about the beacons and marks indicating the area, and consideration of the evidence leads me to think that the beacons—namely those fixed, standing beacons—were at the time when this accident took place undoubtedly deficient. But there were also the floating beacons, though they would not serve the same purpose, because no doubt they are put there rather to divide one class of oyster from another, and they would not convey to anybody so clearly the knowledge that this area was fenced off. Still, they were there, and I am not prepared to say that they would not be sufficient to convey information as to their purpose to a person who was on the alert. But to my mind the matter does not depend upon the particular marks though it is a criticism of that to say that whether they were sufficient or not they were not seen by the captain or the mate of the *Swift*. Apparently, as far as I can make out, no one on the *Swift* saw any beacons at all, and that, to my mind, throws a great deal of light upon the case, because it does not show that care which a person navigating those waters ought to use. But the case does not stop there at all, because, to my mind, those on the *Swift* had, on that particular occasion, clear and distinct warning. Those on the watch-boat *Betsy* were there for the purpose, among other things, of keeping off ships which in their judgment might be likely to injure the ground, and their evidence is that they waved and hailed, I need not go into the question of whether they hailed, but they certainly have stated here that they gave very clear indications that the vessel approaching ought not to enter that particular area. The answer is a complete denial that any such waving or hailing was seen or heard on board the ship. At any rate, those in the *Betsy* were sufficiently on the alert, because directly after the vessel came in and, as they say, had been fast on the ground for a little time, they undoubtedly boarded her and made a complaint. The evidence of the captain of

the *Swift* is very unsatisfactory on that point, because he would not admit that anything of the sort occurred. If, as I have no doubt, they did board the *Swift* and make a complaint, I think one can go a step further and say that they were keenly alive to their duties. I am therefore disposed to believe that they saw the vessel entering the area in which she was likely to ground, and I cannot help thinking that in those circumstances they did what they say they did—namely, make signs to her to keep out of the oyster ground. The captain of the *Swift*, although he is in the habit of going to and from Faversham, said he did not know of the presence of these beds. It appears to me difficult to believe that a man in seafaring employment can go to and from Faversham for twenty years—even allowing for the fact of his being a foreigner—without knowing what I should think pretty nearly everybody knows, namely, that there are valuable oyster beds lying just off Whitstable. I am taking the same view as was taken by Lord Hannen in respect of the conduct of the pilot in *The Octavia Stella* (*ubi sup.*), and I confess I am quite unable to accept the view that the captain was not, as a mere matter of general knowledge, well aware of the presence of these oyster beds. Therefore I think that, both from general knowledge and from special warning received at the time, the captain knew, or ought to have known, that in entering that particular part of the water he was going upon what was an oyster bed. Then the question is, notwithstanding that, had he reason to suppose that he could go safely over without grounding—was it negligence on his part to take the ground? I think that it was? I think that he should have avoided going into that shelving area, and the Elder Brethren, whom I have consulted, are of the same opinion. I think there is negligence proved against the captain; that he knew or ought to have known of the presence of the oyster beds, and that under the circumstances his grounding was an act of negligence for which his owners are responsible. There must be judgment for the plaintiffs, with a reference to assess the damages.

Solicitors for the plaintiffs, *Lowless* and *Co.*
Solicitors for the defendants, *Stokes* and *Stokes*.

HOUSE OF LORDS.

April 25, 26, *and July* 22, 1901.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY.)

WILLIAMS AND OTHERS *v.* CANTON INSURANCE OFFICE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Insurance on chartered freight—Lien—Cesser clause—Bill of lading freight—Loss by perils of the sea.

A ship was chartered for a specified voyage for a lump freight, payable on delivery of the cargo.

The charter-party provided that the master should sign bills of lading at any rate of freight which the charterers might require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. There was also a clause providing for the cesser of the charterers' liability upon shipment of the cargo provided that the cargo was worth freight, dead freight, and demurrage on arrival at the port of discharge, the vessel to have a lien thereon for the recovery of all freight, dead freight, and demurrage.

The owners insured the lump freight "chartered or as if chartered, as valued, on board or not on board."

A full cargo was shipped, but, owing to the loss of part of it on the voyage by perils of the sea, the bill of lading freight at the port of discharge was not equal to the chartered freight, though the cargo itself was worth more than the chartered freight. The bills of lading preserved no general lien on the cargo.

In an action against the underwriters on the policy to recover the difference between the bill of lading freight and the chartered freight:

Held (affirming the judgment of the court below), that they were not liable, as there had been no loss of chartered freight by perils of the sea.

THIS was an appeal from a judgment of the Court of Appeal (Smith, Williams, and Romer, L.JJ.), who had affirmed a judgment of Bruce, J. at the trial before him without a jury.

The case is reported, under the name of *Brankelow Steamship Company* v. *Canton Insurance Office*, 81 L. T. Rep 6; 8 Asp. Mar. Law Cas. 563; (1899) 2 Q. B. 178.

The action was brought by the appellants, the owners of the steamship *Ramleh*, against the underwriters of a policy of insurance upon chartered freight.

The facts are set out sufficiently in the headnote above, and more fully in the judgment of Lord Brampton.

J. Walton, K.C., *Pickford*, K.C., and *Horridge*, K.C., for the appellants, contended that the courts below were wrong in saying that only "bill of lading freight" had been lost by the perils insured against and not "chartered freight," and that if chartered freight was lost it was by the act of the master in signing bills of lading in the form in which they were signed. Where a policy refers to chartered freight the underwriter must be taken to contract with reference to the charter: (see *The Alps*, 68 L. T. Rep. 624; 7 Asp. Mar. Law Cas. 337; (1893) P. 109) which followed *Inman Steamship Company* v. *Bischoff*, 47 L. T. Rep. 581; 4 Asp. Mar. Law Cas. 419; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670). Therefore the respondents must be taken to have notice of the clause as to signing bills of lading, which were in the ordinary form. If a cargo was loaded under bills of lading under which the freight was 3000*l.* on arrival the charterer is not liable, but the owner is entitled to the bill of lading freight, and has a lien. The goods were lost and he lost the lien, and so lost the 600*l.*, the difference between the chartered freight and the bill of lading freight, which he cannot recover any other way. The loss is really a loss of chartered freight by perils of the seas; but if it is only bill of lading freight it is covered by the policy, which was on freight "chartered or as if chartered."

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Carver, K.C. and *J. A. Hamilton*, K.C., for the respondents, maintained that there was in fact no loss of chartered freight. The cesser clause did not exonerate the charterers from the payment of the lump freight unless the correlative lien was effective. This was settled by the decision of the Court of Appeal in *Hansen* v. *Harrold* (70 L. T. Rep. 475; 7 Asp. Mar. Law Cas. 464; (1894) 1 Q. B. 612), which practically overruled *French* v. *Gerber* (36 L. T. Rep. 350; 3 Asp. Mar. Law Cas. 403; 2 C. P. Div. 247): (see also the Scotch case of *Arospe* v. *Barr*, 8 R. 602). The respondents are not concerned with bill of lading freight. The appellants are in this dilemma: either the charterers are still liable for the freight, or the loss was caused by the act of their agent, the master, which is not a peril insured against. The following cases were also referred to:

Bensaude v. *Thames and Mersey Marine Insurance Company*, 77 L. T. Rep. 282; 8 Asp. Mar. Law Cas. 315; (1897) A. C. 609;
Turnbull, Martin, and Co. v. *Hull Underwriters' Association*, 82 L. T. Rep. 818; (1900) 2 Q. B. 402;
The Bedouin, 69 L. T. Rep. 782; 7 Asp. Mar. Law Cas. 391; (1894) P. 1;
Wilson v. *Jones*, 15 L. T. Rep. 669; 2 Mar. Law Cas. O. S. 452; L. Rep. 2 Ex. 139;
Clink v. *Radford*, 64 L. T. Rep. 491; 7 Asp. Mar. Law Cas. 10; (1891) 1 Q. B. 625;
Dunlop v. *Balfour and Co.*, 66 L. T. Rep. 455; 7 Asp. Mar. Law Cas. 181; (1892) 1 Q. B. 507;
Barber v. *Fleming*, L. Rep. 5 Q. B. 59.

J. Walton, K.C. in reply.—*Hansen* v. *Harrold* goes too far, and should be overruled. *Gardner* v. *Trechmann* (53 L. T. Rep. 518; 5 Asp. Mar. Law Cas. 558; 15 Q. B. Div. 154) is in the appellants' favour.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 22.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: A vessel called the *Ramleh*, owned by the Brankelow Steamship Company, was chartered at a lump sum freight. The charter was for a voyage from the River Plate to Liverpool and the freight by the charter-party was a lump sum of 3000*l*. A cesser clause provided that the charterers' liability was to cease upon shipment of the cargo, "provided said cargo is worth the freight, dead freight, and demurrage on arrival at the port of discharge, but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever." It is not denied that the vessel arrived at her port of discharge, Liverpool, worth the freight due. A claim is now made under a policy of insurance which was effected with the Canton Insurance Company against perils of the sea upon freight "chartered or as if chartered." These words "or as if chartered" have, to my mind, no meaning where there is, as in this case, a chartered freight, and if they have any meaning at all in other cases, of which I have some doubt, I decline to speculate as to what their meaning would be in a case different from the present. The chartered freight was earned so far as the charter itself was concerned, and if the whole charterers' freight has not been realised it has not been by any fault of the sea that this has occurred, and I am very clearly of opinion that the judgment of the Court of Appeal is right and ought to be affirmed.

Lord MACNAGHTEN.—My Lords: I agree. I think that the judgment of Smith, L.J. is perfectly right. It seems to me to be clear that the insurance was upon the chartered freight. Whatever may be the meaning of the expression "freight chartered or as if chartered," the subject of the insurance was the lump sum freight valued at 3000*l*.—that and nothing else. I also think that one of two things has happened. Either this freight has not been lost and the charterers are liable to pay the full sum, or the loss has occurred not from perils of the sea, but in consequence of the form in which the bills of lading were taken. It seems to me that it is not desirable to discuss the question whether the cesser clause in the charter-party became operative, because that question may possibly have to be determined between the shipowners and the charterers. I am of opinion that the appeal must be dismissed with costs.

Lord DAVEY.—My Lords: I am of the same opinion. I think that the subject of the insurance is what has been called "chartered freight" only, and that it does not cover loss of the bills of lading freight. The charterer therefore cannot recover in this action. In the case of *The Bedouin* (69 L. T. Rep. 782; 7 Asp. Mar. Law Cas. 391; (1894) P. 1) Lord Esher, M.R. held that the words "freight chartered and (or) as if chartered on board or not on board," which was the description of the risk insured in that case, was an elliptical expression for chartered freight or as if chartered on goods on board or not on board. "If there were any difficulty at all," he says, "in construing the words 'and (or) as if chartered,' it seems to me that these words "on board or not on board' do conclusively show it must be chartered freight; because, if there is no charter, or no contract equivalent to a charter, there cannot be freight payable on goods not on board." This observation appears to me to be well founded. There are similar words in the policy before us, and I am therefore of opinion that the subject of the insurance was chartered freight, and nothing else. But can the owners recover? The 18th clause of the charter-party is not very clearly expressed. But I think that it was intended that the lien of the vessel for the chartered freight should extend to the whole of the cargo, and that an arrangement which conferred separate liens on the bills of lading freights payable on the several portions of the cargo, and therefore indirectly on those several portions only, was not a compliance with the contract. Otherwise, I do not understand the meaning of the proviso that the "said cargo is worth the freight, dead freight and demurrage, on arrival at port of discharge." The proximate cause of the loss to the owners (if they have suffered any) is from their having parted with the liability of the charterers without securing to themselves the lien for which they stipulated in the charter-party. Whose fault was this? I think that counsel for the respondents succeeded in placing his opponent in a dilemma. Either the master of the vessel deliberately or otherwise signed bills of lading in a form which he was not

bound to accept and without reserving the entire lien, in which case the owners have suffered a loss from the act of their agent, which is not a risk insured against; or the master could not help himself, and was obliged to sign the bill of lading which the charterers required him to sign, in which case the charterers remain liable if (as counsel contended) the words "but vessel to have a lien thereon," &c., are to be read as a condition precedent to the cesser of liability. Quite apart from the decision in *Hansen* v. *Harrold* (70 L. T. Rep. 475; 7 Asp. Mar. Law Cas. 464; (1894) 1 Q. B. 612), the words of the 18th clause rather favour this construction. For the cesser of liability is not to be definitive until arrival of the ship at the port of discharge, the cargo being then worth the freight and demurrage. Reading the words in brackets with the subsequent words, they may mean provided that the cargo is sufficient on arrival, and the vessel has a lien thereon. Counsel for the appellants says that the case of *Hansen* v. *Harrold* went too far, and ought to be overruled. I certainly have no prejudice in favour of a decision to which I was a party, and I am perfectly prepared to review it, and, if necessary, to say that it is wrong. But no such necessity exists in the present case, as I believe that this House agrees with the Court of Appeal in holding that counsel for the appellants is impaled on the first horn of the dilemma put by counsel for the respondents.

Lord BRAMPTON.—My Lords: This action is brought by the Brankelow Steamship Company, the owners of a vessel called the *Ramleh*, and Williams and Co., the charterers of that vessel, to recover from the respondents a sum of 614*l.* 0*s.* 4*d.*, as representing an alleged loss by perils of the sea of a part of a lump freight of 3000*l.* insured against such perils by a policy of insurance made by the respondent company. By a charter-party, dated the 17th Sept. 1896, the appellants, Williams and Co., chartered the *Ramleh* to load a full and complete cargo at Buenos Ayres, to proceed to Liverpool, and there deliver the same, the agreed freight being the lump sum of 3000*l.*, payable as to a portion for ship's use at port of loading, and the balance in cash on the delivery of the cargo. In the charter-party there was a clause stipulating that the master should apply at the offices of the charterers or their agents to sign bills of lading at any rate of freight the charterers might require, but not under chartered rates: and the charterer's liability was to cease on shipment of the cargo (provided the said cargo was worth the freight, dead freight, and demurrage on arrival at the port of discharge); but the vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever. On the 11th Nov. 1896 a policy of assurance was effected with the respondent office against perils of the sea upon freight chartered, or as if chartered, valued at 3000*l.* on board or not on board. It must be taken as an admitted fact that the brokers, when effecting this policy, were acting on behalf of and were making an insurance to cover the interests of all the plaintiffs. But of course, that is no admission that the charterers had in fact any such interest as would enable them to sue on the policy, nor can it extend the subject of the insurance beyond the language of the policy. The charterers availed themselves of the bills of lading clause, and under it bills of lading were signed by the master in respect of the whole of the goods which were shipped as the cargo. The aggregate of these bills of lading freights amounted to a sum exceeding the chartered lump freight of 3000*l.* The *Ramleh* left Buenos Ayres with a full cargo as stipulated and proceeded on her voyage. During the voyage a portion of the cargo for which bills of lading to the amount of 645*l.* had been given was lost by perils of the sea, but the *Ramleh* continued on her way and arrived at Liverpool, and there landed the remainder of her cargo, which was then still worth the freight, dead freight, and demurrage. Upon such freights as might become due on the bills of lading the vessel had no doubt a lien, but it was not a lien upon the whole cargo for the lump freight as stipulated in the charter-party, but a lien limited to the amount due on each separate bill of lading, the aggregate of which then amounted to only 2385*l.* 19*s.* 8*d.*; that is to say, in other words, the cargo was worth over 3000*l.*, amply sufficient to cover all the lump freight; whereas the bills of lading freights, upon which alone the ship had a lien, amounted only to 2385*l.* 19*s.* 8*d.*, leaving a deficiency of 614*l.* 0*s.* 4*d.*, to recover which this action was brought.

The only question for the consideration of this House is whether that deficiency ought in law to be treated as a loss by perils of the sea. In dealing with the subject of the insurer's liability under the policy, it must be assumed that it was made by the respondent insurance office, having regard to the terms of the charter-party; these could not fail to be important in determining the premium to be charged for the risk to be undertaken. In this case the sole subject-matter of insurance was the lump freight, and the sole undertaking was to indemnify the owner against loss by perils of the sea of any portion of it. By this policy there was no insurance of the ship, nor of any of the goods forming the cargo, nor of any bills of lading freights, nor so far as I can see was it material to the insurers whether the cargo was shipped by the charterers themselves, for the carriage of which they were to pay the lump sum of 3000*l.* to the owners of the ship, or whether it was made up of numerous shipments by various shippers under bills of lading, so long as the owners had the personal responsibility of the charterers, unless and until the *Ramleh* arrived at Liverpool with a cargo worth the freight due, and on such arrival had a lien on all such cargo for all freight. That the vessel did arrive with a cargo fully worth such freight is conceded, and if the stipulation as to the vessel's lien thereon as contained in the charter-party had remained available, her owners, the appellant company, would have had the satisfaction for the freight for which it had stipulated, and there would have been no loss at all of any part of it. To what, then, is this deficiency or loss to be attributed? And how came it to pass that the lien as given by the charter-party was so limited as to be unavailable, except for the aggregate amount of the bills of lading freights? The true answers to these questions were given by Bruce, J., by whom the case was tried without a jury, and by the Court of Appeal. I adopt the language of Smith, L.J. which very clearly states

the position thus: "By whose act was it that the plaintiffs, the shipowners, had not a lien upon the cargo which arrived for all the lump chartered freight (the cargo which arrived being ample to secure this)? Surely that of the shipowners themselves, by not taking bills of lading with either the words 'freight and all other conditions as per charter-party' therein, or in some other form giving to themselves a lien over the whole cargo which arrived for the recovery of 'all freight' as mentioned in the cesser clause." Suppose every part of the cargo actually shipped had been the sole property of the charterers, and had been loaded by them or their agents in strict accordance with the terms of the charter-party and without any bill of lading at all, that a loss to the same amount of the cargo had occurred by perils of the sea, but that the remainder of the cargo being still, notwithstanding that loss, worth, and amply sufficient to satisfy, the lump freight, had arrived safely at Liverpool and come to the hands of the owners: would it not have been a little against good sense to say that the lump freight, which, according to the intention of both owner and charterers, had been liquidated by means of the lien on the cargo which arrived, had been lost by perils of the sea? I am very much disposed to think that in using in the policy the words "freight chartered or as if chartered," it was intended by the framers of and the parties to it, that, whatever the facts might be, whether the ship was wholly loaded by the charterers or wholly or partly under bills of lading by other shippers, the whole was to be treated for the purposes of the policy as one entire undivided cargo, loaded by the charterers, to be carried for that one lump freight. No doubt there was a loss of a substantial portion of the cargo by perils of the sea, and this occasioned to the owners of the goods a loss to that extent, and to the charterers a loss of their bills of lading freights. For these losses there may or there may not have been insurances by the persons concerned, but they certainly were not losses covered by this policy. The only contract made by the respondent insurers with the owners of the ship was to pay to them any loss occasioned by perils of the sea of the lump freight; but such loss could only happen in case of the arrival of the cargo so reduced by perils of the sea that its worth was less than that of the freight, dead freight, and demurrage. Such a contingency did not happen, and therefore the insurers are not liable, the loss (if any) which the owners have sustained being due not to any insufficiency in the worth of the cargo which arrived, but because they and the charterers, by the bills of lading under which the cargo was shipped, had deprived the owners of the lien stipulated for in the charter-party, and limited it to the amount of the freight due on the bills of lading, the aggregate of which was less, by the sum claimed, than the lump freight due. For these reasons I think that this appeal should be dismissed with costs.

Lord LINDLEY.—My Lords: The words in the policy, "chartered or as if chartered" have given rise to this litigation, and your Lordships will have to determine their real meaning and their effect when applied to the facts of this case. The policy does not in terms refer to any particular charter-party, but there is a charter-party to which it has to be applied, and the provisions of which must be regarded: (see *Inman Steamship Company* v. *Bischoff*, 47 L. T. Rep. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670). That charter-party is dated the 17th Sept. 1896, and had been entered into before the policy was effected. By this charter-party the ship was chartered by the plaintiffs, her owners, to their co-plaintiffs, her charterers, for the voyage mentioned in the policy. She was to be loaded with a full and complete cargo. The freight was to be the lump sum of 3000*l.*, payable on the right and true delivery of the cargo. Perils of the sea and other perils were excepted, as usual (clause 8). There was a provision (18) requiring the master to sign bills of lading "at any rate of freight the charterers or their agents may require, but not under chartered rates." It was also stated "charterers' liability to cease upon shipment of the cargo (provided said cargo is worth the freight, dead freight, and demurrage on arrival at the port of discharge), but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever." Your Lordships will observe that under this charter-party two freights might become payable. First there is the lump sum of 3000*l.*, expressly mentioned in the charter-party, payable by the charterers to the owners; and for this the owners had a lien on the whole and every part of the cargo. There can be no doubt that the policy covered this freight, and that if it or any of it has been lost by perils of the sea the shipowners can recover the loss from the underwriters. But your Lordships will also observe that in this lump sum chartered freight the charterers had no beneficial interest. They might have insured against their liability to pay it, but it is plain that the policy was not effected to cover, and does not cover, any such risk as that. Then there might be (and, in fact, there was) the freight payable under bills of lading issued by the master pursuant to the 18th clause. This freight was very different from the lump sum chartered freight. The bills of lading freights were payable by the consignees of the cargo; their total was not one sum of 3000*l.*, but was the aggregate of the various sums payable in respect of the particular goods for which the bills of lading were respectively given; and, what is very important, there would be no lien on all the goods, for all the freight, whether chartered or bill of lading, unless such lien was expressly given by each bill of lading signed by the master. This bill of lading freight further differed very materially from the lump sum chartered freight; for if goods were jettisoned in the course of the voyage (as, in fact, some were), the right to be paid the bill of lading freight in respect of those goods would be lost by perils of the sea, whilst the right to be paid the lump sum chartered freight in full would still remain. A lump sum freight is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery having regard to and excluding the excepted perils. In other words, the cargo does not mean the cargo shipped but the cargo which the shipowner undertakes to deliver. The non-delivery of some of it affords no defence to a claim for the lump sum freight, although such non-delivery, if wrongful, will give

rise to a cross-action. This was settled by the Court of Exchequer Chamber in *Merchant Shipping Company* v. *Armitage* (29 L. T. Rep. 809; 2 Asp. Mar. Law Cas. 185; L. Rep. 9 Q. B. 99), which followed a decision to the same effect by the Privy Council in *The Norway* (3 Moo. P. C. N. S. 245). It follows that if the bills of lading signed by the master had not been in such a form as to destroy the lien given by the charter-party for the lump sum freight on the whole cargo, such lien would have extended to the whole cargo ultimately landed; and if the value of the cargo landed had exceeded the lump sum freight, no part of such freight would have been lost by the shipowner, and he would have had no claim whatever against the underwriters in respect of it. Both the shipowners and the charterers were beneficially interested in the bills of lading freights. They were a security to the shipowners for the lump sum chartered freight, and the surplus of the bills of lading freights belonged to the charterers. But the two freights cannot be regarded as practically the same. The risks run by insuring them are substantially different. If the chartered freight had been a *pro ratâ* freight—*i.e.*, so much a ton—a partial loss of cargo would have involved a partial loss of freight, and it might have been indifferent to the underwriters under which document the freight was payable. But where, as in this case, the chartered freight is a lump sum, and therefore payable in full, although some cargo is lost, a partial loss of cargo may not involve any loss of freight whatever. Indeed, as I have already pointed out, if as here there is a lien for the whole lump sum on the whole cargo, a partial loss of cargo can only affect the underwriters of a policy on the freight if the cargo landed is of less value than the lump sum. A partial loss of cargo will not affect them even then, if the charterer is personally liable for the difference; for the underwriters do not insure his solvency. It is clear, then, that the risk of insuring a lump sum freight is very different from the risk of insuring freight of the same amount, but apportioned by bills of lading, and accordingly liable to partial loss in the event of a partial loss of cargo.

I proceed to state the circumstances under which the loss sought to be recovered in this action arose. A full cargo was shipped. The master signed bills of lading for goods mentioned in them, and by these bills of lading freight was made payable in respect of those goods on delivery, but no lien on those goods for any other freight was created or preserved. The lien given by the charter-party for the lump sum freight could not be exercised against the holders of the bills of lading; it was practically extinguished. Some goods were jettisoned on the voyage, and those goods, and the freights payable in respect of them under the bills of lading given for them, were lost, and were lost by perils of the sea. The ship, however, arrived at her destination safely with the rest of her cargo. The value of the cargo which arrived exceeded the lump sum chartered freight; so that the shipowners' lien for that freight could have been asserted if such lien had not been lost by the issue of bills of lading which did not refer to it. It is plain from this statement that the lump sum chartered freight has not been lost by any of the perils assured against. If the bills of lading had not been issued in such a form as to extinguish the lien for the lump sum chartered freight it would not have been lost at all; for even assuming that the charterers' personal liability for the lump sum freight had ceased under clause 18 of the charter-party, still the loss of some of the cargo by perils of the sea did not occasion the loss of the chartered freight or any part of it. The cargo which arrived was worth more than the amount of the chartered freight, and would have been an available security for it. Unless, therefore, the policy covers the bills of lading freights as well as the lump sum chartered freight, the plaintiffs' claim cannot be supported. This brings me to the last question, which is, Do the words "freight chartered or as if chartered" cover or include the bills of lading freights, either together with or in substitution for the lump sum chartered freight? I cannot think that they do. The term "chartered freight" is free from ambiguity, and means the freight, if any, made payable by the terms of the charter-party—that is, in this case the lump sum of 3000*l*. The phrase "chartered or as if chartered" is alternative in form; if there is a chartered freight for certain goods or for a certain space in the ship, that is the freight insured, and no other freight for the same goods or space can be added to it or substituted for it if the underwriters' risk is altered. The alternative "or as if chartered" applies to freight, or what in business is treated as freight although not made payable by the express terms of any charter-party—for example, if the shipowner carries other people's goods without a charter-party, or perhaps if he carries his own goods. The phrase "as if chartered" would also cover freight payable under a charter-party entered into after the date of the policy, if the policy without those words would not extend to such freight. Counsel for the appellants relied strongly on the fact that in this case the policy was admittedly entered into on behalf of both shipowners and charterers, and that the only freight the charterers had a beneficial interest in was the bills of lading freights. But the interests of the assured were not disclosed to the underwriters, who, so far as appears, knew nothing of the parties interested, and the fact that the charterers had no beneficial interest in the chartered freight to which the policy plainly does apply cannot justify any court in straining the language of the policy so as to include a different subject-matter involving a different risk. If in this case the words of the policy do not apply to the bills of lading freights, if those words must be confined to the lump sum chartered freight, there is an end of this case; for no part of that freight has been lost by perils of the sea, although, undoubtedly, some of it has been lost for other reasons. It is unnecessary to consider whether, as counsel for the respondent contended, the charterers are personally liable to the shipowners for this loss, on the ground that the shipowners had no effective lien on the cargo landed for the whole of the chartered freight; or whether, as counsel for the appellant contended, the charterers are relieved from liability by the 18th clause of the charter-party properly construed, notwithstanding *Hansen* v. *Harrold* (*ubi sup.*) on which he relied. I purposely, therefore, pass over that question. The short but conclusive

answer to the plaintiffs' claim is that the freight insured has not been lost by any of the perils insured against; and that the freight which has been lost by those perils is not the freight insured. This is the view taken by Bruce, J. and by the Court of Appeal, and their decision ought to be affirmed with costs. Lord Robertson has asked me to say that he concurs in the decision.

The LORD CHANCELLOR.—My Lords: Lord Shand desires me to say that he concurs in the judgment proposed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Pritchard, Englefield,* and *Co.*, for *Simpson, North, Harley,* and *Birkett,* Liverpool.

Solicitors for the respondents, *Waltons, Johnson, Bubb,* and *Whatton.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

July 2 *and* 27, 1901.

(Present: Lords HOBHOUSE, DAVEY, JAMES OF HEREFORD, ROBERTSON, and Sir RICHARD COUCH.)

THE CHITTAGONG; OWNERS OF THE STEAMSHIP KOSTROMA *v.* OWNERS OF THE STEAMSHIP CHITTAGONG (*a*)

ON APPEAL FROM HIS BRITANNIC MAJESTY'S COURT AT CONSTANTINOPLE.

Collision—Bosphorus—Crossing ships.

The steamship C., *whilst turning at night in the Bosphorus under a port helm, opened her green and masthead lights on the port bow of the steamship* K., *which was coming up the Bosphorus in her proper water. About the same time the* C. *sounded two short blasts and starboarded her helm, to which the* K. *replied with one short blast and ported her helm. The vessels collided.*

Held, the C. *was alone to blame.*

THIS was an appeal from a judgment of the Supreme Consular Court at Constantinople, sitting in vice-Admiralty in an action for damages by collision.

The collision took place a little to the northward of Leander Tower and, as the learned judge found, on the Asiatic side of the Bosphorus. The *Chittagong* was a British steamship of 1912 tons gross register, and, at the time of the collision, was on a voyage from Batoum to Singapore with a cargo of petroleum; the *Kostroma* was a Russian steamship belonging to the Russian Volunteer Fleet, and, at the time, was on a voyage from Vladivostock to Odessa with a cargo of tea and copra, and had twenty-seven passengers on board.

The case of the appellants, the owners of the *Chittagong,* was that at about 6.30 p.m. on the 4th March 1900 she came to an anchorage in the course of her voyage just below the Palace of Dolma Bagtche heading up the Bosphorus, and remained there until about 10.30 p.m. the same evening, when she weighed anchor. The weather was dark but clear, the wind a light breeze from the northward, and there was a strong current setting down the Bosphorus towards the Sea of Marmora of the force of about four knots an hour. After proceeding slow ahead for a short time to gather sufficient way, she sounded her whistle and proceeded to turn under a hard-a-port helm. Whilst so doing the masthead and red lights of the *Kostroma* were seen about one and a half to two miles off. The *Chittagong* continued to turn, and by the time she had come round on to her course the green light of the *Kostroma* came into view on the starboard bow, and the red was shut in. The *Chittagong* was then in about the middle of the navigable channel, and her engines were put full speed ahead, and the helm steadied on a course of about S.S.W. The vessels then continued to approach one another, green to green, for three or four minutes, when the *Kostroma* suddenly opened her red light about three points on the starboard bow of the *Chittagong,* and nearly half a mile distant. The helm of the *Chittagong* was put hard-a-starboard and two short blasts sounded on her whistle, to which the *Kostroma* replied with one short blast, whereupon the engines of the *Chittagong* were immediately stopped and reversed, three short blasts were sounded on her whistle, and the helm steadied, but the *Kostroma* came on across her bows, and with her port side about amidships struck the stem of the *Chittagong.*

The appellants charge the *Kostroma* with entering the Bosphorus on the wrong side of the channel, and with improperly porting her helm when the vessels were green to green.

The case on behalf of the respondents, the owners of the *Kostroma,* was that she was coming up from the Sea of Marmora, making ten or eleven knots an hour on a course of N. 16 degrees E., and when abeam of Leander's Tower, the course was altered to N. 42 degees E. in order to proceed up the Bosphorus. Vessels are not ordinarily allowed to pass through the Bosphorus at night, and usually anchor on the European side, but vessels of the Russian Volunteer Fleet have the privilege of passing through at night. After keeping on this course for about a minute, a faint green light, which proved to be the green light of the *Chittagong,* came into sight two or three points on the port bow of the *Kostroma,* and about the same time two short blasts were heard from the *Chittagong.* The *Kostroma* thereupon sounded a single short blast, and her helm was put hard-a-port. The *Chittagong* then sounded two more short blasts, which were replied to by those on board the *Kostroma* by another short blast signal, but the *Chittagong* continued to come on showing her green light, and although, when she was close up, the helm of the *Kostroma* was put hard-a-starboard to swing her stern clear if possible, the collision occurred.

The respondents charged the appellants with neglecting to keep a proper look-out, with leaving her anchorage at a wrong time and being navigated on the wrong side of the Bosphorus, with altering her course to starboard after giving a two-blast signal, with not keeping out of the way of the *Kostroma,* and with not stopping and reversing her engines in due time, if at all.

At the trial of the action, O'Malley, J. held that the *Kostroma* was not to blame for altering her course in the first instance, as, owing to the heading of the *Chittagong* during the greater part of the manœuvre of turning, her green light would

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

not be visible to those on board the *Kostroma* before the helm was altered. He also held that, although the *Chittagong* at the time the *Kostroma* altered her course was on the wrong side of the channel, she was lawfully where she was, but that she committed a breach of art. 19 of the regulations in not keeping out of the way of the *Kostroma*, which was then a crossing ship, and further failed to comply with art. 23 in not stopping and reversing sooner than she did. He therefore held the *Chittagong* alone to blame for the collision.

From this decision the defendants, the owners of the *Chittagong*, appealed.

Art. 19 of the Regulations for Preventing Collisions at Sea is as follows:

When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other or her own starboard side shall keep out of the way of the other.

Art. 23 is as follows:

Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

Art. 25 is as follows:

In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Aspinall, K.C. and *Dawson Miller* for the appellants.—The evidence shows that the *Kostroma* was coming up on the wrong side of the navigable channel in breach of art. 25 of the regulations. There was a bad look-out on board the *Kostroma*, and she ought to have seen the green light of the *Chittagong* before she altered her course. If she did see the green light of the *Chittagong* on her port bow, it was obvious the vessels were crossing vessels, and it was then her duty to keep her course and speed. It is admitted, however, that on hearing the two blasts from the *Chittagong* she hard-a-ported her helm, and afterwards it was put hard-a-starboard. Assuming art. 19 did not apply, then there was no duty on the part of the *Chittagong* to keep out of the way of the *Kostroma*, and the *Kostroma* ought not to have ported to her green light. All the evidence shows that the *Chittagong* stopped and reversed her engines as soon as there was danger of collision.

Joseph Walton, K.C. and *Dr. Stubbs*, for the respondents, were not called upon.

July 27.—The judgment of their Lordships was delivered by

Lord JAMES OF HEREFORD.—This is an appeal from a judgment or order of the Consular Court of Constantinople, dated the 1st Aug. 1901, whereby the appellants—the defendants in the suit—were declared to be liable in consequence of a collision between the above-named two vessels having been caused by the negligent navigation of the appellants' vessel the *Chittagong*. The collision in question occurred under the following circumstances: On the 4th March 1900 the *Chittagong* was anchored in the Bosphorus on the western or European side below the Palace of Dolma Bagtche. She was lying at the usual anchorage ground heading up the Bosphorus. In order to continue her voyage to Singapore, about 10.30 in the evening of the 4th March, she weighed her anchor, and after steaming slowly ahead for a short distance she proceeded to turn short round. At this time the *Kostroma* was coming up the Bosphorus from the Sea of Marmora, and the *Chittagong* would whilst turning be running across her course. It seems to be admitted that the *Chittagong* was by her movement on a wrong course or in a wrong position, whilst the *Kostroma* was on a right course. But on the part of the *Chittagong* it was urged at the bar that although by putting her helm a-starboard she was on a wrong course, the *Kostroma*, by observing the lights or by giving heed to "the two blasts" from the *Chittagong*, could have ascertained, without doubt, the course the *Chittagong* was taking, and could have avoided the collision by altering or deviating from the right course on which she was. It was, however, answered that the lights of the *Kostroma* were open to the observation of those on board the *Chittagong*, and the one short blast given twice from the former vessel was a distinct notice that she was continuing on her course. The judge in the court below came to the conclusion that, under the circumstances, the *Chittagong* should have ported her helm, and that if this had been done the collision might not have occurred. Their Lordships also are of opinion that the collision was solely occasioned by the negligence of those on board the *Chittagong*. Whilst it is not a decisive fact, yet it is most important in its effect that the *Chittagong* was pursuing a wrong course at the time of the collision, and that such wrong course ought not to have been persisted in after it was known that the *Kostroma* had not altered hers. This latter vessel, being on her right course, was justified in assuming that the *Chittagong* would give way and not persist, after being warned, in following a wrong course. Their Lordships are informed by the nautical assessors who have been present during the hearing of the case that the initial fault of the *Chittagong* was in having tried to make too sharp a turn, and they also expressed a strong opinion that there was negligence on the part of those who had charge of the *Chittagong* in not reversing her engines and going astern when they found that the *Kostroma* was pursuing her course. Their Lordships will therefore humbly advise His Majesty that the judgment of the court below should be confirmed, and that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants, *Botterell* and *Roche*.

Solicitors for respondents, *Jull*, *Godfrey*, and *Danvers*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 13, 14, *Aug.* 3 *and* 9, 1901.

(Before SMITH, M.R., WILLIAMS and STIRLING, L.JJ.)

BALMORAL STEAMSHIP COMPANY *v.* MARTEN. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance (marine)—Valued policy—Ship valued in policy at less than real value — General average loss—Salvage—Adjustment on basis of real value—Liability of underwriters.

When a ship is insured for the full agreed value under a valued policy of insurance, and a general average loss is sustained, or a salvage award is paid, by the owners based upon a value larger than the value in the policy, the underwriters are not bound to pay the whole loss, but are bound to pay only in the proportion which the value in the policy bears to the value upon which the general average loss or the salvage award has been based.

A ship was insured for 33,000l., and was valued in the policy at that sum. A general average loss was sustained, and a salvage award was paid, by the owners upon the real value of the ship, which was 40,000l.

Held (affirming the judgment of Bigham, J.), that the underwriters were liable to pay only thirty-three-fortieths of the general average loss and of the salvage charges.

THIS was an appeal by the plaintiffs from the judgment of Bigham, J. at the trial of the action as a commercial cause without a jury.

The plaintiffs were the owners of the steamship *Balmoral*, and they brought this action against the defendant, an underwriter, upon a policy of insurance upon the *Balmoral*, which had been underwritten by the defendant.

The *Balmoral* was insured by the policy for twelve months from the 5th Dec. 1898 to the 5th Dec. 1899 for 33,000*l.*, and by agreement the vessel was valued in the policy at 33,000*l.*

In June 1899, during the currency of the policy, while the vessel was on a voyage from Philadelphia to London with a general cargo, salvage services were rendered to her by the *Amroth Castle*.

On the 27th June an action was commenced by the owners of the *Amroth Castle*, for the recovery of salvage, against the owners of the *Balmoral*, her cargo and freight.

In that action the owners of the *Balmoral* were condemned to pay 500*l.* for salvage services to the ship and her cargo, together with costs and interest amounting to about 136*l.*

In that action the value of the *Balmoral* was stated by the owners to be 40,000*l.*, and that value was agreed between the owners and the salvors to be the value of the ship, by way of compromise to save the expense of a valuation.

Also during the currency of the policy a general average loss was sustained and general average expenses were incurred.

In adjusting the general average and salvage charges, the contributory value of the ship was taken at 40,000*l*

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

The plaintiffs claimed to be reimbursed by the underwriters the whole of the ship's share of the salvage expenses and of the general average expenses. The underwriters refused to pay more than thirty-three-fortieths of these amounts, upon the ground that the salvage award and the general average contribution were based upon a value of 40,000*l.*, and the ship was insured for 33,000*l.* only.

At the trial Mr. Dawson, an average adjuster of many years' experience, gave evidence on behalf of the defendant to the effect that there was a well-known practice among English underwriters, extending over a long time, that when a vessel was insured for a sum less than the contributory value upon which general average was adjusted, or less than the amount at which the vessel was valued in a salvage action, the underwriters were only liable to pay in the proportion of the insured value to the contributory value or salvage value.

The plaintiffs contended that evidence as to this practice was not admissible, and that the alleged practice was wrong in law.

The action was tried before Bigham, J. without a jury, as a commercial cause, and the learned judge gave judgment in favour of the defendant (83 L. T. Rep. 283; 9 Asp. Mar. Law Cas. 139).

The plaintiffs appealed.

Joseph Walton, K.C. and *D. C. Leck*, for the appellants.—The judgment of the learned judge was wrong, for the plaintiffs are entitled to recover from the underwriters the whole of the loss which they have sustained. The ship was fully insured at the agreed value of 33,000*l.*, and the underwriters are bound to pay the whole loss sustained by the owners up to that amount. The fact that the amount of the loss sustained by the owners has been arrived at by valuing the ship at a sum larger than the value agreed in the policy is immaterial. If the claim against the underwriters were made under the "suing and labouring" clause, they could not object that the amount was calculated upon a value different from the agreed value:

Dixon v. *Whitworth*, 40 L. T. Rep. 718; 4 Asp. Mar. Law Cas. 327; 4 C. P. Div. 371.

In *Dickenson* v. *Jardine* (18 L. T. Rep. 717; 3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 639) it was decided that, in a case of jettison of goods entitling the cargo owner to general average contribution, the cargo owner could recover from the underwriters the whole amount insured without first collecting the contributions to which he was entitled, and that the underwriters would be entitled to stand in his place with regard to the general average contributions. If this ship had been totally lost and abandoned to the underwriters, they would have been entitled to the whole of the wreck, and not merely to thirty-three-fortieths:

North of England Iron Steamship Insurance Association v. *Armstrong*, 21 L. T. Rep. 822; 3 Mar. Law Cas. O. S. 330; L. Rep. 5 Q. B. 244.

These losses in respect of salvage and of general average loss were directly caused by the perils insured against, and the whole amount of those losses is recoverable upon the policy without any reference to the agreed value of the ship:

Pitman v. *Universal Marine Insurance Company*, 46 L. T. Rep. 863; 4 Asp. Mar. Law Cas. 544; 9 Q. B. Div. 192.

If damage was caused to the ship by perils of the sea, the underwriters would have to pay the whole cost of the necessary repairs, and the same rule is applicable to a loss caused by the necessity of receiving salvage services. Salvage charges are just as much incurred for the general safety of the ship and cargo as a loss arising from jettison of a mast; and the method by which the amount of the salvage charges is arrived at is immaterial. The rule applicable in the case of damage to goods is not applicable in the case of damage to ship:

Aitchison v. *Lohre*, 41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755.

The alleged practice of average adjusters is not in accordance with the law, and cannot be accepted:

Atwood v. *Sellar*, 41 L. T. Rep. 83; 42 L. T. Rep. 644; 4 Asp. Mar. Law Cas. 283; 4 Q. B. Div. 342; 5 Q. B. Div. 286;
Svendsen v. *Wallace*, 52 L. T. Rep. 901; 4 Asp. Mar. Law Cas. 550; 10 App. Cas. 404.

That practice is contrary to the practice followed in the United States of America:

International Navigation Company v. *Atlantic Insurance Company*, 100 Fed. Rep. 304

Pickford, K.C. and *Scrutton*, K.C. for the respondent.—The decision of Bigham, J. was right. The agreed value in the policy is conclusive, and cannot be reopened. The loss for which the underwriters are liable must be ascertained by reference to that agreed value, but the shipowners are seeking to recover the amount of a loss calculated upon a larger value than the agreed value. Taking the agreed value, the loss which the shipowners have sustained is only thirty-three-fortieths of the amount claimed:

Pitman v. *Universal Marine Insurance Company* (*ubi sup.*).

It has been decided, in *Aitchison* v. *Lohre* (*ubi sup.*), that salvage charges are not recoverable from the underwriters under the "suing and labouring" clause, and therefore the case of *Dixon* v. *Whitworth* (*ubi sup.*) cannot now apply. The shipowners can only sue for the ship's share of the salvage award, and that is ascertained by the real value of the ship; therefore that, and the general average loss, so far as they are recoverable from the underwriters, must be ascertained by reference to the agreed value in the policy:

The Mary Thomas, 71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108.

Joseph Walton, K.C. in reply.—The agreed value in the policy is only conclusive for the purpose of ascertaining the amount of the liability of the underwriters in case of a total loss:

Irving v. *Manning*, 1 H. L. Cas. 287.

The underwriters, in the case of any loss less than a total loss, must pay the whole amount of the loss, and it is immaterial how the amount has been computed. Salvage charges are a particular average loss and a direct loss by perils insured against, and the whole amount is recoverable.

Cur. adv. vult.

Aug. 9.—The following judgments were read:—

SMITH, M.R.—In this case the plaintiffs insured their ship with the defendant for the sum of 33,000*l.*, the ship in the policy being valued at the agreed sum of 33,000*l.* During the time covered by the policy an average loss was sustained which, taking the ship at its real value of 40,000*l.*, and not at its agreed value of 33,000*l.*, amounted to the sum of 56*l.*, and a salvage award had also to be paid by the plaintiffs, which amounted to the sum of 472*l.*, taking the ship at its real value of 40,000*l.*, and not at its agreed value of 33,000*l.* The question is whether the plaintiffs can recover from the defendant, upon this policy, the whole of either of these two amounts. Bigham, J. has held that they cannot, and I think for the reason hereafter given that Bigham, J. is right. It is not denied that his judgment is in accordance with the practice in vogue in this country, when a ship is valued in a policy by agreement of the parties at less than its real value. I am aware that, if it be shown that a practice is erroneous, it is not binding upon me (see *Atwood* v. *Sellar*, 41 L. T. Rep. 83; 42 L. T. Rep. 644; 4 Asp. Mar. Law Cas. 283; 4 Q. B. Div. 342; 5 Q. B. Div. 286; and *Svendsen* v. *Wallace*, 52 L. T. Rep. 901; 4 Asp. Mar. Law Cas. 550; 10 App. Cas. 404); and I also know that the practice in America is not the same as here. But what is it that the plaintiffs are seeking to do? They are carrying in upon a valued policy claims based, not upon the agreed value between the parties of the thing insured—namely, upon a value of 33,000*l.*—but upon a value of 40,000*l.* In my judgment, the agreed value, apart from fraud, is binding between the assured and the underwriter whenever a claim is made by the one against the other upon a valued policy, and it is not competent for the assured, any more than for the underwriter, to open the value agreed to in the policy. The underwriter's answer to the claim now made by the plaintiffs is this. My liability to you, by agreement between you and me, was to be based upon the ship insured being of the value of 33,000*l.*, no more and no less, and I am, therefore, not liable to pay claims based upon a value of 40,000*l.*, and I think this is a good answer in this case. For these reasons I think the practice in existence in this country is correct, and that the judgment of Bigham, J. is right, and that this appeal should be dismissed.

WILLIAMS, L.J.—The case is not free from difficulty. The policy is a valued policy on the ship. Both sides are agreed that, as between the underwriters and the shipowners, the parties to the policy, the policy value cannot be opened, but each side says that the other is making a claim inconsistent with the valued policy. The shipowners say that, according to the terms of the policy, the ship is between themselves and the underwriters a fully-insured ship, and that the underwriters cannot consistently with the policy maintain that the ship is only insured to the extent of thirty-three-fortieths, or that the shipowners are their own insurers to the extent of seven-fortieths. On the other hand, the underwriters say that they insured the ship on the basis of the ship being worth 33,000*l.*, and that the shipowners have no right to ask them to pay on the footing of the ship being worth 40,000*l.* Bigham, J. decided in favour of the contention of the underwriters, chiefly on the ground, I think, of Mr. Danson's evidence, which proved undoubtedly that there was a well-known practice in England amongst underwriters and average adjusters whereby, if the policy value of the ship

is less than her contributory value adopted in the average adjustment, or less than the amount at which the ship was valued in a salvage action, the same proportionate rebate is made upon the average assessment against the ship when indemnity is sought against the underwriters, unless otherwise provided in the policy. In my judgment it is necessary, in order to arrive at a decision between these respective contentions, to ascertain the nature of the claim of the insured owner in cases where there has been either a general average sacrifice or payment of general average contribution, or payment of the whole or a contributory share under a salvage award. In each of these cases the claim of the insured owner is a claim for a loss by perils of the sea; either something has been sacrificed to avert a peril for the benefit of all or salvage has been paid for the benefit of all. But there is an obvious difference in the links of the chain of cause and effect between a case where masts have been sacrified or cargo jettisoned to avert a peril of the sea, and a case where the loss consists of the sum which has to be contributed so as to distribute the burden of the general average sacrifice or the burden of the salvage award. In the former case a part of the ship or cargo has been lost by voluntary sacrifice necessitated by perils of the sea, whereas in the latter case it is impossible to say what loss there has been until the general average contribution has been adjusted or until the salvage award has been made and the burden of it distributed. It is argued that this difference affects the nature and measure of the loss as between the underwriters and the insured owner, and also affects the right of the insured owner to recover from the underwriters the whole of the loss by perils of the sea without reference to contribution from other owners who have had the benefit of the sacrifice, leaving the underwriters to get a contribution from such owners by virtue of subrogation. To a certain extent this is, I think, plainly true. Losses for which underwriters are liable without any adjustment and losses for which underwriters are liable only after adjustment differ in two respects. The former can be recovered as particular average losses, while the latter generally cannot. The former losses fall within the rule in *Dickenson* v. *Jardine* (18 L. T. Rep. 717; 3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 639), in which it was decided that, in a case of jettison of goods entitling the cargo-owner to general average contribution from the owners of the ship, the insured cargo-owner is entitled to recover from the underwriters the whole amount insured without having first collected the contribution to which he was entitled from the ship and other owners of cargo, and that the underwriters, having paid the cargo-owner, would be entitled to stand in his place with respect to general average contribution, whereas losses for which the underwriters are only liable after adjustment clearly cannot be sued for until after adjustment, and then only to the extent of the insured owner's share of liability according to the statement of the average adjusters. The decision of Barnes, J. and of the Court of Appeal in *The Mary Thomas* (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108) seems to make it clear that underwriters are only liable for general average expenditure after adjustment, and to the extent of the contribution due according to the average statement from the insured owner of ship, cargo, or freight, as the case may be, and *The Mary Thomas* seems also to establish that *Dickenson* v. *Jardine* (*ubi sup.*) has no application to such a case. *The Mary Thomas*, however, is not conclusive as to the case of salvage in the strict sense of the word. It is not conclusive as to salvage by a volunteer independent of agreement, for it will be seen that, in *The Mary Thomas*, the operations after the stranding were done under the orders of the master, just as in the present case the work by the *Gamecock* was done under the master's orders. In all these cases the liability of the underwriters is simply to recoup the insured owner his share of expenditure incurred by the master for the benefit of all. I think, however, that, even in the case of salvage proper, the liability of the underwriter is only to pay the share of the salvors' remuneration awarded against the owner whom he has insured from loss by perils of the sea. The outcome of all this is that neither in a case of general average contribution nor in the case of salvage proper is the underwriter a guarantor of the contributions due under the average statement, or the salvage award, from the other owners interested, but still the loss by ship, in having to pay salvage, is not a loss dependent on the salvage being for the benefit of owners other than the shipowner: (see Arnould on Marine Insurance, 3rd edit., pp. 728-9). It is a direct loss by the peril of the sea, which the salvors are entitled to recover from each owner to the extent that their volunteer services have benefited him. The liability does not seem to me to arise out of the equities of the owners *inter se* or out of the Rhodian law. To that extent the liability of the shipowner or the cargo-owner or other owner, as the case may be, to pay his share of salvage remuneration differs from his liability to pay his share of general average loss, and resembles a loss by jettison. Salvage, however, is generally not expressly named in marine policies, but it is to be remembered that the liability of the underwriters does not depend on the words of the policy, but upon salvage being made by the law of the land or the general law maritime a direct and immediate consequence of perils of the sea. Assuming that salvage is a partial loss of a ship by perils of the sea, which can only be recovered after the liability of the ship has been determined by the award of the court fixing the share of liability, and that the underwriters can in no case be subrogated to the rights of the insured owner, and that therefore so much of the judgment in *Dickenson* v. *Jardine* has no application, yet there remains the question how far the underwriters can resist payment of the share of salvage which the ship has had to pay. It is a loss by the perils of the sea. The ship has had to pay that amount. *Primâ facie* the underwriters are bound to indemnify the shipowner against this loss. What is it that gets rid of this *primâ facie* obligation? The suggestion is that it is got rid of by the fact that the full value of the ship has been agreed in the policy at 33,000*l.*, and the salvage award has been based on a value of 40,000*l.* It is said that this agreement estops the owner, as a party to the policy, from enforcing against the underwriters any indemnity against a loss based on a value inconsistent with that value. Secondly, it is said that the rule in cases of partial loss is to ascertain

the proportion of the contribution of the ship to the total salvage expenditure according to the values and amounts on which the liability of the ship has been fixed by the court which disposed of the salvage action, and that then the liability of the underwriters will be the same proportion of the policy value. It may be that this is a convenient rule of thumb, but it is not the logical outcome of holding the parties to the policy to be bound by the figure of policy value; and it is to be recollected that the salvage valuation is based on the value of the damaged ship as salved, and the policy value is the value of the sound ship. In the case of *Irving* v. *Manning* (1 H. L. Cas. 287) it appears by the opinion of the judges, delivered by Patteson, J., that the meaning of a valued policy is not that as between the parties to the policy the policy value shall for all purposes be taken to be the value of the ship, but only that for the purpose of ascertaining the amount of compensation to be paid to the assured when the loss has happened the value shall be taken to be the sum fixed. The judges, having arrived at that conclusion, go on to approve the doctrine, established by *Lewis* v. *Rucker* (2 Burr. 1167), that on a valued policy on goods the amount to which the underwriters ought to be held liable for a partial loss is to be ascertained by computing such a proportion of the value in the policy as the difference between the price for which sound goods would have sold at the port of delivery and that for which the damaged goods actually sold bore to the price for which sound goods would have sold, and then Patteson, J. goes on to say: "But the extent and nature of the loss being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy": (see pp. 305, 306). This is not the way in which losses by actual damage to the ship are measured for the purpose of ascertaining the *quantum* of the liability of the underwriter. The underwriter has to pay the whole expense of repairs whether the policy value be high or low, less one-third for new work substituted for old, provided only such expenses do not exceed the total sum insured. Now, ought salvage expenses to be measured against the underwriters on the basis of a partial loss of goods or on the basis of repairs? Apart from the established practice spoken to by Mr. Danson, I should have thought that the measure of the loss against which the underwriters had to indemnify the shipowner was the actual sum which the shipowner had to pay for salvage, and that this was so whether the valuation in the policy was above or below the actual value. Salvage expenditure is the sum which the shipowner has had to pay to save the underwriters from a total loss. It does not seem to me to matter how that sum is arrived at. It is not in its origin a computation of the *quantum* of compensation which the underwriters have to pay the shipowner. It is a computation of the sum which the shipowner has to pay to save the underwriters from a total loss—*i.e.*, of the sum which the shipowner has to pay to save the ship from perils of the sea—and this is clearly a direct loss by perils of the sea. But the evidence seems to show that in the case of salvage claims covered by a policy of insurance the *Lewis* v. *Rucker* (*ubi sup.*) measure has been applied for a very long time, and with much hesitation I am concurring in affirming the decision of Bigham, J.

STIRLING, L.J.—There is no dispute that the plaintiffs are entitled to recover on the policy in respect both of the average loss and the salvage award. Forasmuch, however, as the ship was insured at the full amount of the agreed value, the plaintiffs urge that the contract of the defendants is from its nature one of indemnity; that the plaintiffs have suffered a loss to the full amount apportioned to the ship; and that *primâ facie* they ought to be indemnified to that extent. It is, however, contended on behalf of the defendants that, inasmuch as by agreement between the parties the ship has been valued at 33,000*l.*, the plaintiffs must be taken to have contracted that for the purposes of the policy the ship shall be taken to be of that value; that, when the claim of the plaintiffs is investigated, it is found to be based on the ship being of the value of 40,000*l.*; and that under the contract they are only bound to pay the sum which would have been payable if, in the adjustment of the average and in the salvage proceedings, the value of the ship had been 33,000*l.* Now, in the case of *Irving* v. *Manning* (1 H. L. Cas. 287), a ship was insured by a policy in which the value was stated at 17,500*l.* The ship suffered damage while on the voyage, and the amount necessary to repair her was estimated at 10,500*l.*, while her value if repaired would only have been 9000*l.* The assured, having abandoned her, claimed for a total loss; and this claim was upheld by the House of Lords. The opinion of the judges who were consulted by the House of Lords was delivered by Patteson, J., who says: "By the terms of it (the policy) 'the ship, &c., for so much as concerns the assured, by agreement between the assured and assurers, are and shall be rated and valued at 17,500*l.*,' and the question turns upon the meaning of these words. Do they, as contended for by the plaintiff in error, amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired? Or do they mean only, that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the *quantum* of the assured's interest? We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies." After referring to and discussing the previous cases on the subject, his Lordship continued: "The principle laid down in these latter cases is this: that the question of loss, whether total or not, is to be determined just as if there was no policy at all; and the established mode of putting the question, when it is alleged that there has been what is perhaps improperly called a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against. If he would not have repaired the vessel, it is deemed to be lost. When this test has been applied, and the nature of the loss has been thus determined, the *quantum* of compensation is

then to be fixed. In an open policy, the compensation must be then ascertained by evidence. In a valued one, the agreed total value is conclusive; each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to receive in case of a total loss. It is argued that this course of proceeding infringes on the generally received rule, that an insurance is a mere contract of indemnity, for thus the assured may obtain more than a compensation for his loss, and it is so. A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify." This opinion was accepted by the House of Lords as a correct statement of the law. Two points were therefore decided: first, that the value stated in the policy is not conclusive for all purposes, but is conclusive for the purpose of ascertaining the compensation to be paid to the assured when a loss has happened; and, secondly, that a valued policy of insurance is a contract of indemnity with this qualification, that the amount recoverable is ascertained beforehand by way of liquidated damages. It is not to be inferred that the rule thus established is to be applied only for the purpose of ascertaining the amount to be paid to the assured, as is shown by *Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Association* (1894) A. C. 72, 79). There a policy contained a clause making it a condition that the assured should keep one-fifth of the value of the ship uninsured. The policy value of the ship was 3750*l.*; insurances were effected to the amount of 4000*l.*, and it was contended that there was no breach of the condition because the real value was 5000*l.*; but Lord Herschell said: "It is clear that, as between the parties to this action (viz., the assured and underwriters), the value of the vessel must be taken as 3750*l.*; and, if she was insured for more than four-fifths of 3750*l.*, it appears to me that the condition was broken." This rule (as is shown by the opinion of the judges in *Irving* v. *Manning*, *ubi sup.*), extends to cases of partial, as well as total loss, but is much less easy of application. As regards goods and freight, the rule appears to be that established in *Lewis* v. *Rucker* (2 Burr. 1167)—viz., that the assurer pays such proportion of the value stated in the policy as the amount of damage done bears to the total actual value, such damage and actual value being both ascertained with reference to the same time and place. It was said in argument on behalf of the defendants that this rule was introduced to avoid charging the underwriter with fluctuation in the market value of the goods. This is the reason for that part of the rule which requires that the proportion between the damage and actual value shall be ascertained with reference to the same time and place; but, after this proportion has been got, the rule requires (as in the case of a total loss) that the amount of compensation shall be assessed with reference to the value stated in the policy, and this is pointed out by Lord Mansfield in the case cited. In commenting on the same case in *Irving* v. *Manning* (*ubi sup.*), Patteson, J. says: "The extent and nature of the loss being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy; and this mode of treating partial losses on goods is always adhered to." Where, however, a ship is damaged without becoming a total loss, then, if the vessel is repaired, the rule is that the damage is to be taken as the cost of repairs less one-third, and the amount recoverable under a valued policy is the same aliquot part of the sum insured as the amount of damage is of the valuation in the policy; so that, when the sum insured is the full value stated, the assured recovers the whole of the repairs: (see Arnould, 6th edit., p. 940, the leading passages in which are quoted with approval by Lord Esher, M R. in *Pitman* v. *Universal Marine Insurance Company*, 46 L. T. Rep. 863; 4 Asp. Mar. Law Cas. 544; 9 Q. B. Div. 192, 209; Phillips, 5th edit., sect. 1435). It is contended that the rule as to repairs ought to be applied in the present case. In my opinion, however, this does not follow. The cost of repairs has no necessary relation to the value of the ship; whereas the amount here sued for is a sum apportioned by the average adjuster to the ship by a calculation in which the value of the ship directly enters as an important element. If indeed the shipowner were entitled to recover against the underwriters the whole of the average loss and the salvage award, the underwriters being subrogated into his rights of contribution against the owners of freight and cargo, as was held in *Dickenson* v. *Jardine* (18 L. T. Rep. 717; 3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 639) with respect to goods jettisoned, there would be what seems at least a plausible argument in support of the plaintiffs' contention; but the judgment of Barnes, J. in *The Mary Thomas* (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108, 117) negatives such a right as regards the average loss; and the learned counsel for the plaintiffs admitted in argument that the shipowner could only sue for the ship's share of the salvage award

This being so, I think that in assessing the amount of compensation to be paid by the underwriters it must be determined by reference to the policy value. The question then arises, What sum ought the plaintiffs to recover? Theoretically, I think the sum would be that which would be payable if the value of 33,000*l.* had been employed in the average adjustment instead of 40,000*l.*, or possibly, if the adjustment be based on the value of the ship as saved, to the proportion of 33,000*l.* which the saved value bears to the sound value at the same time and place. To this there are two objections: first, that the ascertainment of this sum would, or at all events might, involve a computation of greater or less complexity and the trouble of a reference back to the average adjuster; and, secondly, that it is contrary to a long-established practice, to which effect has been given by Bigham, J. This practice is not contrary to any rule of law, and in the circumstances ought, I think, to be followed. At the same time it seems to me that, when the policy value exceeds that adopted by the average adjuster, the like regard ought to be paid to it; for I think that to hold otherwise would be contrary to *Irving* v. *Manning* (*ubi sup.*) and the cases which have followed it, according to which the policy value is to be regarded whether it exceeds or falls short of the true value. I have only to add, with reference to the decision in the American courts, which was referred to in argument, that it was to

a large extent based on the practice of average adjusters in the State of New York, which is different from that which prevails in England. So far as this *ratio decidendi* extends, that case supports the view taken by Bigham, J. I think that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondent, *Waltons, Johnson, Bubb*, and *Whatton.*

Nov. 26 and Dec. 16, 1901.

(Before COLLINS, M.R., STIRLING and MATHEW, L.JJ.)

THE WINKFIELD. (a)

Collision—Limitation of liability—Claim by Postmaster-General for loss of registered letters and parcels on behalf of senders—Right of bailee to recover value of goods lost where under no liability to bailor.

In an action against a wrongdoer for the loss of goods caused by his negligence, a bailee in possession can recover the value of the goods lost, although he would have had a good defence to an action by the bailor for damages for the loss of the goods bailed.

A collision occurred between the steamships M. and W., in consequence of which the M., which was carrying passengers and mails, sank, and the greater portion of the mails were lost. The W. limited her liability under the provisions of sect. 502 *of the Merchant Shipping Act* 1894.

At the reference before the registrar and merchants, the Postmaster-General claimed against the fund in court, as bailee for the senders of registered letters and parcels lost by the collision, the estimated value of the same, although he was under no liability to the owners of them.

Held, reversing the decision of the President (Sir F. Jeune), that, as bailee in possession, he could recover damages for the loss of the goods irrespective of whether or not he was liable to the bailors.

Claridge *v.* South Staffordshire Tramway Company (66 *L. T. Rep.* 655; (1892) 1 *Q. B.* 422) *overruled.*

THIS was an appeal from a decision of the President of the Probate, Divorce, and Admiralty Division (Sir F. Jeune), confirming a report of the registrar, dated the 29th March 1901.

On the 5th April 1900 a collision occurred about eighty-six miles from Cape Town between the steamships *Mexican* and *Winkfield* in a fog. The *Mexican* was homeward bound from the Cape to England with passengers, mails, and a general cargo on board.

The *Winkfield* was at the time engaged as a transport, and was bringing out yeomanry and volunteers for service in South Africa, and horses and materials of war.

In consequence of the collision the *Mexican* was so badly damaged that she sank a few hours afterwards. Her passengers were safely got on board the *Winkfield*, but the greater portion of the mails and postal parcels on board of her, together with her cargo, were lost.

The owners of the *Winkfield* admitted their vessel was partly to blame for the collision, and, finding that the claims for loss or damage to ship and goods would exceed the amount of their statutory liability under the provisions of the Merchant Shipping Act 1894, they obtained on the 4th July 1900 a decree limiting their liability to 8*l.* per ton, and paid into court the sum of 32,514*l.* 17*s.* 10*d.*

At the reference before the registrar and merchants to assess the amounts of the claims put forward against the fund in court, a large number of claims were made, and amongst others one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal in respect of the loss of registered letters and parcels on board the *Mexican*, and lost by reason of the collision.

These claims represented the amounts the Post-office had had to pay for claims actually put forward by owners of registered letters and parcels which had been lost.

No question as to the real liability of the Postmaster-General to pay these claims was raised, and they were admitted by consent of the other parties, and duly allowed in full by the registrar.

The Postmaster-General, however, also claimed a further sum representing the estimated value of letters and parcels for which no claim had so far been put forward. The registrar refused to allow the claim on the ground that the Postmaster-General was not liable over to the senders, and therefore he could not sue as a bailee.

On a motion by the Postmaster-General in objection to the registrar's report, the President confirmed it, holding that he was bound by the decision of *Claridge* v. *South Staffordshire Tramway Company* (66 L. T. Rep. 655; (1892) 1 Q. B. 422), and that in the face of that decision the claim of the Postmaster-General could not be sustained.

The Postmaster-General appealed.

The *Attorney-General* (Sir R. Finlay, K.C.) and *Acland* for the appellant.—The decision in *Claridge* v. *South Staffordshire Tramway Company* (*ubi sup.*) is wrong. There it was held that the bailee of a chattel, who was under no liability to the bailor for injury to the chattel bailed, could not recover against the person by whose negligence the chattel was injured. The case was commented on by Smith, L.J. in *Meux* v. *Great Eastern Railway Company* (73 L. T. Rep. 247, at p. 250; (1895) 2 Q. B. 387, at p. 394). It is submitted that as against a wrongdoer a person in possession has a good title, not merely for the purpose of bringing an action, but also to recover the thing itself, if it exists, or damages for its loss if it has ceased to exist. As against a wrongdoer he can recover the value of the real article. The doctrine that a bailee cannot recover unless he is chargeable over is wrong in principle. It is clear that the bailee could sue to recover the chattel itself if it were in existence; he ought, therefore, to be able to recover the value of the chattel if it has been lost. As between bailor and bailee the party suing could only recover the value of his interest in the chattel, but as against a stranger who was a wrongdoer the bailee could recover the chattel, or its full value, possession giving him right to sue. This rule avoided multiplicity of actions, one by the bailor and one by the bailee. Under the old law it was laid down that the bailee alone could

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

sue the wrongdoer, and having recovered was liable over to his bailor.

Heydon v. *Smith*, 13 Co. Rep., p. 69.

The words "because he was chargeable over" in that case mean that the bailee was the only person who could sue, and that when he recovered he was liable over to the bailor. The law is correctly stated in Holmes, C.J.'s Lectures on Common Law, 5th lecture, pp. 166, 167, 170, 171, 175, 178, and 180. The history of the law of bailments is also dealt with in Pollock and Maitland's History of English Law, vol. 2, p. 169. A bailee could have brought an action for detinue supposing the wrongdoer had made away with the chattel. He ought, therefore, to be able to recover the value of the whole thing. In *The Minna* (L. Rep. 2 A. & E. 97) the bailees of a barge were held to be the proper persons to sue where a collision had taken place between the barge and a steamship. They also referred to the following cases:

Sutton v. *Buck*, 2 Taunton, 302;
Martini v. *Coles*, 1 M & S. 140;
Lyle v. *Barker*, 5 Binney (Pennsylvania) 457;
Rooth v. *Wilson*, 1 B. & A. 59;
Burton v. *Hughes*, 2 Bingham, 173;
Moore v. *Robinson*, 2 B. & A. 817;
Nicholls v. *Bastard*, 2 Cromp. M. & R. 659;
White v. *Webb*, 15 Connecticut Rep. 302;
Brierly v. *Kendall*, 17 Q. B. 937;
Jeffries v. *Great Western Railway Company*, 26 L. T. Rep. O. S. 214; 5 E. & B. 802;
Waters v. *Monarch Insurance Company*, 26 L. T. Rep. O. S. 217; 5 E. & B. 870;
London and North Western Railway Company v. *Glyn*, 33 L. T. Rep. O. S. 199; 1 E. & E. 652;
Turner v. *Hardcastle*, 5 L. T. Rep. 748; 11 C. B. N. S. 683;
Swire v. *Leach*, 11 L. T. Rep. 680; 18 C. B. N. S. 479.

Pickford, K.C., and *Batten* for the respondents, *contrà*.—The Postmaster-General cannot sue because he was not in possession of the letters and parcels. They were in the actual possession of the owners of the *Mexican* at the time they were lost. If therefore the right of action was in the bailee in possession they are the proper persons to bring the action. But the steamship company were contractors, not bailees. If the Postmaster-General is entitled to sue, every shipowner who carries goods under a bill of lading is entitled to do so too. Secondly, the test of the right of the bailee to recover is the liability of the bailee to the bailor. The Postmaster-General is not bound in any way to account for the money, and has absolute discretion as to claims. It is the obligation to account to the true owner which is the foundation of the action. Pollock and Maitland, in their History of the English Law, vol. 2, p. 170, state the law in a somewhat different manner from Holmes, C.J. The right of recovering damages against the bailee is, as the cases show, reduced in proportion to his liability to the bailor:

Dockwray v. *Dickinson*, Skinner, 640;
Mayne on Damages, 6th edit., p. 414.

There is no contract that the Postmaster-General should represent the parties. In the case cited above it was held that the bailee could maintain the action, but only for his own share. Most of the cases cited by the Attorney-General are cases of trover, and in none of them was the point expressly raised. It might be that in cases of trover, where the wrongdoer had taken the chattel out of the possession of the bailee, the latter could recover the full value of the chattel. There were dicta to that effect. That, however, did not apply to the case of an injury to a chattel in the possession of a bailee. In such a case there was no authority which showed that a bailee could recover damages which he had not sustained. Further, payment to a bailee would be no defence to an action by the bailor for the loss of the goods.

They referred to the following Year Books:

11 Henry IV., pp. 23 and 24;
9 Edward IV., p. 34, plea 9;
3 Henry VII., p. 4, plea 16;
20 Henry VII., p. 1, plea 1;
21 Henry VII., p. 14 (*b*), plea 23.

Also to

Addison v. *Overend*, 6 T. R. 766;
Sedgworth v. *Overend*, 7 T. R. 279.

Scrutton, K.C. for the owners of the *Mexican*.

Christopher Head for the owners of the *Winkfield*.

The *Attorney-General* in reply.

Cur. adv. vult.

Dec. 16.—COLLINS, M.R.—This is an appeal from the order of Sir Francis Jeune dismissing a motion made on behalf of the Postmaster-General in the case of the *Winkfield*. The question arises out of a collision which occurred on the 5th April 1900, between the steamship *Mexican* and the steamship *Winkfield*, and which resulted in the loss of the former, with a portion of the mails which she was carrying at the time. The owners of the *Winkfield*, under a decree limiting their liability to 32,514*l.* 17*s.* 10*d.*, paid that amount into court, and the claim in question was one by the Postmaster-General, on behalf of himself and the Postmaster-General of Cape Colony and Natal, to recover out of that sum the value of letters, parcels, &c., in his custody as bailee, and lost on board the *Mexican*. The case was dealt with by all parties in the court below as a claim by a bailee who was under no liability to his bailor for the loss in question, as to which it was admitted that the authority of *Claridge* v. *South Staffordshire Tramway Company* (*ubi sup.*) was conclusive, and the President accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals. The question for decision, therefore, is whether *Claridge's* case was well decided. I emphasise this because it disposes of a point which was faintly suggested by the respondents, and which, if good, could distinguish *Claridge's* case—namely, that the applicant was not himself in actual occupation of the things bailed at the time of the loss. This point was not taken below, and, having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now, and I therefore deal with the case upon the footing upon which it was dealt on the motion—namely, that it is covered by *Claridge's* case. I assume, therefore, that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the reasons which I am about to state, I am of opinion that *Claridge's* case was wrongly decided, and that the law is that in an

action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed. It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall show presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor. I think this position is well established in our law, although it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned, and, further, I think it can be shown that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases—namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since the case of *Armory* v. *Delamirie* (1 Stra. 504), not to mention earlier cases from the Year Books onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of Lord Campbell in *Jeffries* v. *Great Western Railway Company* (26 L. T. Rep. O. S, at p. 214; 5 E. & B., at p. 806), "that the person who has possession has the property." In the same case he says (26 L. T. Rep. O. S., at p. 214; 5 E. & B., at p. 805): "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is title." The law is so stated by the very learned annotator in his note to *Wilbraham* v. *Snow* (2 Wms. Saund. 47 f.). Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature of limitation of the possessor's right, and, unless it is competent for him to do so, the question of his relations to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a *jus tertii* under which he cannot claim.

But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter. I think this view is borne out by authority; for instance, in *Burton* v. *Hughes* (*ubi sup.*) the plaintiff, who had borrowed furniture, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it, without giving in evidence the written agreement under which he held it. The point made for the defendant was that "the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped." The argument on the other side was "that the existence of some kind of interest having been established, the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action." Best, C.J., in delivering judgment, says: "If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to (*Sutton* v. *Buck*, *ubi sup.*) confirms what I had esteemed to be the law upon the subject—namely, that a simple bailee has a sufficient interest to sue in trover." By holding, therefore, that the agreement defining the conditions of the plaintiffs' interest was immaterial the court in effect decided that the right of the bailee in possession to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion. In *Sutton* v. *Buck* (*ubi sup.*), on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover. The plaintiff had taken possession of a stranded ship under a transfer void for noncompliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. Sir James Mansfield, C.J. had nonsuited the plaintiff, on the ground that the transfer was defective without registration. On motion the nonsuit was set aside, Sir James Mansfield being a member of the court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that Chambre, J. reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was

justified as lord of the manor in doing what he did, a contention which was rejected by the court. In *Swire* v. *Leach* (*ubi sup.*) a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong court, consisting of Erle, C.J., Williams and Keating, JJ., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognised as well established. See also *Turner* v. *Hardcastle* (*ubi sup.*), a considered judgment of the Court of Common Pleas, which included Willes, J., who had not been a party to *Swire* v. *Leach* (*ubi sup.*), and where the bailee's right to recover full damages, and his obligation to account to the bailor is again affirmed.

The ground of the decision in *Claridge's* case was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think the position is untenable, it is necessary to follow it out a little further. There is no doubt that the reason given in *Heydon and Smith's* case (*ubi sup.*)—and itself drawn from the Year Books—has been repeated in many subsequent cases. The words are these: "Clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over." It is now established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other. Holmes, C.J., in his admirable lectures on the Common Law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says at p. 167: "At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner." And again at p. 170: "The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue." This inversion, as he points out is traceable through the Year Books, and has survived into modern times, though, as he shows, it has not been acted upon. Pollock and Maitland's History of English Law, vol. 2, p. 170, puts the position thus: "Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable, and was liable because he had the action." It may be that in early times the obligation of the bailee to the bailor was absolute—that is to say, he was an insurer. But long after the decision of *Coggs* v. *Bernard* (2 Ld. Raym. 909), which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor. The cases above cited are instances of this. In each of them the bailee would have had a good answer to an action by his bailor; for in none of them was it suggested that the act of the wrongdoer was traceable to negligence on the part of the bailee. I think, therefore, that the statement drawn, as I have said, from the Year Books may be explained, as Holmes, C.J. explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our courts. Upon this, before the decision in *Claridge's* case, there was a strong body of opinion in text-books, English and American, in favour of the bailee's unqualified right to sue the wrongdoer: (see Mayne on Damages, 6th edit., p. 416, and cases there cited; Sedgwick on Damages, 7th edit., vol. 1, p. 61, note (*a*); Story on Bailments, 9th edit., sect. 352; Kent's Commentaries, 12th edit., vol. 2, p. 568, note (*e*); Pollock on Torts, 6th edit, pp. 354, 355; Addison on Torts, 7th edit., p. 523; and as I have already pointed out Williams, J., the editor of Williams Saunders, was a party to the decision of *Swire* v. *Leach*). The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted: (see them referred to in the passages cited, and in particular see *Ullman* v. *Barnard*, 73 Mass. Rep. 554; *Parish* v. *Wheeler*, 22 New York Rep. 494; and *White* v. *Webb*, *ubi sup.*). The case of *Rooth* v. *Wilson* (*ubi sup.*) is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord Ellenborough, C.J. Bayley, Abbott, and Holroyd, JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. Abbott, J. says shortly: "I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action"; and Bayley, J. points out that case is a possessory action. But Lord Ellenborough undoubtedly rests his judgment on the view that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. This, no doubt, was his personal view, but it was not the decision of the court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases. Therefore, as I said at the outset, and as I think I have now shown by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is

not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor: (see Story on Bailments, 9th edit., sect. 352, and the numerous authorities there cited). The liability by the bailee to account is also well established (see the passage from Lord Coke and the cases cited in the earlier part of this judgment), and, therefore, it seems to me that there is no such preponderance of convenience in favour of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's* case. I am aware that in two able text-books, Beven's Negligence in Law (2nd edit., at p. 885), and Clerk and Linsell on Torts (2nd edit., at p 237), the decision in *Claridge's* case is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's* case was treated as open to question by the late Master of the Rolls in *Meux* v. *Great Eastern Railway Company* (*ubi sup.*), and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence. I think the appeal must be allowed.

STIRLING, L.J. and MATHEW, L.J. concurred.

Solicitors: for the appellant, *The Solicitor for the Post Office*; for the respondents, *Thomas Cooper* and *Co.*; for the owners of the *Mexican*, *Botterell* and *Roche*; for the owners of the *Winkfield*, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Nov. 26 *and* 27, 1901.

(Before WALTON, J.)

BLACKBURN AND ANOTHER *v.* LIVERPOOL, BRAZIL, AND RIVER PLATE STEAM NAVIGATION COMPANY LIMITED. (*a*)

Bill of lading—Exception—Perils of the sea—Exception of any peril of the seas, whether arising from negligence of the crew or otherwise—Opening of valve by mistake whereby sea water was admitted to ship—Damage to cargo—Liability of shipowner.

A cargo of sugar was shipped under a bill of lading which contained an exception of "any loss or damage resulting from any peril of the seas, rivers, or navigation of whatever nature or kind soever (whether arising from the negligence, default, or error in judgment of the pilot, master, mariner, engineers, or others of the crew, or otherwise howsoever)." During the voyage the engineer, intending to fill a ballast tank with sea water to be used for the boilers in discharging the cargo, opened the sea-cock, and he then intended to open the valve of the ballast tank, but by mistake he opened the valve of a tank in which part of the sugar was stored, with the result that the sea water flowed into the tank where the sugar was instead of into the ballast tank, and the sugar was damaged:

Held, that the damage was caused by a peril of the seas within the meaning of the exception in the bill of lading, and that the shipowners were protected by the exception and were not liable for the damage.

COMMERCIAL ACTION tried by Walton, J. without a jury, in which the plaintiffs claimed damages for breach of duty in and about the carriage and delivery of sugar by sea by the steamship *Tropic*.

The agreed statement of facts was as follows:—

1. At all material times the steamship *Tropic* was on time charter to the defendants.

2. The plaintiffs in Dec. 1900 and in Jan. 1901 shipped a quantity of sugar in bags on board the *Tropic* at Pernambuco, in good order and condition.

3. The plaintiffs received from the defendants five bills of lading in respect of the shipment of sugar. The bills of lading which are all in the same form were dated respectively the 31st Dec. 1900, and the 4th and 10th Jan. 1901.

4. One of such bills of lading was attached hereto.

5. By the terms of the bills of lading the sugar was to be carried by the defendants to New York to be there delivered by them to the plaintiffs' order in the like good order and condition, subject to the exceptions contained in the bills of lading.

6. The plaintiffs remained the holders of the bills of lading, and were the receivers of the cargo.

7. The *Tropic* left Pernambuco on the 10th Jan. 1901. She arrived at New York on or about the 31st Jan. 1901, and completed the discharge of the sugar by the 9th Feb. 1901.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

8. The sugar so shipped by the plaintiffs was contained in 54,373 bags. All the bags were delivered to the plaintiffs, but a considerable number thereof proved to be damaged.

9. The damaged bags had been carried in the *Tropic's* deep tank, a water-tight compartment in the bottom of the vessel. This tank was a usual and proper place in which to carry the cargo.

10. The damage was caused by an incursion of sea water into the deep tank under the following circumstances: When the *Tropic* was outside Sandy Hook the chief engineer, being under the mistaken impression that the *Tropic* was going to Williamsburg Wharf to discharge her cargo, desired to fill the No. 4 ballast tank with water for boiler use while discharging instead of taking in water at the Williamsburg Wharf, where, according to his previous experience, the water was contaminated with sewage. He therefore opened the sea-cock and intended to open the valve of No. 4 tank, but by mistake he opened the valve of the deep tank, with the result that the water ran into the deep tank where the bags of sugar were, instead of into No. 4 ballast tank. The sea-cock was open from 11.30 a.m. on the morning of the 30th Jan. 1901 until 3 p.m. of the same day. The mistake was not discovered until six o'clock in the morning of the 31st. Jan. 1901. The water was then pumped out.

11. By the terms of the bills of lading the *Tropic* was to discharge alongside Refiners Wharf if required, but until after her arrival at New York it was not known by the defendants or anyone on board the *Tropic*, where she would be required to discharge. The *Tropic* was not intended by the plaintiffs to go, and did not in fact go, to Williamsburg Wharf.

12. The defendants admitted, without prejudice to the question of liability, that the damage done to the sugar amounted to 1319*l.* 17*s.* 6*d.*

The bills of lading contained an exception (amongst others) of

> Loss or damage resulting from . . . any of the following perils (whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise howsoever), namely, . . . or other peril of the seas, rivers, or navigation of whatever nature or kind soever and howsoever such collision . . . or other peril may be caused. . . .

Carver, K.C. (*Bailhache* with him) for the plaintiffs.—The plaintiffs are entitled to recover for the damage to the sugar. By their contract the defendants were bound safely to carry and safely to deliver the sugar, which they failed to do. They are therefore clearly liable, unless they come within the exception in the bill of lading; but they do not come within the exception. The damage was not caused by a peril of the seas. The damage resulted from the opening of the sea-cock, and letting the sea water into the ship. That act was not an accident; it was not accidental, but it was intentional, as the engineer intended to open the sea-cock, and he opened it, and so he let the sea water into the ship, and he intended to do so. The opening of the valve into the deep tank was, no doubt, accidental, but that was not the real cause of the damage. The act being intentional was not a peril of the sea; nor does it come under the head of negligence in "navigation" within the exception. The act of the engineer in filling No. 4 tank was not an act of navigation, and therefore the damage did not result from a peril of navigation. If it was not an act of navigation none of the other exceptions in the bill of lading exempt the defendants:

> *The Accomac*, 63 L. T. Rep. 737; 6 Asp. Mar. Law Cas. 579; 15 P. Div. 208;
> *Carmichael and Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association*, 57 L. T. Rep. 550; 6 Asp. Mar. Law Cas. 184; 19 Q. B. Div. 242, at p. 247 (per Lord Esher, M.R.), and at p. 250 (per Fry, L.J.);
> *Canada Shipping Company* v. *British Shipowners' Mutual Protection Association*, 61 L. T. Rep. 312; 6 Asp. Mar. Law Cas. 422; 23 Q. B. Div. 342, at p. 344 (per Bowen, L.J.);
> *Good* v. *London Steamship Owners' Mutual Protecting Association*, L. Rep. 6 C. P. 563.

Horridge, K.C. and *Maurice Hill* for the defendants.—The defendants are within the exception in the bill of lading of loss or damage resulting from a peril of the seas. When the sea-cock was opened so as to admit the sea water the ship was not tight, and was not fit to carry the cargo. The ship then was subjected to a peril of the seas, in the same way as if the sea had come into the ship by collision. It was an accidental admission of sea water at sea, and that is a peril of the seas within the exception. Even if it were not a peril of the seas, it was a peril of "navigation" within the exception, and it was just the same whether the opening in the ship was made before sailing, as in the case of *Carmichael and Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (*ubi sup.*), or after sailing, as in this case. Although the *primâ facie* duty of the defendants was to carry the sugar safely, they are exempt in this case by the exception of loss by peril of the seas or of navigation:

> *Thames and Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser, and Co.*, 57 L. T. Rep. 695; 6 Asp. Mar. Law Cas. 200; 12 App. Cas. 484;
> *Wilson and Co.* v. *Owners of the Cargo of the Xantho* (or *The Xantho*), 57 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503;
> *Hamilton, Fraser, and Co.* v. *Pandorf and Co.*, 57 L. T. Rep. 726; 6 Asp. Mar. Law Cas. 212; 12 App. Cas. 518;
> *The Southgate*, (1893) P. 329;
> *The Cressington*, 64 L. T. Rep. 329; 7 Asp. Mar. Law Cas. 27; (1891) P. 152.

Carver, K.C. and *Bailhache* in reply.

Walton, J.—I think the law on this subject is clear and is established by the cases which have been referred to of *The Xantho* (*ubi sup.*) and *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*ubi sup.*), of which I think the case of *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*ubi sup.*), is the example most applicable to the present case. It is to be noted that in those two cases no question arose with regard to what is called the negligence clause; and in neither of them was the shipowner exempt from damage arising from the negligence of the crew. As I understand the law when there is no negligence clause, it is this: That the shipowner is bound absolutely as an insurer to deliver safely, subject to the exception of perils of the seas, or any other exceptions which there may be in the bill of lading. If the shipowner fails to carry

safely, but the loss is caused by one of the excepted perils, then *primâ facie* he is not liable; but in cases which came long before *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*ubi sup.*), the effect of which is there recognised, and in the case of *The Xantho* (*ubi sup.*), the contract of the shipowner was not merely as an insurer to deliver safely subject to the excepted perils, but there was the further contract—namely, that he would use due care and diligence to deliver safely. The exceptions, therefore—and I am assuming that they contain no exception of negligence—relieve him from his absolute obligation as an insurer to deliver safely, but do not relieve him from his obligation to exercise due care and diligence in carrying cargo. Therefore, even when the loss is occasioned by one of the exempted perils—again assuming that negligence is not an excepted peril—if the shipowner has failed to use due care and diligence in carrying the cargo, although he may be exempt so far as the absolute obligation to deliver safely is concerned, he is not exempt from the consequences of the breach of his contract to use due care and diligence; and, therefore, if the loss, although occasioned by perils of the sea, has been brought about by want of due care and diligence on the part of the shipowner, the shipowner renders himself liable, notwithstanding the exceptions. In the present case there is what is sometimes called a negligence clause, and the shipowner is exempt by an exemption of perils of the seas, even though the loss by such perils is brought about by the negligence of the crew. Therefore in this case we have not got to consider the liability of the shipowner arising from the want of due care and diligence on the part of his servants, the crew of the vessel. The only question is whether the loss was occasioned by perils of the seas or of navigation. If it was so occasioned, the shipowner is protected by the exemption, although the loss was brought about by the negligence of some of his servants, the crew of the vessel. It is perfectly true that in the first place to bring the case within the exception there must be an accident. By that I understand the loss must have been something which might happen, not something which must happen, as Lord Halsbury said in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*ubi sup.*), as, for instance, wear and tear is not a casualty or accident, because a ship must decay, and wear and tear must take place. He says: "I think the idea of something fortuitous and unexpected is involved in both words "peril" or "accident"; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas." In the next place, the accident must not only be an accident that is something in the nature of a casualty, something fortuitous, but it must be an accident of the seas, and a peril of the seas. That is pointed out by Lord Herschell in his judgment in the case of *The Xantho* (*ubi sup.*). But it appears to me to be entirely a fallacy to say that because the loss has been occasioned by mistake or neglect—mistake if you like on the part of the crew—it is not an accident. It is obviously not a thing which must happen; it is a thing which may happen, and in the ordinary popular sense, which is the sense in which one must interpret the words of a bill of lading, and in the sense in which I am now using the word, whether arising from some negligence of a servant or not, it is an accident. It is a casualty, something fortuitous, and it seems to me that this loss now in question did arise from an accident—that it was fortuitous.

Then, was it an accident of the seas? As I understand the judgments in *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*ubi sup.*) and in *The Xantho* (*ubi sup.*), one of the perils of the seas is this, that if the ship is not kept tight the sea water will come in. It may damage the cargo, or sink the ship, and if by some accident the ship is not kept tight, and the water does come in and sink the ship, we say that is a loss of the ship by perils of the seas. Those considerations afford a very simple answer to the question which arises in this case. The engineer, intentionally, it is true, opened the sea-cock. After he had done that the ship remained perfectly tight. Opening the sea-cock no doubt allowed sea water to flow into what we may call certain parts of the ship, but the ship was perfectly tight. The sea water could not come into the carrying part of the ship, and could never sink the ship, or do any damage to anybody or to anything. It was exactly as if the water had been admitted into the ballast tank; then the ship would have remained perfectly tight, although the sea water was flowing in from the sea-cock, so that those parts of the vessel into which the sea is flowing are no doubt open to the sea. That being the position of things, the engineer, not doing in the least what he intended to do, but entirely by mistake, which probably was an act of negligence—which makes no difference in the present case—opened a valve or cock by which he let the water into the carrying part of the ship. He let the sea into the ship, and when this cock was opened the ship was no longer tight, and if it had been left open the ship would have gone to the bottom of the sea if the deep tank was not tight. As it was, it only damaged the cargo in that carrying space in which this sugar was stowed. I cannot distinguish that from the case in which one of the crew accidentally and by mistake opens or leaves open a porthole. That is an act of one of the crew, and in that sense it is an act of one of those under the shipowner's control. It is an act of negligence. He opens the port, or leaves the port open, and the ship is no longer tight, and therefore the water comes in. In either case an opening is accidentally made by mistake, the effect of which is that the ship ceases to be tight, and consequently begins to leak, and damage follows. It seems to me that in either case the ship, by negligence—by an accident—is exposed to the peril that every ship while afloat is exposed to—namely, that if she is not kept tight the water will come in. That seems to me to be one of the essential perils of the seas, and a peril to which every ship is necessarily exposed while she is afloat, because she is afloat. Damage arising from that peril appears to me to be within this exception, and therefore I think the shipowners bring the case within the exception and are exempt from liability. Therefore there must be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Walker, Son,* and *Field,* for *Weightman, Pedder,* and *Weightman,* Liverpool.

Solicitors for the defendants, *Field, Roscoe,* and *Co.,* for *Thornely* and *Cameron,* Liverpool.

Dec. 13 *and* 16, 1901.

(Before WALTON, J.)

MANCHESTER LINERS LIMITED *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY LIMITED. (*a*).

Marine insurance—Policy on "chartered or hire money" to cover "loss of hire money"—Loss of hire through vessel becoming inefficient—Government charter-party—Option to discharge vessel—Loss by discharge of vessel—Right of assured to recover on policy.

By a charter-party in the Government form the Admiralty chartered a vessel for transport service for three months certain, and thenceforward until they should give notice to the owners that the vessel was discharged from their service, such notice to be given when the vessel was in port in the United Kingdom; and the charter-party provided that if the ship became incapable from any defect, or from any cause whatsoever, to perform the service efficiently, the Admiralty might make abatement by way of mulct out of the freight. The shipowners effected a time policy upon "chartered or hire money" to "cover the loss of hire money calculated at" so much per day caused by (amongst other things) want of repairs or breakdown of machinery, rendering the vessel inefficient for the service. Under the charter-party the vessel had made a voyage and had returned to England, and, the three months having previously expired, the Admiralty had continued the employment, and had given instructions that the vessel was to proceed on another voyage on a certain day. While the vessel was in dry dock it was discovered that some of the blades of her propeller were cracked and that it would take some time to repair the damage. In consequence of this the Admiralty, under their option in the charter-party, gave the owners notice discharging the vessel, and the vessel was discharged from the Government service as from that date. The vessel then underwent repairs, which took fifteen days from the date of her discharge by the Admiralty. In an action on the policy by the owners of the ship to recover from the insurers the loss of hire money for the fifteen days:

Held, that the "chartered or hire money" in the policy meant "hire money" in the nature of freight payable under a contract; that the loss of such hire to the shipowners for the fifteen days was caused by the exercise of the option which the Admiralty had under the charter-party to discharge the vessel from their service, and not by the want of repair, breakdown of machinery, or other perils insured against under the policy, and that there was therefore no loss under the policy, for which the shipowners were entitled to recover.

COMMERCIAL ACTION tried by Walton, J. without a jury, the plaintiffs' claim being for a partial loss upon a policy of marine insurance underwritten by the defendants. The plaintiffs, the Manchester Liners Limited, were the owners of a steamship called the *Manchester Corporation* of 5473 tons, and the policy upon which they now sued was a policy effected with the defendants, an insurance company, on the 9th March 1900.

The *Manchester Corporation* was chartered by the Government for transport service by a charter-party dated the 14th Dec. 1899. The charter-party was in the Government form, and was made between the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of the one part, and the agent on behalf of the owners of the vessel of the other part, and after reciting that a copy of the regulations for Her Majesty's transport service had been delivered to the owners and the master of the ship, provided that the *Manchester Corporation*

Shall on and from the 25th Nov. 1899 be at the service of the said commissioners to the extent hereinafter mentioned for the space of three calendar months certain and thenceforward until the Commissioners for Executing the Office of Lord High Admiral aforesaid for the time being shall cause notice to be given to the second party named [that is, to the agent of the owners of the ship], his executors or administrators, or to the master or other person having charge of the said ship, that she is discharged from Her Majesty's service, such notice to be given when the said ship is in port in the United Kingdom.

Then, as to the rate of payment, the owners

Shall be allowed and paid for the freight of the ship at the rate of twenty-four shillings per ton per calendar month for the number of tons above-mentioned during such time as the said ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged.

The charter-party contained the following clause:

Provided always and it is hereby agreed and declared that if at any time or times hereafter it shall be made to appear to the said commissioners that any delay has been caused or has accrued by breach of orders or neglect of duty, or that the said ship became incapable from any defect, deficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the freight of the said ship as they shall adjudge fit and reasonable.

Under this charter-party the vessel had made a voyage to South Africa, and she was on her homeward voyage on the 9th March 1900 when the policy of insurance sued upon was effected with the defendants. She arrived in England on the 31st March, and the Commissioners of the Admiralty gave orders that she should proceed on another voyage to South Africa, the date fixed for the sailing from London being the 13th April.

By the permission of the Admiralty the plaintiffs put the vessel in dry dock for the purpose of being cleaned and repainted, and while the vessel was in dry dock it was discovered that three of the blades of her propeller were cracked; and, in consequence of that, on the 5th April 1900 notice was given by the Admiralty to the master of the ship "that the hired transport *Manchester Corporation* was that day discharged from Her Majesty's

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

service," and on the 7th April the Director of Transports on behalf of the Admiralty wrote to the plaintiffs' agents that "the *Manchester Corporation* was discharged from Her Majesty's service on the 5th inst."

In answer to a letter from the plaintiffs' agents the Director of Transports on the 9th July 1900 wrote:

That it was intended that this vessel should make another voyage, and she was being prepared to that end when it was discovered on the ship going into dry dock that three of her propeller blades were cracked, and the Divisional Transport Officer, Royal Albert Docks, reported that they would probably take about eighteen days to replace. As she has lost blades of her propeller on the way out, and had to put into Gibraltar to replace them, and as she lost further blades between Gibraltar and the Cape, it was decided to discharge her from the service and appropriate another transport in her place.

And subsequently, on the 16th Nov. 1901, in answer to a letter written by the defendants' solicitors, the Director of Transports wrote admitting that the reason of their decision was:

That the Admiralty were unwilling to run the risk of further trouble similar to that which had been previously experienced.

The material terms of the policy of insurance, dated the 9th March 1900 (being for a sum of 3000*l.* at a premium of 3*l.* per cent.) were as follows:

And it is hereby agreed and declared that the said insurance shall be and is an insurance (lost or not lost) at and from and for and during the space of three calendar months from 8th March 1900 to 7th June 1900, both days inclusive, Greenwich mean time. If required by the assured it is agreed to return *pro ratâ* daily premiums on cancelling this insurance and arrival. And it is also agreed and declared that the subject-matter of this policy as between the insured and the said company, so far as concerns this policy, shall be and is as follows, upon chartered or hire money valued at 19,500*l.* To cover and pay the loss of hire money calculated at 216*l.* 13*s.* 4*d.* per day as per clause attached. In the event of total or constructive total loss of steamer, no claim to be made for the unexpired time in the ship or vessel called the *Manchester Corporation.*

The clause attached, which was contained in a printed slip, was as follows:

The amount to be paid on this policy in the event of loss of time as mentioned in this clause shall be 216*l.* 13*s.* 4*d.* daily on 19,500*l.* In the event of loss of time from deficiency or inefficiency of men or stores, collisions, stranding, want of repairs, breakdown of machinery, or any causes appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four hours, or rendering her inefficient for the service, the payment of hire shall cease from the hour when the detention or inefficiency begins until she be again ready and in a fully efficient state to resume her service. . . . Being for and during the space of three calendar months (beginning and ending with Greenwich mean time) as employment may offer.

The plaintiffs in their points of claim alleged that the policy sued on was a policy executed by the plaintiffs in continuation of a policy with the defendants on the 8th Dec. 1899, while the *Manchester Corporation* was employed in Her Majesty's transport service under a contract with the Director of Transports of the 25th Nov. 1899; that on the 5th April 1900, while still employed under this contract, the vessel became inefficient for service under the contract, by reason of damage to or defect in the propeller, and was not ready and efficient to resume the service until 5.30 p.m. on the 20th April 1900, a period of fourteen days and seventeen and a half hours; and the plaintiffs claimed 491*l.* 15*s.* 7*d.*, defendants' proportion of loss of hire on fourteen days and seventeen and a half hours.

The defendants, in their points of defence, alleged that notice that the vessel was discharged from Her Majesty's service was given on the 5th April 1900; that the plaintiffs had not between the 5th and the 20th April any chartered or hire money at risk, and had between those dates no insurable interest within the terms of the policy; and that if there was any loss of chartered or hire money the proximate cause of the loss was the notice of the commissioners discharging the vessel, and not the alleged inefficiency, and that the defendants were under no liability to the plaintiffs.

Carver, K.C. (*L. Noad* with him) for the plaintiffs.—The defendants contend that there was no loss within the meaning of the policy. The plaintiffs' contention is that there was a loss, and that what was lost was the use of the ship for the period from the 5th April to the 20th April, when she was again fit for service. What was at risk was the loss of hire which would accrue under a clause in this form. The Government charter-party does not contain a cesser clause, or a cesser of hire at all; it contains a clause which enables the Admiralty to deprive the shipowner of hire; but it does not make the hire cease on certain events, and under the clause it would be a matter of discretion for the commissioners to make the pay cease. The first question is, What was the subject-matter insured by this policy? The policy, which was a time policy, does not refer to the charter-party, and the charter-party does not contain a cesser clause, so that the insurance effected by the policy is not a limited insurance merely against the loss of hire arising under this form of a Government charter-party, but is a general insurance against the loss of hire which would take place assuming that the vessel were working under a charter-party with the cesser of hire clause in it. Therefore the risk insured against accrues if the vessel becomes unable to work within the meaning of that clause for twenty-four hours. Our first argument, therefore, is on the assumption that this was an insurance on the actual employment of the ship and against the loss of the use of the ship, and, arguing on that assumption, there must be a loss under the policy caused by something done under the charter-party. The loss of the hire by the cancellation of the agreement is a loss within the policy; it was a loss by the action of the Admiralty in giving notice under the charter-party. Secondly, even if the plaintiffs are wrong in their first contention, and if the policy is limited to freight under the charter-party, the plaintiffs are still entitled to recover. There was a want of repair or breakdown of machinery within the meaning of the marginal clause in the policy. The plaintiffs had an interest in the "hire money" payable under the charter-party, and there was a loss of this hire money by perils of the seas insured against. There was a defect within the meaning of the marginal clause, and also within the meaning of

the charter-party, which entitled the commissioners to put the ship out of pay. The loss arising therefrom was a loss from perils of the seas; and this loss arose, not from the act of the commissioners, but from the defect which brought about that act. *Inman Steamship Company* v. *Bischoff* (47 L. T. Rep. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670) appears at first sight to be against the plaintiffs' contention, but when carefully looked at it is really in their favour. In that case, which also turned on the Admiralty charter-party, the Admiralty simply took under their power of mulct any freight that had been earned. No doubt Lord Selborne there says that he came to the conclusion, though with reluctance, that the loss was not so proximately resulting from the perils of the seas insured against as to make it payable under the policy; but he puts a hypothetical case which precisely applies to this case. He says: "If, in the present case, the other terms of the charter-party being the same, a power had been reserved to the charterers or their agents to determine the contract, and their liability to further freight, on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable." Here there were two causes operating: the first was a defect in the ship, which was the proximate cause of the loss, and that was a peril insured against, and that defect, coupled with the decision of the Admiralty, caused the loss which was a loss of the chartered or hire money. In such cases the proximate cause of the loss is considered by Cleasby, B. and Bramwell, B. in *Jackson* v. *Union Marine Insurance Company Limited* (31 L. T. Rep. 789, at pp. 793-4; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125, at pp. 127, 148). The plaintiffs are entitled to recover on the two grounds, that there was by perils insured against a loss of the Government employment, and that, apart from Government employment, there was a loss of expectant hire which they were prevented from earning. [He also referred to Phillips on Insurance, sect. 1208.]

Scrutton, K.C. and *Loehnis* for the defendants. —It is said for the plaintiffs that there was a loss of the Government employment, but the answer to that is that there was not a loss by perils insured against. The insurance was not such a general insurance as the plaintiffs contend it was. It was not an insurance against the loss of expected employment, but was only against loss under a contract. The subject-matter of the policy is said to be chartered or hire money; but it is perfectly clear on the authorities that chartered or hire money means money accruing due for the use of the ship under a contract: (per Blackburn, J. in *Barber* v. *Fleming*, L. Rep. 5 Q. B. 59, at pp. 70, 71; per Lord Selborne, L.C. in *Inman Steamship Company* v. *Bischoff*, 47 L. T. Rep. at p. 582; 5 Asp. Mar. Law Cas. at p. 9; 7 App. Cas. at p 672; per Lord Ellenborough in *Forbes* v. *Aspinall*, 13 East, 323; *Patrick* v. *Eames*, 3 Camp. 441; *Re Jamieson and Newcastle Steamship Freight Insurance Association*, 72 L. T. Rep. 648; 7 Asp. Mar. Law Cas. 593; (1895) 2 Q. B. 90). To come within the policy the hire money must be due under a contract, as the insurance is an insurance of hire money arising under a contract. The first thing to determine is the subject-matter of the insurance. In this case that subject-matter is "chartered or hire money valued at ———"; that is, hire money to be earned under a contract in the nature of a charter-party. Then, when the subject-matter is ascertained, the next thing to be considered is, against what perils the subject-matter is insured. The perils insured against are set out in the clause attached to the policy, as the policy states that the insurance is "to cover and pay the loss of hire money as per clause attached." What was at risk immediately before the 5th April was the freight payable under the charter-party; after the 5th April there was no freight payable as the service had been determined. There was therefore no hire money at risk from the 5th to the 20th April, and therefore there was no loss of such hire money by any perils insured against. The freight or hire money was lost, not by any of the perils insured against, but by the exercise of the option to cancel in the charter-party, and the exercise of that option was the proximate cause of the loss: (*Mercantile Steamship Company Limited* v. *Tyser*, 7 Q. B. Div. 73; per Lord Watson in *Inman Steamship Company v. Bischoff*, 47 L. T. Rep. at p. 587; 5 Asp. Mar. Law Cas. at p. 12; 7 App. Cas. at p. 690). Therefore the defendants' answer is twofold: first, that the subject-matter of the policy was chartered or hire money arising under an existing contract (namely, the charter-party) which was determined by the option given to the hirers by that contract, and that at the time when this money sued for was alleged to have accrued there was no existing contract under which any hire money was payable, and therefore there was no hire money at risk; and, secondly, there was no loss by any perils insured against, but the loss arose merely from the exercise by the Admiralty of the option to determine the contract given to them in that contract. For these two reasons the defendants are entitled to succeed.

Carver, K.C., in reply, referred to *Joyce* v. *Kennard* (25 L. T. Rep. 932; 1 Asp. Mar. Law Cas. 194; L. Rep. 7 Q. B. 78) and *Crowley* v. *Cohen* (3 B. & Ad. 478).

Cur. adv. vult.

Dec. 16.—WALTON, J.—In this case the plaintiffs are the Manchester Liners Limited, and the action is brought against the British and Foreign Insurance Company upon a marine policy of insurance. The plaintiffs were the owners of a steamer called the *Manchester Corporation*, which was chartered by them to the Admiralty by a charter-party made on the 14th Dec. 1899, and by that charter-party she was placed at the service of the commissioners for the space of three months certain, and "thenceforward until the commissioners shall cause notice to be given to the said second-named party"—that is the shipowners—"that she is discharged from Her Majesty's service, such notice to be given when the said ship is in port in the United Kingdom." Therefore the service was for three months certain, to be continued until notice was given that the service was at an end, and that notice might be given at any time when she was in a port in the United

Kingdom. Then the rate of payment was provided for and a clause inserted that the ship might under certain conditions be put out of pay. [His Lordship read these clauses of the charter-party.] The service therefore under that charter-party commenced as from the 25th Nov. 1899, and was upon the terms stated. On the 9th March 1900 the shipowners effected with the defendants a policy of insurance for the space of three calendar months, from the 8th March 1900 to the 7th June 1900, both days inclusive, and it was on "chartered or hire money valued at 19,500*l.* to cover and pay the loss of hire money calculated at 216*l.* 13*s.* 4*d.* per day, as per clause attached. In the event of total or constructive total loss of steamer, no claim to be made for the unexpired time." [His Lordship then read the clause attached.] On the 3rd April 1900 the vessel was in a port in the United Kingdom—namely, in London. She had made a voyage to the Cape and had returned. In the course of that voyage to the Cape there had been some trouble with the blades of her propeller, and she had been repaired at Gibraltar, and again at the Cape. On the 3rd April she was back again in London and was preparing, under the instructions of the Admiralty, to proceed on another voyage, and I think there is no doubt that but for what happened she would have proceeded on another voyage, and her services under the charter-party would have been continued. She was put into dry dock, no doubt for the purpose of the voyage, and when there it was discovered that some of the blades of the propeller were cracked, and in consequence of that the Admiralty gave the shipowners notice that the ship was from that date discharged from Her Majesty's service. A further notice was given on the 7th April, but there is no doubt that from the 5th April the service was put an end to and the vessel discharged as from that date from Her Majesty's service, that is, from the service under the charter-party. As to the reason why the Admiralty exercised their right which they had under the charter-party so to put an end to the service, two letters from the Admiralty were put in and admitted as evidence. [His Lordship read these letters, and proceeded:] Therefore the position, so far as the undoubted facts are concerned, was this: The three months certain in the charter-party had expired, and the service was being continued on the terms of the charter-party, which provided that at any time when the vessel was in a port in the United Kingdom, the Admiralty could, with or without reason, put an end to the service, and they did so on the 5th April for the reason stated in their letters. The blades of the propeller were repaired, and the repairs occupied from the 5th April, when the vessel was discharged from the service, till 5.30 p.m. of the 20th April, so that from the 5th to the 20th April the vessel was undergoing repair and was not fit to be used. Under the circumstances which I have stated, the plaintiffs claim payment, under the policy, by the defendants of their proportion of 216*l.* 13*s.* 4*d.* a day from the 5th April to 5.30 p.m. on the 20th April 1900. The defendants contend that the subject-matter of the insurance was hire money to be earned under a contract in the nature of a time charter; that the only hire money at risk on the 5th April was the freight payable under the charter-party of the 14th Dec.; and that there was no loss of such freight by the perils insured against. On the other hand, counsel on behalf of the plaintiffs contended that the subject-matter of the insurance was not limited to freight or hire money payable under a contract, but included or covered the interest of the shipowner in the use of his ship, entirely independent of any particular contract for the payment of freight or hire.

It seems to me clear that a shipowner has an interest in the use of his ship, and that he may insure himself against the loss which he may undoubtedly suffer from being deprived of its use by perils of the seas or other causes. But in cases of this kind it is not enough to consider what interest the shipowner had, and against what losses he might lawfully have insured himself; the true question must be whether the interest in respect of which he claims to be insured, and the loss against which he claims to be indemnified, were in fact covered by the terms of the policy which he effected, and upon which he sues. In the present case the subject-matter of the policy is "chartered or hire money," and, in my judgment, this means hire money in the nature of freight payable under a contract I do not think that it is enough for the plaintiffs, in order to entitle them to succeed in this action, to show that they were interested in the use of their ship, and that they were deprived of such use for fourteen or fifteen days by a peril insured against. Counsel, however, contended on behalf of the plaintiffs that they had an interest, as undoubtedly they had, in the "hire money" payable under the charter-party of the 14th Dec. 1899; and that they lost this hire money from the 5th April to the 20th April by perils insured against under the policy. Reading the policy and slip together, it seems sufficiently plain that the insurance was against the loss of hire money by reason of the payment of the hire ceasing in consequence, amongst other things, of want of repairs or breakdown of machinery preventing the working of the vessel for more than twenty-four hours or rendering her inefficient for the service, which must mean for service under the contract upon which she is at the time employed. It is said that in the present case there was a want of repair or breakdown of machinery which prevented the working of the vessel for more than twenty-four hours, and which rendered her inefficient for service under the charter-party of the 14th Dec. 1899, and that, in the language of the slip, it was on this event, and in consequence of this, that the payment of hire ceased from the 5th April until the 20th April. Is this a correct statement of the facts? It appears to me that this is the question which I have to decide in this case. The fact is that the hire ceased on the 5th April (not merely till the 20th April, but altogether), because on the 5th April the charter-party came to an end; and it came to an end on the 5th April because the Admiralty had on that day, the vessel being then in a port in the United Kingdom, an absolute right at their discretion, whether with or without reason, to discharge the vessel from the service, and they exercised this right. The motive upon which the Admiralty acted, and their reason for acting, were undoubtedly that they ascertained, when the vessel was put into dry

dock, that the propeller blades were cracked and would require repair, and they were afraid that they might give trouble again in the future. It is clear, however, that as between the plaintiffs and the Admiralty, the motive upon which, or reasons for which, they acted were altogether irrelevant; and, as against underwriters on the policy in question, I do not think that it was competent to the plaintiffs to search into the reasons which induced the Admiralty to act, and to say that, because their reason for putting an end to the contract, as they were entitled to do with or without reason, was the want of repair or breakdown of machinery, there was therefore a claim under the policy. If the service had continued and the Admiralty had put the vessel out of pay from the 5th April to the 20th April, the case would have been different. It is to be observed that in the event of a total or constructive total loss of the vessel, the underwriters were not to be liable for the loss of hire for the unexpired time; and still less, in my opinion, was it the intention of the parties, as expressed in this policy, that the underwriters should take the risk of the employment of the vessel ceasing by the exercise by the hirers of the absolute right given to them by the contract to put an end to the service, whatever the motive or reason influencing them in so acting may have been. I have carefully considered the authorities cited by counsel for the plaintiffs, and his very clear and, if I may say so, very useful argument.

Perhaps I ought to say a word as to the instances to which he referred of the loss of freight by damage to, or loss of, the ship by perils of the seas. He suggested that in such cases, or some of them, an argument similar to that relied upon by the defendants in the present case might be used, to the effect that the freight was lost not by the perils of the seas, but by the act of the shipowner in electing either not to repair his ship or not to forward the cargo by another vessel. If the cases are considered, they will be found, I think, to be very different from the present case. In such cases the freight may be lost because the necessary repairs will cause so much delay that it frustrates the voyage. In that case the freight-earning voyage being destroyed by perils of the seas, there is a clear loss of the freight by the same perils. Or again, the cost of repair may be so great, as compared with the value of the ship when repaired, that a reasonable uninsured shipowner would not repair the ship at all, and in that case the ship is practically lost, and the freight also, by perils of the seas; at all events, unless there is another vessel available by which the cargo can be carried to its destination. If there is another such vessel available, the shipowner may—but he is not bound as between himself and the cargo owner to—forward the cargo and earn his freight It is said by counsel for the plaintiffs that, if under such circumstances the shipowner elects not to forward the cargo, the freight may be said to be lost by his act, and that it is notwithstanding a loss by perils of the seas and recoverable against underwriters. In the first place I desire to avoid expressing an opinion whether in such a case the loss would be a loss by perils of the seas, if the cargo could be forwarded at an expense to the shipowner less than the freight to be earned by forwarding it. But, if in such a case the loss is to be treated as a loss by sea perils, it must, I think, be on the ground that the freight insured was the freight arising from the carriage of the cargo by the ship named in the policy, that this was lost by the loss of the ship, and therefore by perils of the seas, and that the right remaining in the shipowner to save as much as possible of the money lost by forwarding the cargo in another vessel is in the nature of salvage, to the benefit of which the underwriter is entitled on payment of a total loss; and on this basis, therefore, it is plain, as in the other cases, that the freight insured is lost by perils of the seas, I think, therefore, there is no true analogy between any of these cases and the present case. But, after all, every case of this kind must depend upon the terms of the particular contract and their application to the particular facts of the case; and I have come to the conclusion that the loss in respect of which this action is brought was not a loss covered by the policy underwritten by the defendants. Therefore, there must be judgment for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *William A. Crump and Son.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, and Whatton.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Aug. 7 and 8, 1901.

(Before Barnes, J. and Trinity Masters.)

The Minneapolis. (a)

Salvage—Apportionment—Special awards—Non-navigating portion of crew—Horsemen.

A large steamer carrying passengers, cargo, horses, and cattle, fell in during bad weather with a dismasted barque in the Atlantic, and, after taking off her crew and cutting away the wreckage of her masts, towed her to the Azores. The owners of the barque in settlement of the salvage claim paid 8250l. to the owners of the steamer.

In an action for apportionment:

Held, that the owners were entitled to 6175l. and the master to 500l.; that as special awards and according to their rating those of the crew who had taken off the crew of the barque should receive 150l., those who had cut away the wreckage 300l., the boat's crew employed during that service 25l., and the boat's crew engaged in passing ropes 75l.; and that the remaining sum of 1025l. was to be divided rateably amongst the whole crew, the non-navigating portion, consisting of the surgeon, purser, cooks, stewards, and stewardesses, to share as if rated at one-third of their actual rating, and the horsemen and foreman, who were in the employment of the owners and liable to be called upon to perform duties, at one-third of the rating of an A.B.

The Coriolanus (62 *L. T. Rep.* 844; 6 Asp. Mar. Law Cas. 514; 15 *P. Div.* 103) *distinguished.*

This was an action for apportionment of salvage brought by certain members of the crew of the

(a) Reported by Christopher Head, Esq., Barrister-at-Law.

steamship *Minneapolis*. The defendants were the owners of the vessel.

The facts are stated in the judgment.

Laing, K.C. and *Nelson* for the plaintiffs.

Aspinall, K.C. and *A. Pritchard* for the defendants.

The arguments of counsel were directed to the special claims of the boats' crews which took off the crew of the salved vessel, cut away the wreckage, passed the ropes and made connection, and to the share, if any, of the salvage reward to which the non-navigating portion of the crew and the horsemen and horse foreman were entitled. The following cases were referred to:

The Coriolanus, 62 L. T. Rep. 844; 6 Asp. Mar. Law Cas. 514; 15 P. Div. 103;
The Spree, 69 L. T. Rep. 628; 7 Asp. Mar. Law Cas. 397; (1893) P. 147.

Aug. 8.—BARNES, J.—This is a suit by some of the crew of the steamship *Minneapolis* against the owners of that vessel, and practically, by reason of the statement of counsel for the plaintiffs that they appeared for the master and all the crew besides those who are on the record as plaintiffs, it is a suit between all those who are interested in the salvage action, which has been settled, to obtain an apportionment of the reward. It appears that on the 21st March 1901 the *Minneapolis* when homeward bound from New York to London with a general cargo and passengers, and in latitude 44 degrees 49 minutes N. and longitude 35 degrees 47 minutes W., fell in with the *Comet*, a four-masted barque, bound in ballast from Greenock to Philadelphia to load a cargo of oil for Japan. The *Minneapolis* is a vessel of 13,401 tons gross register, belonging to the Atlantic Transport Line, and she had a crew of 148 persons. There were some sixty-two passengers and a number of horses and cattle. It is not necessary to go in great detail into the services that were rendered. Substantially they appear to be these: First of all a lifeboat, with an officer and crew, was sent to take off the crew of the *Comet*—I presume that at that time it was not certain whether the vessel could be saved or not—and they, in the course of three trips, succeeded in bringing the whole of the crew of the *Comet*, and the master and his wife, on board the *Minneapolis*. Then, later on, the *Minneapolis* sent a boat, with the second officer in charge and others of the crew, for the purpose of cutting away the wreckage of the masts, or some of the masts—I think the foremast and mizzenmast—of the *Comet*, with a view, if possible, of taking the barque in tow, if the risk of her being lost by the puncturing of the hull by the masts was done away with. Some of those men seem to have gone on board, and at very considerable risk succeeded in cutting away the wreckage. That all, I think, took place on the 22nd March. On the 23rd March, the weather having somewhat moderated, the *Minneapolis* was able to take the *Comet* in tow, and on the following day the *Comet* was safely brought to Ponta Delgada in the Azores. Now, the result of the litigation and settlement between the salvors and the owners of the *Comet* is that a sum of 40,000 dollars was agreed to be paid by the owners of the *Comet* to the salvors as a whole, and that, I am told, represents 8250*l.* in English money. The question before the court is, How is that sum to be apportioned between the owners, master, and crew of the *Minneapolis*? It is quite obvious at the outset that a very large portion must go to the owners of the *Minneapolis*. In the first place, this is a very large vessel, belonging to the line I have referred to, and her value, with cargo, is stated to be 300,000*l.* at least, and there is some freight amounting to 8000*l.* odd. The owners were put to expense which, in round figures, is stated to be somewhere about 2000*l.*, partly from the consumption of coal, stores, and for extra victualling, and partly the various expenses which were consequent upon the disorganisation of their service through their vessel being late in her arrival and otherwise, details of which were furnished. The real instrument of salvage was this large, powerful steamer, because it was by means of her being treated as a tug on the occasion that this vessel was rapidly taken into the Azores.

The apportionment which I propose to make is as follows: To the owners, I think, the sum of 6175*l.*, having regard to their interests and so forth, should be awarded. Next comes the consideration of the master's claim. The master had a very serious responsibility in determining to deal with such a salvage as this. He was in charge of a very large steamer, with a numerous crew and a number of passengers, and also live stock on board, and it is easy to see that his responsibility is great in determining what to do on such an occasion. I think, having regard to those considerations, that he should receive the sum of 500*l* Now I come to deal with some matters which are of importance. They are matters which arise in this way. It is obvious from what I have said that a number of those who are the deck and engine-room and stoke-hole part of the crew did a great deal of extra work in connection with the actual salvage services, because they did not remain simply on board their own steamer, but did outside work, some of it of a substantial and important character. In the first place, there was the transfer of the crew and master and the master's wife from the *Comet* to the *Minneapolis*, which was a most desirable thing to do in order to save their lives if it had not been possible to take the *Comet* in tow. To do that the boat made three trips. Particulars have been furnished me of those who were on board the boat. The names are: Paul, chief officer; Pollard, second officer; Pearce, quartermaster; Morton, Griffiths, Ferguson, Mowat, and Elt, A.B.'s. Apart altogether from the part which they take in the general award to the crew, I think their services ought to be recognised by an award of 150*l.*, to be divided amongst them in proportion to their ratings. Then there comes a still more important matter. It appears that the boat, as I have said, was sent in charge of the second officer, Mr. Lazalle, with certain of the crew, to cut away the masts, and we are told that that was a risky and difficult matter to do. They had to go on board the ship which had no one on board and was rolling about, and somehow to hold on whilst two masts were cut away. Those who did this work appear to have been Mr. Lazalle; Mr. Berkeley, the second engineer; P. Kircaldy, the senior third engineer; J. M'Queggin, leading fireman; H. Porter, fireman; W. Trim, carpenter. I think those men did a very useful service, because by that means the *Comet* was enabled to be towed, and, as I have said, there was risk in going on board to do this

work. Amongst those men I consider that the sum of 300*l.* should be distributed according to their ratings. Now, I have looked through the details of the evidence, but I cannot find who were the persons who were left in the boat whilst those whom I have mentioned went on board and cut away the masts. I assume that some sailors must have assisted in rowing the boat whilst those men went on board, and, lest I should leave anybody out who assisted in that matter, I think that they should get 25*l.* in recognition of their assistance. In addition to that, there was a suggestion made of the merits of those who remained on board the *Comet* whilst she was in tow to St. Michaels; but I find, on looking through the list, that I have really rewarded all those persons in dealing with the crew of the boat which transferred the crew of the *Comet* and those who went to cut away the masts, and I do not think it necessary, therefore, to deal in any way specifically with those who remained on board the *Comet*. I do not suppose their danger was a very material matter to consider outside the general award to the officers and crew. But there remains Mr. Brown, the third officer who was in charge of the boat which went later on, on the 23rd, to pass ropes and make connection. That appears to have been a duty of some danger and difficulty, and I have had no particulars given me exactly as to who were the persons doing that. The names, however, can easily be ascertained. I think there should be divided amongst Mr. Brown and the seamen who did that work, according to their ratings, a sum of 75*l.* The result of these deductions is to leave the sum of 1025*l.* to be divided amongst the rest of the crew, and that crew, as I have said, numbered, without the master, 147 persons. That sum should be divided amongst the crew according to their ratings subject to these qualifications. I have considered the way in which what I may call the navigating and non-navigating members of the crew may be treated in the case of *The Spree*, (1893) P. 147, and it is not necessary that I should go over the judgment which I gave in that case, because it would be only repeating a number of reasons which have been there pointed out for differentiating between those who are the real workers of the ship both on the deck and down in the engine room department, and those who are merely members of the crew attending, not to working the ship at all, but to working such parts of her as are concerned with the passengers and otherwise, like the horsemen.

Dealing first with the navigating members of the crew, it will be seen from what I have already said that a good number of the deck hands and officers are specially remunerated for what they did outside the ship, and as regards what was done on board the ship I see no particular reason for drawing any particular distinction between the various navigating members of the crew—that is to say, the officers, seamen, engineers, firemen, donkeymen, greasers, and trimmers, and so forth—and they, I think, should therefore take their share of the 1025*l.* according to their ratings. Then there remain a number of persons who were not in the navigating and working part of the ship as a navigating machine, such as the surgeon, cook, steward, stewardess, purser, and so forth. It was not contended before me that any of these persons whom I am now considering were to be excluded from the salvage award, and I think that is the right view to take, for the reasons which I gave in the course of my judgment in *The Spree*. It is quite true that some of these, if not all of them, do not in one sense perform any active service in the rendering of the salvage service, but it must not be forgotten that they are all on the articles, that they are all liable to take their stations, that they are all persons who run some risk in so far as the ship salving is at any extra risk, and that if any of those persons who went away and assisted had been lost, extra duties would necessarily be required to be performed by those who are left. So I think it would not be wise that these persons should be excluded from the salvage award altogether. I think it would be bad policy and lead to difficulties if they were not recognised. Therefore, I think the parties are right in not suggesting they should be excluded; but, at the same time, whatever their merits are, they do not bear a high proportion of the work of those who are actually engaged in performing services on the deck or in the engine room and so forth, and, having regard to the large size of this steamer, practically they were not in any serious risk. As I said before in the case of *The Spree*, without laying down a rule, as each case must be governed by its merits, because in some cases you might find the steward of the vessel hauling on the ropes, as happened in the case of *The Noordland*, referred to in the case of *The Spree*, I think the proper thing to do is to treat all those with whom I am dealing as if they were rated at one-third of their ratings; that is to say, they will take a share as if their rating was a third of what it really is. It is less, I agree, than what I mentioned in the case of *The Spree*, but there are reasons for differentiating. Then there are the horsemen and the horse foreman. Again, it is not now suggested that they should be excluded. Their case is not the same as that of the cattlemen in *The Coriolanus* (62 L. T. Rep. 844; 6 Asp. Mar. Law Cas. 514; 15 P. Div. 103), who were not really servants of the shipowners. These men are really the servants of the shipowners. They are paid so much for the trip, and I was informed that these men have their stations at the boats, and are liable, therefore, to be called upon to perform duties, so far as they can, very much in the same way as stewards. I think that persons in that position ought to be just as much included in a salvage award as those who are in the cabin department. In order to recognise their position, and yet not reward them as if they had done a great deal, I think the proper thing to do, and the Elder Brethren, with whom I have had a long consultation, agree, is to treat them as rated at one-third of the rating of an A.B., and let them take a proportion on that basis. The costs will be borne by the parties in proportion to their awards.

Solicitors for plaintiffs, *Lowless* and *Co.*
Solicitors for defendants, *Pritchard* and *Sons.*

Monday, Nov. 4, 1901.

(Before Sir F. JEUNE, President.)

THE MERSEY. (a)

Collision — Practice — Transfer of action from County Court—Cross-action in High Court—Priority of time in commencement of action—Conduct of action.

Where an action is commenced in the County Court and a cross-action is brought in the High Court in respect of the same matter, and an order is made transferring the County Court action and consolidating the two actions, the original plaintiffs in the High Court action will have the conduct of the consolidated action, unless it appears that there was a clear priority of time in commencing the County Court action.

Where proceedings are commenced practically simultaneously the High Court action will be treated as the principal cause.

THIS was a motion by the Mersey Docks and Harbour Board, the owners of the steamship *Miles K. Burton*, praying that an action for damage by collision brought against them in the Liverpool County Court by the Birkenhead Corporation, the owners of the steam ferry *Mersey*, might be transferred to the Probate, Divorce, and Admiralty Division of the High Court, and consolidated with an action commenced by them in the High Court in respect of the same collision. They also asked that their action might be made the principal cause.

On the 27th Sept. 1901 a collision occurred in the river Mersey between the steam hopper dredger *Miles K. Burton*, belonging to the Mersey Docks and Harbour Board, and the steam ferry *Mersey*, which is the property of the corporation of Birkenhead, in consequence of which both vessels were damaged.

It was agreed between the legal representatives of the parties that neither of them would take proceedings without giving notice to the other.

On the 20th Oct. the corporation of Birkenhead gave notice that they were commencing proceedings, and at 3.15 p.m. they instituted an action under the Admiralty jurisdiction of the County Court of Liverpool claiming 300*l.* damages.

On the same day, at 3.50 p.m., the Mersey Docks and Harbour Board issued a writ *in rem* in the Liverpool District Registry of the High Court claiming damages against the owners of the *Mersey* in respect of the collision.

Service of the summons in the County Court proceedings was accepted, and an undertaking was given to appear in the High Court action at about the same time.

It was estimated by the Mersey Docks and Harbour Board that the damage their vessel had sustained by the collision amounted to about 500*l.*

There was no opposition on the part of the Birkenhead Corporation to the transfer of their action to the High Court; but each party claimed to be treated as plaintiffs and to have the conduct of the action.

Aspinall, K.C. (*Bateson* with him), for the Mersey Docks and Harbour Board, in support of the motion.—The harbour board are plaintiffs in the High Court action, and therefore ought to be plaintiffs in the consolidated action. The plaint in the County Court and the writ in the High Court were issued practically simultaneously.

E. G. Hemmerde (*F. E. Smith* with him) for the Birkenhead Corporation, *contra*.—The party that first institutes proceedings ought to be treated as plaintiffs:

The Never Despair, 50 L. T. Rep. 369; 5 Asp. Mar. Law Cas. 211; 9 P. Div. 34.

The practice was settled by that case. Here, although, it may be. there is not much difference in time. yet the Birkenhead Corporation were clearly the first to institute proceedings. If the question of the amount claimed were to influence the court, parties would claim an amount exceeding the jurisdiction of the County Court, so as to obtain the conduct of the action.

Aspinall, K.C., in reply.—It cannot be properly urged in this case that the Birkenhead Corporation were the first to institute proceedings, as there was an arrangement between the legal representatives of the parties that neither should commence proceedings without giving notice to the other.

The PRESIDENT. — In this case two actions of damage have been commenced in respect of the same collision, one at 3.15 p.m. on the 21st Oct. in the Liverpool County Court, and the other at 3.50 p.m. on the same day in the High Court. The motion by the plaintiffs in the High Court for the transfer and consolidation of the County Court action is not opposed except on one point—namely, that the plaintiffs in the High Court ask as part of the order that their action shall be treated as the principal cause. I must decide this matter upon principle, although I do not think that my decision, in the circumstances, will in any way affect the real interests of the parties concerned. In *The Never Despair* (*ubi sup.*) Sir James Hannen took in chambers what, with all respect to Sir Robert Phillimore, I think was the wiser course. He held that the action which was already in the High Court, where the order of transfer was made, must be deemed to be the principal cause, and that the plaintiffs in that suit should, therefore, have the conduct of the consolidated actions, but he found that Sir Robert Phillimore had, in previous cases, gone on the principle of priority of time, and on the matter being adjourned into court he varied his first decision. If, therefore, there is clear priority of time, I ought to follow Sir Robert Phillimore as did Sir James Hannen. In the present case, no doubt, if I had to decide the matter absolutely, as a jury and anything depended upon it, there would be some evidence to show that the County Court plaint was issued at 3.15 p.m., and the writ in the High Court action not till 3.50 p.m.; but, for practical purposes, I cannot regard the case as one in which either party commenced proceedings before the other—that is to say, I cannot attach sufficient importance to the times of 3.15 p.m. for the plaint and 3.50 p.m. for the writ to enable me to say that there is a clear priority of time which would or should give the advantage to one party or the other. I think that the proper way to look at the matter is to treat the proceedings as if they had been taken simultaneously, which was evidently the intention of the parties,

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

with the result that I am entitled to regard the matter as Sir James Hannen looked at it—namely, as a case in which one party is in the court already, and being so is entitled to the advantage, whatever it is, of having their action treated as the principal cause. I agree that it would not be a safe principle to act upon in every case to give the advantage to the party making the larger claim; still it is the fact that the claim of the Mersey Docks and Harbour Board is larger than the claim of the Birkenhead Corporation, and I think the Dock Board should have the conduct of the consolidated actions. The costs of the motion will be costs in the cause.

Solicitors for the Mersey Docks and Harbour Board, *Rowcliffes, Rawle,* and *Co.*, agents for *W. C. Thorne*, Liverpool.

Solicitors for the Birkenhead Corporation, *F. Venn* and *Co.*, agents for *Alfred Gill*, Birkenhead.

Nov. 20, 21, *and* 22, 1901.

(Before Sir F. JEUNE, President, and TRINITY MASTERS.)

THE BRISTOL CITY. (*a*)

Collision in river Avon—Fault of pilot—Master holder of pilotage certificate—Wrong description of owners in certificate—Sects. 599 *and* 633 *of Merchant Shipping Act* 1894—*Meaning of words "same owner."*

Sect. 599 *of the Merchant Shipping Act* 1894 *gives a pilotage authority power to grant a pilotage certificate to a master of a ship, allowing him to pilot the ship to which he belongs, or any one or more ships belonging to the same owner, within the district over which they have authority. It also gives them power to renew certificates from year to year.*

A collision occurred in the river Avon between the steamtug P. *and the steamship* B. C., *partly through the fault of the pilot in charge of the* B. C. *The master of the* B. C. *had been granted a certificate by the pilotage authority, which had been renewed from year to year, authorising him to pilot the steamship* J. C. *The* B. C. *was managed by the same firm, but did not, in fact, belong to the same owners as the* J. C., *but no alteration had been made in the certificate on the transfer of the master to the* B. C., *or on the renewal of the certificate.*

Held, that the certificate was bad, and the B. C. *was, at the time of the collision, in charge of a pilot by compulsion of law.*

Semble, *if the certificate had been in order, she would have been exempted from compulsory pilotage.*

THIS was an action for damage by collision brought by the owners of the tug *Peri* against the owners of the steamship *Bristol City*.

The collision occurred about 10 a.m on the 26th March 1901 in the river Avon, off Lamb and Flag Point in Hung Road.

The *Peri* at the time was coming up the river on a voyage from Portishead to Bristol, and the *Bristol City* was coming down the river on a voyage from Bristol to Cardiff in ballast. She was in charge of a duly qualified pilot, but her master also held a pilotage certificate which had been granted under the provisions of sect. 599 of the Merchant Shipping Act 1894, and which authorised him to pilot the *Jersey City*, or any other vessel belonging to the same owners, within the district.

In consequence of the collision the *Peri* was badly damaged, and had to be beached on the Gloucestershire side of the river to prevent her sinking.

The defendants, in their defence, while denying that the collision was caused by the negligence of those on board the *Bristol City*, pleaded that the fault, if any, was that of the pilot, who, they alleged, was solely in charge at the time of the collision.

At the trial of the action before the President (Sir F. Jeune) he found both vessels to blame for the collision, but held that, so far as the *Bristol City* was concerned, it was caused solely by the negligence of the pilot who was in charge. He reserved the question whether the *Bristol City* was at the time compulsorily in charge of the pilot for further consideration.

It is on this question that the case is reported.

Sects. 599 and 633 of the Merchant Shipping Act 1894 are as follows:

Sect. 599 (1). A pilotage authority may, if they think fit, on the application of the master or mate of any ship, and on payment by him of the usual expenses, examine him as to his capacity to pilot the ship of which he is master or mate, or any one or more ships belonging to the same owner as that ship, within any part of the district of the pilotage authority. (2) A pilotage authority, if on examination they find that any master or mate is competent, shall grant him a certificate . . . specifying (*a*) the name of the person to whom it is granted; (*b*) the ship or ships in respect of which it is granted; (*c*) the limits within which the master or mate is entitled to pilot the ship or ships; and (*d*) the date on which it is granted. (3) The person to whom a pilotage certificate is granted shall, while he is acting as master or mate of any of the ships specified in the certificate, be entitled to pilot that ship within the limits specified in the certificate without incurring any penalty for not employing a qualified pilot. (4) A pilotage certificate so granted shall not be in force for more than the period of one year from its date, but may be renewed from year to year by an indorsement under the hand of the secretary or other proper officer of the pilotage authority who have granted the certificate.

Sect. 633. An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

The certificate granted to the master of the *Bristol City* was in the following terms:

Whereas Alfred Sendall, master of the steamship *Jersey City*, registered at the port of Bristol, whereof Charles Hill and Sons are the owners, has applied to the mayor, aldermen, and burgesses of the city of Bristol, being a pilotage authority within the meaning of the Merchant Shipping Act 1854, to be examined as to his capacity to pilot the said ship, or any one or more ships belonging to the same owners within the district over which the said pilotage authority has jurisdiction. And whereas the said Alfred Sendall has thereupon been examined, and having been found competent, the said pilotage authority do by virtue and in pursuance of the provisions of the said Act and of all other powers thereunto them enabling, grant the said Alfred Sendall this pilotage certificate to enable him to pilot the said ship or any other ship or ships belonging to the same owners, of

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

which he shall be acting as master or mate at the time, within the district over which the said pilotage authority has jurisdiction, without incurring any penalties for the non-employment of a qualified pilot.—In witness, &c.

The certificate was dated the 8th Dec. 1891, and it had been renewed from year to year, but no alteration had been made, either in the name of the vessel, on the master being transferred to the *Bristol City*, or in the name of the firm described as owners.

It was admitted by the plaintiffs, the owners of the *Peri*, that the *Bristol City* was at the time of the collision within waters in which pilotage was compulsory by law.

Evidence was called to prove that at the time the certificate was granted Charles Hill and Sons were not the owners of the *Jersey City* according to the register, but that she was owned in sixty-fourth shares, and that although certain shares were owned by individual members of the firm, there were a number of other shareholders who were not members of it.

The *Bristol City* was also owned in sixty-fourth shares, and was registered in the sole name of Charles Gathorne Hill, as the owner of sixty-four sixty-fourths. As a matter of fact, although he was described as sole owner, he held these shares partly for himself, and partly as trustee for members of his family.

Since Dec. 1891, the date of the certificate, there had been several changes in the firm through death, and Charles Gathorne Hill himself had since died.

Laing, K.C. and *Lewis Noad* for the defendants.—The master's certificate is bad. When the certificate was granted Charles Hill and Sons were not the sole owners. Even assuming the certificate was not invalid and capable of being renewed from year to year, the *Bristol City* is not a vessel owned by the same owners as the *Jersey City*; for whether the date of the certificate is taken, or that of its renewal or the date of the collision, Charles Hill and Sons were at no time the owners of the *Jersey City* or the *Bristol City*. Since 1891 Charles Gathorne Hill and other members of the firm have died so that a vessel owned by the firm in 1891 would if owned by the firm in 1901 be really owned by a different firm carrying on business under the old name:

The Earl of Auckland, Lush. 165.

Although the master may have a certificate, and assuming it was a good one, the owners of the *Bristol City* cannot be liable, for it has been held that the fault was solely that of the duly qualified pilot who was in charge at the time of the collision within a district in which pilotage was compulsory by law. Therefore under sect. 633 the defendants are relieved from liability. Sect. 599 does not remove the compulsion to take a pilot; it merely extends the class of qualified pilots, and owners are bound either to take a pilot or a man who has a certificate.

Aspinall, K.C. and *Dawson Miller* for the plaintiff, *contrâ*.—There was no compulsion in this case to take a pilot. *The Earl of Auckland* (*ubi sup.*) is not an authority in point, because in that case the certificate entitled the master to pilot any ships belonging to one Carey, who was described as owner, and as a matter of fact Carey was only the broker and manager, and in no sense the owner. What one should really look to is who are the actual owners, who, in fact, not merely in name, are the owners of the vessel. As the vessels are held in sixty-fourth shares the owners must be expected from time to time to change, and it would be absurd to suppose that the fact of a share changing hands during the life of the certificate should invalidate it.

The PRESIDENT.—I think there can be no doubt that if this certificate had been a good one it would have had the effect of exempting the *Bristol City*, so that the pilot on board would not be a pilot taken by compulsion of law, and therefore her owners would not be able to plead compulsory pilotage; but, after hearing the arguments and having the facts now before me, I have come to the conclusion that this certificate cannot be considered a good certificate for that purpose. The first objection taken was that there is a misstatement on the face of the certificate as to the ownership, at the time of the original issue of the certificate, of the *Jersey City*. That occurs in the preliminary statement. It is stated there that "Alfred Sendall, master of the ship *Jersey City*, whereof Charles Hill and Sons are the owners." Now Charles Hill and Sons were not the owners, and the question is what effect did that have on the certificate. The case of the *Earl of Auckland* (*ubi sup.*) does not appear to me to be conclusive on that matter, because, as was pointed out by counsel for the plaintiffs in that case, the misstatement occurred in the actual material body of the certificate. The certificate there was a certificate given to a man as master of a ship of which somebody was stated to be the owner, and that was a misstatement, and there was an obvious misstatement in the material part of the certificate. This case is not exactly the same case. In this case there is a misstatement merely in the preliminary statement of the ownership of the *Jersey City* at that time. But when the future effect of the certificate is considered I am inclined to think that a matter arises on that misstatement which may well be considered to render the certificate bad, because it is not a certificate only in favour of Sendall whilst master of the *Jersey City*, but it is in his favour while he commands any ship of the same owners as the *Jersey City*. The words are: "To enable him to pilot the said ship or any other ship or ships belonging to the same owners." As I read the certificate I can read it only in one way, and that is that it is a certificate in favour of him while he commands the *Jersey City* or any other ship belong to the same owners—that is to say, Messrs. Charles Hill and Sons. I do not think it is possible to read the certificate without understanding that "same owners" means the owners mentioned above, and nobody else. Therefore it is a certificate enabling him to pilot the *Jersey City*, owned by Messrs. Charles Hill and Sons, and any other vessel owned by Charles Hill and Sons; and if Charles Hill and Sons were not the owners of the *Jersey City*, then it follows that supposing Mr. Sendall was transferred to another vessel, if that other vessel was not owned by Messrs. Charles Hill and Sons, then it could not be in accordance with the terms of the certificate; but, on the other hand, if it was owned by them, then it would be in violation of the Act of Parliament, because it would

not be owned by the same persons as owned the *Jersey City*. Therefore I think it is impossible to sustain the certificate.

But there is a further ground, which to my mind is absolutely conclusive, and that is, that in point of fact the *Bristol City* was not owned by the same owners as the *Jersey City* at any material time. The question may well be raised which is the material time as to the ownership of the *Jersey City*. Is it the time of the original issue of the certificate, or the time of the last renewal, or the time of the collision? One of those three times must be taken; counsel for the plaintiffs contended, and with considerable force, that what you have to look at is the time of the last renewal of the certificate, because the certificate expires at the end of the year unless renewed, and, if renewed, it is not a new certificate but a renewal of the old. I think perhaps I ought to look at the ownership of the *Jersey City* at the time of the renewal; if not, then at the time of the original granting of the certificate. But, put either way, this certificate cannot be considered good, because the owners of the *Bristol City* were not, either on the 8th Dec. 1891, or at the time of the last renewal, owners of the *Jersey City*. I may add that it appears to me there are great difficulties connected with these certificates, because, as vessels are owned in sixty-fourths, and some of the owners of these shares may, nay must, continually change, it is very difficult to suppose it could have been intended that a single change in the ownership of one sixty-fourth should render the renewal of the certificate practically useless. With that, however, I have nothing to do. When the Act of Parliament was passed, I have no doubt it was contemplated that ships would be owned by companies or partnerships of a comparatively small number of persons, and it may have been supposed that a fleet of ships would go on being owned by the same persons; but the law does not leave me any option for I am bound to say that if the Act of Parliament talks of owners one must take that in the ordinary sense of the word; so that there cannot be the same owners unless all the sixty-fourths belong to the same persons, and that the change of the ownership of one sixty-fourth is a change of ownership of the ship. The result is that I hold the certificate bad; and therefore the *Bristol City* was, at the time of the collision, by compulsion of law in charge of a qualified pilot. I have already found that, so far as that vessel is concerned, the pilot is alone to blame; but, as the defence of compulsory pilotage was only an alternative plea, I follow the usual course, and dismiss the plaintiff's suit without costs.

Solicitors for the plaintiffs, the owners of the *Peri*, *Downing*, *Bolan*, and *Co.*

Solicitors for the defendants, the owners of the *Bristol City*, *Ince*, *Colt*, and *Ince*, agents for *Ward*, *Vassall*, and *Co.*, Bristol.

Monday, Dec. 9, 1901.

(Before Sir F. JEUNE, President.)

THE ACANTHUS. (a)

Collision—Reference—Bilge keels fitted by owners whilst vessel undergoing repairs—Liability for dock charges and demurrage.

There is no legal obligation on a person to contribute towards an expenditure incurred by another merely because he has derived a benefit from it.

A collision occurred between two vessels in consequence of which one of them had to be put into dry dock in order to be repaired.

The owners of the other vessel admitted liability for the collision and damages.

While in dry dock her owners took the opportunity of fitting bilge keels, and the work was done simultaneously with the collision repairs, but without interfering with them or causing the vessel to be detained in the dock for any time beyond what was necessary for completing the repairs.

Held, that the owners, being under no obligation to put their vessel into dry dock, were not liable for any portion of the expenses of so doing, and the owners of the wrongdoing vessel were liable for the whole of the demurrage while she was undergoing repairs.

Ruabon Steamship Company *v.* London Assurance (81 *L. T. Rep.* 585; 9 *Asp. Mar. Law Cas.* 2; (1900) *A. C.* 6) *followed.*

THIS was a motion in objection to a report of the Registrar of the Admiralty Division dated the 4th Nov. 1901.

A collision occurred on the 30th April 1901 in the river Mersey between the steamship *Bohemian*, which was on a voyage from Boston to Liverpool at the time, and the steamship *Acanthus*, in consequence of which the *Bohemian* was damaged, and in order that repairs should be effected it became necessary to put the *Bohemian* into dry dock.

The owners of the *Acanthus* admitted liability for the collision subject to a reference to the registrar and merchants to assess the amount of the damages.

Previous to the date of the collision the owners of the *Bohemian*, which was a nearly new ship, had contemplated fitting her with bilge keels, and tenders for the work had been obtained and a deposit of 5*l.* paid to secure the option of using a dry dock, but no contract had been entered into.

After the collision they decided to avail themselves of the vessel being in dry dock to fit on the keels. She went into dock on the 7th May, and remained there until the 16th May, when the repairs were completed and the bilge keels fitted on.

At the reference the bill for repairing the collision damage was not disputed, and it was not suggested that the fitting of the bilge keels in any way interfered with or caused delay in the completion of the repairs. Objection, however, was taken to the dock dues and other charges connected with dry docking on the ground that the vessel would have been put into dry dock in any event to have the bilge keels fitted, and the owners of the *Acanthus* disputed the amount of the demurrage claim on the same ground.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

The registrar came to the conclusion that "the plaintiffs had not before the collision been absolutely committed to doing the bilge keel work at that time, and that justice would be done by apportioning the expenses consequent on dry-docking the vessel as well as the loss sustained through her detention between the bilge keel work and the collision repairs." Out of 1960*l.* 6*s.* 8*d.*, the total amount claimed, he therefore allowed 1461*l.* 8*s.* 2*d.*

The owners of the *Bohemian* objected to the report on the ground that all the expenses of dock dues and dry docking ought to be borne by the owners of the wrong doing vessel, and that they were also liable for the whole of the demurrage claimed.

Aspinall, K.C. (*Glynn* with him) for the owners of the *Bohemian*.—No doubt the owners of the *Bohemian* have taken advantage of her being in dock to carry out the alterations, but it is not suggested that the work has in any way interfered with or delayed the completion of the repairs of the damage due to the collision. The case is within the principles of law laid down by the House of Lords in *Ruabon Steamship Company* v. *London Assurance* (81 L. T. Rep. 585; 9 Asp. Mar. Law Cas. 2; (1900) A. C. 6). It was there decided that where a shipowner took advantage of his vessel being placed in dry dock to do work on his own account, he was not required to give credit to the wrongdoer for the benefit he had thus derived. He also referred to

The Alfred, 3 W. Rob. 232;
The Richer, cited in Pritchard's Admiralty Digest, vol. 2, p. 1746, note 158.

Scrutton, K.C. and *Bateson* for the owners of the *Acanthus*, *contrà*.—Neither party is entitled to take advantage of the vessel being in dock, and therefore the expenses ought to be borne by each of them in proper proportion. Lord Brampton (whose judgment is approved of by Lord Davey) in *Ruabon Steamship Company* v. *London Assurance* (*ubi sup.*) lays down that "such contribution can only be insisted upon in those cases where work is done to the vessel itself, by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, dry-docking being necessary for each." The facts in this case are analogous with the facts in the case of *The Vancouver* (*Marine Insurance Company* v. *China Transpacific Steamship Company*, 55 L. T. Rep 491; 6 Asp. Mar. Law Cas. 68; 11 App. Cas. 573). That decision was distinguished in *Ruabon Steamship Company* v. *London Assurance* (*ubi sup.*), but not disapproved of, and counsel for the appellants, the shipowners, argued that in *The Vancouver* case there were two sets of repairs, owners' repairs as well as underwriters' repairs, which distinguished it from *The Ruabon* case. It is submitted that here there were also two separate sets of repairs, and therefore the case comes within the principles laid down in *The Vancouver* (*ubi sup.*). In *The Normandy* (*Shipping Gazette*, the 8th Aug. 1901) Barnes, J. held that where owners took advantage of painting a vessel while in dock for repairs rendered necessary by a collision, and where they would in any event have had to do the painting within a month or two, the defendants were entitled to be credited with something on that account.

Aspinall, K.C. in reply.—Bilge keels are, in a sense, a luxury and not a necessity, and there was at no time any obligation on the owners to dry dock their vessel.

The PRESIDENT.—The question in this case raises a point which, to my mind, has been decided in other cases. There is no doubt that it became necessary to repair the vessel in consequence of the collision, and that the owner was justified in putting the ship into dock and repairing her at the expense of the owners of the *Acanthus*. While she was in dry dock he took advantage of the occasion to add what is called a luxury—no doubt a correct enough expression, in the sense that it was not necessary for the repair of the vessel. He took occasion to add bilge keels, which could not be done without putting the vessel into dry dock. He had thought before the collision of putting on the bilge keels when occasion occurred, but I think the result of the evidence is that he was under no contract to do so, and had not retained the dock for that purpose. Therefore the state of things was that he had it in his mind to put them on when occasion arose, but he was under no obligation to do so, either as regards a contract towards anyone else, or as regards his duty towards the ship. It therefore comes to be a simple case of the owner taking advantage of the vessel being in dry dock to add bilge keels. That appears to me to bring the case within the principles laid down by the Lord Chancellor in the *Ruabon Steamship Company* v. *London Assurance* (*ubi sup.*). The judgment of the Lord Chancellor puts the matter in the broadest possible way. It comes to this, that a person is not bound to contribute unless there is some legal obligation on him to do so. The mere fact that he gets an advantage from the opportunity which he has taken, although it may give rise in some person's mind to a general idea of general justice or good sense, or one of those vague propositions, which are sometimes invoked—although it may be said on those grounds that a man who gets a benefit ought to pay for it, the Lord Chancellor points out that that is not sufficient to impose a legal obligation. The Lord Chancellor in putting it in these words, appears to me to lay down the principle in the broadest possible way. He says (81 L. T. Rep. at p. 587; 9 Asp. Mar. Law Cas. at p. 5; (1900) A. C. at p. 12): "This is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound and the duty to contribute is alleged to arise only on some general principle of justice that a man ought not to get an advantage unless he pays for it." The Lord Chancellor gives illustrations to show that that is not founded upon any principle recognised by the English law. Comment has been made upon the judgments of Lord Davey, and especially Lord Brampton, in that particular case. The case of *The Vancouver* (*ubi sup.*) has no bearing upon this case, because I think the question there was whether a particular average loss sustained by the respondents exceeded 3 per cent, within the meaning of the warranty contained in a policy of assurance. That was the only question to be decided, and it was quite possible to hold in that case what was held. There

was no question there of a man taking advantage of an opportunity afforded by somebody else to benefit himself. It was really a different question altogether, but I quite agree that there are expressions in Lord Brampton's judgment (with which Lord Davey agrees) which seem to go a little further. But perhaps it only comes to this, that where there is an obligation, or where the case arises that the vessel has to be repaired—or to use Lord Brampton's phrase, where there are two things necessary to be done, one by one person and one by another—if they are done at the same time then the cost, so far as it is common to both, may well be shared by them. But the point is that the two things are obligatory by reason of contract or duty. I can easily understand if it had been shown in this case that the bilge keels were a necessity, and the vessel could not go to sea without them, it might be said that the owner was under an obligation to fit them, and if he had been under an obligation, and if at that time he had put the vessel into dry dock, it might be said it was as much on his own behalf as on behalf of the owners of the *Acanthus*. But this case is precisely the opposite. As I have said, there was no obligation on the shipowner at all, and the learned registrar and merchants have found in terms that he was under no obligation—that "he had not absolutely committed himself to do the bilge keel work at that time," which means, I suppose, that he had not made any contract which compelled him to do it. Therefore it seems to me to be, in these circumstances, the simple case of a man who when he is under no obligation to do a thing takes advantage of the opportunity. That appears to me to be practically the case decided on the principle laid down by Lord Halsbury in the *Ruabon Steamship Company* v. *London Assurance* (*ubi sup.*), and quite a different case from *The Vancouver* (*ubi sup.*), nor does it come within the principle laid down by Lord Brampton and Lord Macnaghten of common obligation. Therefore I see no reason why the principle of the case of the *Ruabon Steamship Company* v. *London Assurance* (*ubi sup.*) should not be applied, and why the owner of the *Bohemian* was not entitled to take advantage of the opportunity afforded by the ship being in dry dock, to make the improvement of putting on bilge keels. The best course, perhaps, will be to allow the matter to go back to the registrar, to make an alteration of the figures so far as it is necessary to alter them. The appeal must be allowed with costs.

Solicitors for the owners of the *Bohemian*, *Rowcliffes, Rawle*, and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the owners of the *Acanthus*, *Thomas Cooper* and *Co.*

Friday, Feb. 21, 1902.

(Before BARNES, J. and TRINITY MASTERS.)

THE RHEIN. (a)

Collision—Gravesend Reach, River Thames—Vessel at anchor in fairway—Bye-laws 8 *and* 38 *of Thames Bye-laws—Proper application of Bye-law* 38.

Semble, *that the obligation on steamers and sailing vessels under the* 38*th Thames Bye-law, when in the fairway and not under way, to ring a bell, does not apply in clear weather.*

THIS was a collision action brought by the owners of the steamship *Sitona* against the owners of the steamship *Rhein*.

The case is reported on the question of the proper application of bye-law 38 of the Thames Bye-laws, and the facts so far as material are as follows:—

The *Sitona* was a screw steamship of 1010 tons gross register, and was on a voyage from Skien, Norway, to Surrey Commercial Docks. The collision occurred about 8.30 p.m. on the 1st Jan. 1902, in Gravesend Reach, river Thames. The *Sitona* was at anchor at the time, in the anchorage-ground, it was alleged, heading up river, and exhibiting the regulation anchor lights.

The *Rhein* was a screw steamship of 1024 tons gross register, and was proceeding down the river on a voyage from London to the Tyne. The defendants' case was that her helm was ported for an upcoming steamer, and almost at the same time two white lights were seen nearly right ahead, which were taken to be the stern-lights of two vessels going down river. Owing to the strong wind blowing, she was slow in coming round, and, whilst still under a port helm, it was seen that the lights ahead were the lights of a vessel at anchor, and although every effort was made to avoid a collision, the *Rhein* collided with the *Sitona*.

The defendants charged the plaintiffs (*inter alia*) with improperly anchoring in the fairway and with neglecting to ring their bell. It was admitted by the plaintiffs that the bell of the *Sitona* was not being rung.

Bye-laws 8 and 38 of the Thames Bye-laws are as follows:

All vessels navigating Gravesend Reach are to keep to the northward of a line defined by a skeleton beacon erected upon the India Arms Wharf or with the high chimney at the Cement Works at Northfleet, and all vessels intending to anchor in the Reach are to bring up to the southward of that line.

Bye-law 38. All steam and sailing vessels, when in the fairway of the river and not under way, shall at intervals of about one minute ring the bell rapidly for about five seconds.

Aspinall, K.C., *Christopher Head*, and *Dunlop* for the plaintiffs.

Laing, K.C. and *Nelson* for the defendants.

In the course of the arguments the following cases were referred to

The Carlotta, 80 L. T. Rep. 664; 8 Asp. Mar. Law Cas 544; (1899) P. 223;
The Blue Bell, 72 L. T. Rep. 540; 7 Asp. Mar. Law Cas. 601; (1895) P. 242;
The Warwick, 63 L. T. Rep. 561; 6 Asp. Mar. Law Cas. 545; 15 P. Div. 189.

BARNES, J., after dealing with the facts and finding that the *Sitona* was anchored a little outside of the anchorage ground, proceeded as follows:—The defendants contended that their vessel cannot be held to blame because the persons navigating her would, having regard to the rule requiring vessels at anchor to keep in the anchorage ground, be entitled to assume that the lights they saw were not the lights of a ship at anchor, or, at all events, that they would not be negligent in not thinking them the lights of a ship at anchor,

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

and that they might be the lights of a vessel or vessels moving on the tide. That appears to me to be very much a matter for the opinion of the Elder Brethren. The question is, whether a competent person in charge of the downcoming steamer, when two anchor lights are properly exhibited and showing properly in weather in which they can be seen for an adequate and proper distance, is entitled to assume or is negligent in thinking that they are not the lights of a vessel at anchor, but the lights of something moving. The Elder Brethren are strongly of opinion that a person navigating with care and keeping a proper look-out ought, without any difficulty, to have been able to know that they were the lights of a vessel at anchor. It ought not to make any material difference that the person navigating has the rule about the anchorage ground in his mind, and would naturally suppose that vessels would be at anchor there and not in the fairway. The Elder Brethren say that for many reasons nobody navigating down Gravesend Reach can assume that no vessels will be at anchor in the fairway. They point out, for instance, that it may not always be possible to enter the anchorage ground owing to the crowd of vessels there already, and there are many other circumstances in which a vessel may be forced to bring up in the fairway. The view of the Elder Brethren is that it is improper to assume that because there are white lights ahead they are not the lights of a vessel at anchor because they happen to be in the fairway. That being so, and finding that the lights exhibited would adequately warn approaching vessels that they were the lights of a ship at anchor and therefore a ship to be avoided, then they ought to avoid it, and the mere fact that the vessel is at anchor in the fairway does not affect the question. This depends on the well-known principle that if there is an object which, even though it is not in a proper place, you can avoid by the exercise of reasonable care and skill, then you must avoid it. The conclusion of fact, therefore, to which I come is that the collision was really due to bad lookout on board the *Rhein*, and to not appreciating that the lights they saw were the lights of a vessel at anchor. With regard to the point raised that the *Sitona* was not ringing her bell, Mr. Laing referred to rule 38. I do not suppose that if she had been ringing her bell it would have made any differnce, but, as at present advised, I cannot hold that this rule applies except in special circumstances where there is proper necessity for the application of it. If I were to hold otherwise I should be holding that every ship at anchor in the Thames, because it is practically all fairway, would have to ring her bell on the finest summer day, and there would be the clang of bells all the way down the river. I should not hold that view until I were forced to do so. It seems to me unreasonable to so hold, especially when I find that rule 38 is in the class headed "fog and steam-whistle signals," which would go to show that rule 38 only applies in cases of fog, mist, falling snow, and the like. The conclusion I have come to is that the defendants must be held alone to blame for this collision.

Judgment for the plaintiffs.

Solicitors: for the plaintiffs, *T. Cooper* and *Co.*; for the defendants, *Rehders* and *Higgs*.

Friday, Feb. 28, 1902.

(Before BARNES, J.)

THE AUGUSTE LEGEMBRE. (*a*)

Salvage—Lifeboat services—Services rendered by tug against wish of master of salved vessel.

A steamship having fouled her propeller and become disabled was towed into port by the steam lifeboat H. P. *and two tugs, the* V. *and the* D.; *and the lifeboat* E. H., *which was required by the rules of the National Lifeboat Institution to accompany the* H. P., *remained fast astern of the steamship during the towage, but otherwise rendered no service. The* D. *assisted in the towage at the request of the master of the* V., *but against the wish of the master of the steamship. The employment of a third tug was, in the circumstances, reasonable and prudent, but turned out to be unnecessary.*

Held, that the lifeboatmen in the E. H. *and the tug* D. *were entitled to salvage remuneration.*

Where a salvor at the request of a co-salvor, but against the wish of the master of the salved vessel, renders salvage services in such circumstances that they ought to have been accepted, he is entitled to salvage remuneration.

THIS was an action to recover salvage remuneration for services rendered by the lifeboats *Helen Peele* and *Edmund Harvey*, and the steam-tugs *Victor* and *Dragon*, to the steamship *Auguste Legembre* in Dec. 1901.

The facts were as follows: On the 12th Dec. 1901 the *Auguste Legembre*, a French screw steamship of 2603 tons gross register, whilst bound from Barrow-in-Furness to Port Talbot in water ballast, got her propeller entangled in a manilla warp washed overboard in a gale of wind off Cardigan Bay, and could not work her engines. She then drifted before the gale, and touched on the Barrell's Rocks off the Pembroke coast, where she sustained some damage, so that No. 2 hold filled with water up to the level of the sea outside, and some water got into the engine-room; but, owing to the watertight doors being shut down and the bulkheads between No. 2 hold and the engine-room being watertight, the pumps were able to keep down the water in the engine-room. She then drifted across the mouth of the Bristol Channel, and eventually on the night of the 13th Dec. was brought up with both anchors in twenty-six fathoms of water about fifteen miles to the westward of Trevose Head. There she lay until the morning of the 15th Dec., and, though the wind throughout continued to blow a strong gale from the N.E. with a very heavy sea, she held safely to her anchors. Signals of distress were not exhibited, but she was seen from the shore to be in difficulties, and shortly before midnight on the 14th Dec. the *Helen Peele*, a twin-screw steam lifeboat belonging to the National Lifeboat Institution and stationed at Padstow, manned by a crew of eleven hands, and of the value of 10,500*l.*, came out to the steamer with the Padstow lifeboat in tow, which was manned by a crew of fifteen men. The master of the steamer told them he did not want assistance, but asked them to wait until the morning to see about taking her in tow.

On the morning of the 15th Dec., the weather having greatly moderated, the steamer got up her

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

anchors with the object of being taken in tow by the *Helen Peele*. The steam-tugs *Victor* and *Dragon*, which had heard of the steamer's position and come round from Falmouth in very bad weather, then came up and offered their assistance. The *Victor*, which was the leading tug, was at once asked to assist in the towage, and she accordingly made fast ahead and began towing alongside the *Helen Peele* towards Cardiff, and the lifeboat *Edmund Harvey* made fast astern of the steamer. The *Dragon* also offered her services, which the master of the steamer declined, as he considered he had enough assistance without her. The *Dragon*, however, kept alongside for about an hour, and from time to time offered her services, which were as often refused. The weather was moderate but threatening, and the sea, though high, was going down as the wind fell. The steamer was sheering and difficult to tow and was making some water, and, thinking it was important that she should be towed into a place of safety as quickly as possible, the master of the *Victor* shouted to the steamer through the megaphone that he would not continue to tow without a third tug, and, not getting any audible answer from the steamer, he asked the *Dragon* to make fast ahead of the *Victor*. The *Dragon* accordingly made fast against the wish of the master of the steamer, and assisted to tow her until midnight.

On the morning of the 16th Dec. the steamer was safely brought to anchor in Cardiff Roads, having been towed a distance of nearly one hundred miles.

The value of the *Auguste Legembre* was 11,400*l.*

It appeared that by the rules of the National Lifeboat Institution the crews of the *Helen Peele* and *Edmund Harvey* were liable to make good any damage done to the lifeboats while rendering salvage services, and to pay for all stores consumed while employed for salvage purposes, and that the expenses to which they were liable amounted to about 60*l.* It was also proved that the steam lifeboat was not allowed to go out unless accompanied by the lifeboat.

Aspinall, K.C. and *Stokes* for the plaintiffs.

Laing, K.C. and *Miller* for the defendants.

BARNES, J. (after stating the facts, proceeded): —The real contest in this case is as to the amounts that ought to be awarded to the *Victor* and to the *Helen Peele*, and as to whether anything ought to be awarded to the men in the lifeboat *Edmund Harvey* and to the *Dragon*. The French steamer was undoubtedly placed in safety by the efforts of the salvors, and, though she had ridden out the severe weather and had never moved from her anchors, she could not get away from the place where she was at anchor without assistance, and it was absolutely necessary that she should be towed by someone. The tugs did it satisfactorily, and a reasonable and proper award must be given for that service. I need say nothing about the *Victor*, except to state later on the amount which I think is the proper sum to award to her. With regard to the *Helen Peele*, I do not think the case can be treated exactly as if the eleven men in the *Helen Peele* owned her. We are told that these men are to be treated in the same way as an ordinary lifeboat service is treated —that is to say, they take the salvage, and run the risk of paying for any damage to the tug or the lifeboat. I can understand an ordinary lifeboat service being dealt with on that footing; but I confess that it seems to me hardly applicable to the case of a tug of this character, and that I must deal with this case on the footing of men who had rendered a service and were liable for any repairs that had to be done. In this case the liability was not very great, because, although they went out in very bad weather, the tug is built for the purpose, and after she got to the steamer there does not seem to have been any unusual risk in the towage, which did not commence until the weather had moderated. With regard to the lifeboat men, I think they are entitled to be considered in the salvage award because of the peculiar circumstances under which they had to render their services. We are told that the tug would not be allowed to go out without the lifeboat, as she is built expressly for that service, and the rule is that she has to tow out the lifeboat. Practically, therefore, the lifeboat men had to keep with her, and she had to keep with the lifeboat. It seems to me that this case ought to be treated as if the lifeboat men formed part of the crew of the tug, for, though not really part of the crew, their position is analogous to that. I cannot, therefore, come to the conclusion that they are not to be treated as in any sense instrumental in salving the property.

With regard to the *Dragon*, the question is one partly of law and partly of nautical skill. Although the tug's services were not directly accepted, but were in fact refused by the master of the steamer, the tug did at the request of the master of the *Victor* make fast ahead, not that it was in fact absolutely necessary at that time to have more than two tugs towing, but because he at least wished to have a third tug in case it was wanted afterwards, and the *Dragon* rendered a towage service of a valuable character. It is a legal question in this sense, that if those services were rendered in such circumstances that they ought to have been accepted, then, although the master of the steamship, according to his evidence, did not wish to have them, an award of some amount should, as a matter of law, be made. It is also a nautical question, therefore, whether, having regard to the circumstances of the case, and what kind of weather might be anticipated at that time of year and in that locality, it was reasonably prudent and necessary to have a third tug. The Elder Brethren think it was, because, although the weather had moderated, it was in the middle of December, when the wind seems to have been flying about from quarter to quarter, and no one could be certain as to what would take place before they got to Cardiff. That is the reason why the *Victor* took this third tug ahead, and, although I think in fact it did not turn out to be necessary, it was a reasonable thing to do. For these reasons the *Dragon* must not be excluded, although her award should be of a moderate character. The award which I make to the various salvors is the sum of 1000*l.*, which I propose to divide in this way: To the owners, master, and crew of the *Victor*, 500*l.*; to the crew of the *Helen Peele*, 325*l.*; to the owners, master, and crew of the *Dragon*, 100*l.*; and to the lifeboat men, 75*l.*

Judgment accordingly.

Solicitors: for the plaintiffs, *Thomas Cooper* and *Co.*, agents for *William Jenkins*; for the defendants, *Botterill* and *Roche*.

Tuesday, March 4, 1902.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE MYSTERY. (a)

Collision in dock—Dock company—Foreman's orders—Negligence—Costs.

The owners of a vessel are not liable for a collision solely due to the improper orders of a dock foreman which those in charge of her are bound by statute to obey and do properly obey.

The owners of a steamship damaged by collision with a barge instituted an action in the City of London Court against the owners of the barge, and afterwards joined as defendants the dock company to whose improper orders the owners of the barge alleged the collision was due. The dock company alleged the collision was due to the negligence of the barge. Judgment was given against both defendants, but, on appeal by both, the judgment against the owners of the barge was set aside. The court, following The River Lagan (58 *L. T. Rep.* 773; 6 Asp. Mar. Law Cas. 281), *ordered the dock company to pay the costs of the plaintiffs and of the successful defendants both in the court below and of the appeal.*

THIS was an appeal from the judge of the City of London Court in an action which arose out of a collision between the plaintiffs' steamship *William Adamson* and the defendants' sailing barge *Mystery* at the entrance of the Victoria Docks, London, about 2 p.m. on the 28th Oct. 1901.

The facts of the case were shortly as follows: The *Mystery*, which was bound into the Victoria Docks and was waiting for the dock gates to be opened, had made fast, by orders of a dock official, with a rope forward and aft to the outermost barge of four which were moored in tiers close to the dock wall. When the dock gates were opened the stern rope was, by orders of the lock foreman, taken to the pierhead, and the *Mystery's* head was allowed to swing round with the flood tide to get her into position to enter the dock. The barge to which the head rope was fast was also allowed to swing, with the result that the rope ceased to act as a check rope, and the *Mystery*, while swinging round, struck with her bowsprit the stern of the *William Adamson*, which was entering the dock. No charge of negligence was made against the *William Adamson*, but the case for the *Mystery* was that she was swinging as directed by the lock foreman, and that the stern rope was let go and the barges were allowed to swing by his orders, and that the collision was solely due to the carrying out of these orders. The London and India Docks Company were then added as defendants in the action, and they, both in their answers to interrogatories and at the trial, alleged that the collision was solely due to the negligence of those in charge of the *Mystery*. The learned judge found as a fact that the collision was due to the improper orders of the lock foreman, which the *Mystery* properly carried out, but held that although those in charge of the *Mystery* had not been guilty of negligence, her owners were not relieved from liability for the consequences of obedience to the orders of the lock foreman, and accordingly gave judgment against both defendants, with costs.

Both defendants appealed.

The following are extracts from the bye-laws of the dock company, made under the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.), the dock company's private Act:—

Bye-law 2:

The order in which vessels are to enter any dock is in the absolute discretion of the dockmaster, his assistants or deputies; and all persons in charge of vessels must cause their vessels to pass into the dock as directed by the dockmaster, his assistants or deputies.

Bye-law 10:

All vessels must be transported to and from the river or any part of the dock premises by the persons in charge and their crews under the direction of the dockmaster, his assistants or deputies.

Bye-law 17:

The dockmaster, his assistants or deputies, may at any time give in such manner as he or they may think fit to the master or other person in charge of any vessel any other directions.

Bye-law 2 of the bye-laws of 1893:

The expression "dockmaster" shall include his duly authorised deputies and assistants.

The following sections of the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), which is incorporated in the London and St. Katharine Docks Act, were referred to:

Sect. 51. The undertakers may appoint such harbour-masters as they think necessary (including in such expression dockmasters and piermasters), as hereinbefore defined.

Sect. 52. The harbour-master may give directions for (*inter alia*) regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier; and its position mooring or unmooring, placing and removing whilst therein.

Sect. 53. The master of every vessel within the harbour or dock or at or near the pier shall regulate such vessel according to the directions of the harbour-master, made in conformity with this and the special Act; and any master of a vessel, who after notice of any such direction by the harbour-master served upon him, shall not forthwith regulate such vessel according to such directions shall be liable to a penalty not exceeding twenty pounds.

Scrutton, K.C. (with him *Miller*) for the owners of the *Mystery*.—On the facts found by the learned judge, the *Mystery* was not guilty of any negligence, and the action against her ought to have been dismissed:

The Bilbao, Lush. 149.

Pickford, K.C. (with him *Bucknill*) for the dock company.—The order to pass the *Mystery's* stern rope ashore was in the circumstances a proper order. The alleged order to the barges to swing was not given by the lock foreman, but, even if it was given, the *Mystery* could have checked her swing and avoided the collision by dropping an anchor, and was negligent in not doing so. If the collision was due to the improper orders of the dock foreman, the dock company are not liable, as the lock foreman had no authority to give such orders. The dockmaster was the only person who had power to regulate how vessels should come into the dock, and he was present directing the movements of the *William Adamson*. The duty of the lock foreman was merely to assist vessels with their ropes, and he was not a person whose orders the *Mystery* was bound by law to obey.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Aspinall, K.C. and *Balloch* for the owners of the *William Adamson*.—The learned judge was right in finding that the orders were given by the lock foreman, and were in the circumstances improper; but the *Mystery* could have carried out his orders without accident if she had let go an anchor, as she ought to have done in the circumstances, on her own initiative.

Scrutton, K.C. in reply.—The lock foreman was an official of the dock company. He was acting as assistant of the dockmaster, and as such was a person who was authorised by the dock company's bye-laws to give orders, and whose orders the *Mystery* was bound by the Harbours, Docks, and Piers Clauses Act 1847 under a penalty to obey.

The PRESIDENT.—I think that the findings of the learned judge in the court below cover the whole ground in this case, with the exception possibly of one point. With these findings I am not disposed to differ, and, after having heard the observations made in argument on the judgment of the learned judge, it appears to me his findings of fact are correct. On these facts it is quite clear that the dock company alone are liable, because he has found that the orders given by the lock foreman were wrong and mistaken, and that in carrying them out the *Mystery* did nothing wrong. If the *Mystery* only acted in obedience to the orders of the dockmaster or his assistant and obeyed them properly, then, assuming these orders were lawful, I am quite at a loss to see on what grounds the *Mystery* could be held to blame. The only point which has been raised and is not covered in terms by the judgment of the learned judge is the question of the authority of the lock foreman who actually gave the orders in question. On the evidence it appears to me that the learned judge must have held, and I think rightly, that the lock foreman was a person whose orders could bind the dock company. It is clear he was an official of the dock company and was there for the purpose of looking after the barges, and it appears to me to be quite clear that in the circumstances he was a person authorised to give the necessary orders to the barges going into the docks. By some mistake he gave a wrong order. It is impossible to say he was acting in these circumstances outside the scope of his authority. It is expressly provided by the dock company's bye-laws that not only are the regulations with regard to going into dock to be obeyed, but also any other order which is thought fit to be given by the dockmaster, or his assistants or deputies. In this case a deputy or assistant of the dockmaster gave such orders, and, that being so, it appears to me they were orders given by a person who was the assistant of the dockmaster within the meaning of the Harbours, Docks, and Piers Clauses Act 1847. For these reasons the judgment of the court below should stand as against the dock company, but ought to be reversed as regards the *Mystery*.

BARNES, J.—I have nothing to add so far as the judgment of the learned judge against the dock company is concerned. But with regard to the judgment which he has given against the *Mystery*, it seems to be founded on a misapprehension that her owners were responsible because there was no statutory enactment relieving them from liability, as there is in the case of the compulsory employment of pilots. The decision of Dr. Lushington in *The Bilbao* (Lush. 149) deals with this point, and lays down the principle that the shipowner is not to be held responsible for obeying under compulsion of a statute any order of a harbour-master who is a stranger to him. The statute in this case is the Harbours, Docks, and Piers Clauses Act 1847, incorporated in the defendant company's Act, which imposes the obligation of obeying the orders of the dockmaster or his assistant. The learned President has dealt with the question of the lock foreman's authority to give the orders he did. The dock officials were not in any sense the servants of the owners of the *Mystery*, and the owners cannot, according to the well-established principles of the common law, be held responsible for the acts of such persons. I think the principles upon which *The Halley* (18 T. L. Rep. 879; L. Rep. 2 P. C. 193; 3 Mar. Law Cas. O. S. 131) was decided are exactly analogous and applicable to the present case, and, according to those principles, the owners of the *Mystery* are not liable for the collision.

Aspinall, K.C., for the plaintiffs (respondents), asked on the authority of *The River Lagan* (58 L. T. Rep. 773; 6 Asp. Mar. Law Cas. 281) that the dock company should be ordered to pay the whole of the costs both of the plaintiffs and of the owners of the *Mystery* in the court below and of the appeal.

Pickford, K.C. (*contrà*).—There is no hard-and-fast rule regarding costs in cases of this kind, and the question is always one for the discretion of the court in each case. The facts in *The River Lagan* are different from those in this case, as the plaintiffs in this case commenced their action against the successful defendants, got judgment against them in the court below, and sought to uphold that judgment here. In any case the dock company ought not to be made to bear the plaintiffs' costs of the appeal.

The PRESIDENT.—I think the plaintiffs acted reasonably in joining both parties as defendants, and, following the decision of Sir James Hannen in *The River Lagan*, the whole burden of costs should fall on the unsuccessful defendant. I do not see any reason for dividing the costs in the court below and the costs here, and I shall therefore order the dock company to pay both sets of costs, here and in the court below.

Judgment accordingly.

Solicitors: for the owners of the *Mystery* (appellants), *Clarkson, Greenwell*, and *Co.*; for the London and India Docks Company (appellants), *Turner, Son*, and *Foley*; for the owners of the *William Adamson* (respondents), *C. E. Harvey*.

Wednesday, March 5, 1902.

(Before Sir F. JEUNE, President, and BARNES, J.)

WASTWATER STEAMSHIP COMPANY LIMITED v. T. B. NEALE AND CO. (a)

Charter-party—Sub-charter-party—Right of shipowner to sue indorsee of bill of lading for freight on cargo shipped under sub-charter-party.

The owners of the W. *chartered her to G. under a charter-party, which provided that the master*

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

should sign bills of lading as presented, and that the charterers' liability should cease on shipment of the cargo, and gave the shipowners a lien for freight, dead freight, and demurrage.

G. rechartered the vessel to M. L. under a charter-party which contained provisions similar to the original charter-party.

M. L., who had no notice of the original charter-party, shipped a cargo in pursuance of the second charter-party, and bills of lading were signed by the master as presented by which the cargo was to be delivered to the order or assigns of the shippers on payment of freight without recourse to shippers as per the second charter-party.

Held, that the bills of lading were signed by the master as agent of the shipowners, and that in the circumstances the shipowners were entitled to sue the indorsees of the bills of lading for the freight due thereon and demurrage.

APPEAL of the plaintiffs from a decision of the judge of the County Court of Lancashire.

Action to recover a sum of 86*l.* 11*s.* 6*d.*, being a balance of freight, and 61*l.* 8*s.* 9*d.*, being a balance of demurrage alleged to be due from the defendants under the following circumstances:—

By a charter-party dated the 13th July 1899 the plaintiffs as owners chartered their steamship *Wastwater* to Goddard and Gilliland, of Sabine Pass, for three consecutive voyages from Sabine Pass, Galveston, or New Orleans to certain named ports in the United Kingdom and Continent at a freight of 16*s.* per ton on her dead-weight cargo capacity.

The charter-party contained the following amongst other clauses:

The freight to be paid in cash on unloading and right delivery of the cargo.

Owners shall pay at port of loading 2½ per cent. commission and also cost of insurance on the amount to be advanced by charterers or their agents for disbursements and charges at port of loading, and master shall give his draft on owners or consignees as required to cover said advances (which, together with drafts for difference of freight, shall be payable within three days after arrival or out of the first freight collected), or, if required, a bank credit to be furnished by the owners for amount of said disbursements.

Charterers have the option of loading lawful merchandise, paying freight on steamers d.w. capacity as above. All spaces to be placed at charterers' disposal which would be used for cargo if loading for owners' account.

The captain shall sign bill of lading as presented without prejudice to this charter-party, any difference between the amount of freight by the bills of lading and this charter-party to be settled at port of loading before sailing.

Eighteen running days (Sundays and holidays excepted) shall be allowed charterers for loading and discharging, and her days on demurrage over and above the said lay-days at the rate of 4*d.* per net register ton per day.

Charterers' liability to cease when the cargo is shipped, the owner or master having an absolute lien upon cargo for the recovery and payment of all freight, dead freight, and demurrage.

Subsequently Mr. Gilliland, of the firm of Goddard and Gilliland, by a charter-party dated the 18th Jan. 1900, purporting to act as agent of the steamer but without informing the plaintiffs, chartered her to the Morgan Lumber Company, who were ignorant of the original charter-party, for the carriage of a cargo of timber from Sabine Pass to Liverpool at a freight of 10·75 dollars per 1000 feet, payable on delivery of the cargo. This charter-party contained clauses similar to those set out above, except that it provided for a higher rate of demurrage than the charter-party of the 13th July, and it was doubtful whether it gave a lien for damages for detention at the port of loading.

A cargo of timber was shipped in April on board the *Wastwater* at Sabine Pass by the Morgan Lumber Company for which bills of lading were signed by the master as presented, by the terms of which the cargo was to be delivered at Liverpool to their order or assigns on payment of freight, without recourse to shippers, at the rate of 10·75 dollars per 1000 feet as per charter-party dated the 18th Jan. 1900.

Gilliland appointed Thin, a shipbroker, to act for the steamer in Liverpool as his agent, and Thin was also appointed by the plaintiffs to act as their agent.

The defendants were the indorsees of the bills of lading.

The whole of the time allowed for loading and discharging was used at the port of loading, and the vessel came on demurrage on her arrival at Liverpool.

The defendants took delivery of the cargo and paid part of the freight, withholding payment of part of the freight against a claim for short delivery.

They disputed the claim for demurrage altogether.

The master threatened to exercise a lien on the cargo for freight and the demurrage at the higher rate under the second charter-party, and after some negotiations the defendants agreed to pay Thin whatever freight was due under the bills of lading, and by a letter dated the 22nd May and addressed to Thin, agreed to pay "whatever demurrage may be due this steamer on final discharge under our charter-party."

The plaintiffs claimed the balance of freight under the bills of lading and the demurrage under the letter of the 22nd May and the charter-party of the 18th Jan. therein referred to.

The defendants resisted the claim on the grounds that they were only liable to Gilliland under the charter-party of the 18th Jan.; that the bills of lading were signed by the master as agent of Gilliland, and not of the plaintiffs; that the agreement in the letter of the 22nd May was made with Thin as agent of Gilliland, and that, therefore, the plaintiffs had no title to sue on the bills of lading or on the agreement with Thin for the freight or demurrage.

The County Court judge held that Thin could not equitably act as the agent of both the plaintiffs and Gilliland at the same time, and on the grounds relied on by the defendants nonsuited the plaintiffs.

The plaintiffs appealed.

Horridge, K.C. and *Leslie Scott* for the appellants (plaintiffs).—The plaintiffs were entitled to sue the defendants for the freight as indorsees of the bills of lading. The July charter-party did not operate as a demise of the ship to Goddard and Gilliland. The ship remained in the possession of the owners, and the master signed the bills of lading as their agent, and not as the agent of Gilliland. Owing to the operation of the cesser clause in the July charter-party the

consignees were the only persons to whom the owners could look for payment of the freight. The charter-party gave an absolute lien for freight and demurrage. Even if the January charter-party gave no lien for damages for detention at the port of loading it was contemplated by all the parties that the master would exercise a lien if the claims were not settled. The defendants agreed with Thin to pay the demurrage to prevent delay in getting delivery. The master was acting as the owners' agent throughout. Thin was authorised by the owners and by the master to collect the freight and demurrage for them, and the fact that he was also Gilliland's agent did not prevent his acting as the owners' agent at the same time. The interests of both principals were identical, as both wanted to get the freight and demurrage paid by the consignees. The defendants knew that Thin was the owners' agent when they wrote the letter of the 22nd May.

Hamilton, K.C. and *Keogh* for the respondents (defendants).—The January charter-party was entered into by Gilliland without the owners' authority. The freight due under that charter was due to Gilliland and not to the plaintiffs. It was under this charter that the cargo was shipped and the bills of lading were signed by the master as agent of Gilliland. The Morgan Lumber Company had no notice of the July charter-party, and were not bound by its terms. The bills of lading in the hands of the Morgan Lumber Company and of the defendants, who were their agents to receive the cargo at Liverpool, were merely receipts for the goods, and the only contract to which the Morgan Lumber Company and the defendants were parties was the charter-party of January to which the plaintiffs were no parties. There was no privity of contract between the plaintiffs and the defendants. [BARNES, J.—If the Morgan Lumber Company's goods were on board the ship without the plaintiffs knowing anything of the second charter-party they were taken on board by the plaintiffs on the terms of the first charter-party.] Neither the Morgan Lumber Company nor the defendants were bound by the terms of the July charter of which they had no notice:

Marquand v. *Banner*, 25 L. J. 313, Q. B.

This decision was approved by Lord Campbell in *Schuster* v. *McKeller* (26 L. J. 281, Q. B. at p. 288), and, though doubted in *Gilkison* v. *Middleton* (26 L. J. 209, C. P.), that case is not the present case:

Carver's Carriage by Sea, 3rd edit., s. 155.

The owners in the peculiar circumstances of this case, could only look for the freight and demurrage to Goddard and Gilliland, who are only relieved by the cesser clause to the extent to which it gives an effective lien. The owners could not exercise their lien, as it was not preserved by the second charter-party. A lien for freight can only be exercised in favour of the person to whom the freight is due, and here the freight claimed was due to Gilliland. As regards the arrangement made by the defendants with Thin, that was merely an undertaking by the defendants, as representing the Morgan Lumber Company, to pay to Goddard and Co. whatever freight and demurrage was due to them under the bills of lading, and the January charter-party. The only lien the master could exercise was the lien under the January charter-party as agent of Gilliland and not of the owners. [BARNES, J.—The owners had a lien under the first charter-party against Gilliland; Gilliland had a lien under the second charter against the Morgan Lumber Company. The master had a right against Gilliland which he could exercise against the Morgan Lumber Company, and the consignees as representing them.] The plaintiffs' claim for demurrage is based as to time on the first charter, and as to rate on the second. It was for the plaintiffs to show that there was an agreement by the defendants to pay the freight and demurrage to Thin as agent of the plaintiffs, and the learned judge in the court below came to a conclusion of fact which was warranted by the evidence, and his judgment ought not to be disturbed.

Horridge, K.C., in reply, referred to

Baumwoll v. *Furness*, 68 L. T. Rep. 1; 7 Asp. Mar. Law Cas. 262; (1893) A. C. 8.

The PRESIDENT.—In this case the learned judge of the court below nonsuited the plaintiffs, but I think this nonsuit must be set aside both with regard to the claim for freight and with regard to the claim for demurrage. Those claims stand on rather different grounds. The learned judge appears to me to have decided the whole of the matter upon the ground that Thin was the agent only for Gilliland, and was not, and could not be, the agent for the plaintiffs as well. His view appears to have been that there was a conflict between the interests of the plaintiffs and those of Gilliland, and under these circumstances he could not act as agent for both without the consent of both. I am clearly of opinion that on the evidence Thin was appointed to act and did act as agent for the plaintiffs as well as agent for Gilliland. That point is not of first importance, because the plaintiffs' claim to freight rests on the broad ground of the defendants' liability under the bills of lading. No doubt there are cases where the master ceases to be agent for the shipowner and becomes the agent of the charterer, but I see no reason for saying that that was so in the present case. The master all through appears to have acted in the ordinary way as agent for the shipowners, and there is no reason why the shippers should not be liable to pay the freight to the shipowners under and according to the bills of lading, and apart from that the defendants are liable for freight, upon the ordinary law, on the bills of lading, the master having a lien which he was entitled to enforce.

With regard to the demurrage, the matter stands upon different grounds. The liability rests upon the agreement expressed in the letter of the 22nd May, and that agreement is quite clear in its terms. That agreement shows that Thin was then acting as the agent for the plaintiffs, and it shows that he was agent for the ship. It may be said with a good deal of force that Thin may have been agent for both the plaintiffs and Gilliland, and that the arrangement made by the defendants in their letter was that the demurrage should be paid to him as agent of Gilliland, and not as agent for the plaintiffs. But that does not appear to be the reasonable or businesslike way of looking at it. The result of the arrange-

ment expressed in that letter appears to be that Thin was represented as the plaintiffs' agent to collect the whole of the demurrage, leaving him to arrange, as between Gilliland and the plaintiffs, how the demurrage was to be divided, and the fact that the master was pressing for the demurrage at that time, and considered himself entitled to enforce his claim for it, is sufficient explanation of such arrangement having been made. Under those circumstances I think the nonsuit of the learned judge of the court below cannot be maintained, and the case must go back to him in order that, if so advised, the plaintiffs may have an opportunity of calling any evidence they may desire.

BARNES, J.—There are two claims in this case, one being for freight and the other for demurrage. As to both these claims the defendants say that the plaintiffs have no right of action against them, because there was no obligation on their part to pay either freight or demurrage to the plaintiffs. Dealing with the question of freight first, it appears to me that the position taken up by the defendants is erroneous, both in law and in fact. First of all because, having regard to the form of the charter-parties, and the course of business which it is necessary to follow in order to put those charter-parties into proper operation, I feel no doubt that the bills of lading were signed by the master as agent for the shipowners, and that they gave the shipowners a right to sue those who are responsible on the bills of lading. If the defendants are liable as holders of the bills of lading at all, they are liable to the plaintiffs in accordance with the view which I think is correctly stated in Carver on Carriage by Sea, 3rd edit., at s. 157, where it says that, when the bill of lading is in the hands of a shipper or indorsee, who is a stranger to the charter-party, the contract shown by it is one between him and the shipowner, and may be enforced by and against the shipowner accordingly, whether the shipper or indorsee had notice of the charter-party or not. But the case as regards the freight does not rest there, because there was, according to the evidence, an express contract, which was made afterwards, with the defendants, to pay the freight to Thin according to the bills of lading. The only question on that is whether Thin was acting as agent for the plaintiffs. There is not the slightest doubt that that was so, because Gilliland was no longer interested in the case at all. By the way in which this class of business works out, Gilliland having to pay so much freight to the shipowners, and having to get part of it out of his recharter, a draft is given at the port of loading for the difference of freight, and the shipowner remains the only person practically concerned in enforcing the claim for freight against the consignees. That being so, I have no doubt whatever that the contract, so far as it went, was made with Thin as an agent for the shipowner.

With regard to the demurrage, it seems to me that the only point that can be taken in favour of the defendants is that the contract contained in the letter of the 22nd May was in fact made with Thin as the agent for Gilliland only, or as joint agent for Gilliland and the plaintiffs. From the negotiations that took place beforehand, in which the position of the plaintiffs, who were interested in the demurrage, whatever rate or amount was to be paid, was known to the defendants, it is quite obvious that the contract with Thin was not made in the interest of Gilliland alone. [The learned judge referred to the evidence, and continued:] I do not think there is the least doubt on the evidence that the contract was in fact made by the defendants with Thin on behalf of the shipowners, and that they are entitled to the benefit of any contracts made by Thin on their behalf. The result is that, in my opinion, the judgment in the court below was wrong, and the nonsuit must be set aside, and the case go back to the learned judge.

Judgment accordingly.

Solicitors for the appellants, *Rowcliffe* and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the respondents, *Trinder, Capron*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 12 *and* 13, 1902.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

HULTHEN *v.* STEWART AND CO. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Discharge of cargo—Demurrage—"Customary steamship dispatch"—"As fast as steamer can deliver"—"According to custom of port"—Delay through unavoidable causes—Obligation of receiver of cargo.

By a charter-party it was provided that a steamer should proceed to London and there deliver a cargo of timber, the cargo to be discharged with customary steamship dispatch, "as fast as the steamer can deliver . . . according to the custom of the port"; and there was an express exception in respect of delay in discharging the cargo caused by a strike or lock-out.

The vessel arrived at London and was ready to deliver the cargo, but the dock to which the defendants, the receivers of the cargo, directed her to proceed was so crowded that she could not enter the dock for some days, and further delay arose in obtaining a berth for discharging. The vessel could not have been more quickly discharged elsewhere in the port, and the defendants used all reasonable means to procure the discharge of the cargo, which could not in the circumstances have been discharged more quickly.

Held (affirming the judgment of Phillimore, J.), that the obligation of the defendants was only to use all reasonable means to procure the discharge of the cargo as quickly as was possible in the circumstances, and that, as they had performed that obligation, they were not liable for demurrage.

THIS was an appeal by the plaintiff from the judgment of Phillimore, J. at the trial of the action as a commercial cause, without a jury.

The plaintiff in this action claimed demurrage

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

in respect of his steamer *Anton*, and the defendants were sued as indorsees of bills of lading which incorporated the provisions of a charter-party, and as receivers of the cargo under those bills of lading.

The charter-party was made on the 22nd Aug. 1900 and provided that the *Anton* should proceed to Heret, in the White Sea, and there load from the agents of the charterers a full and complete cargo of battens, and therewith proceed to London and deliver the same always afloat, on being paid freight as provided.

The charter-party provided, in clause 3, as follows:

The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging, excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 30*l.* per day, and *pro ratâ* for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary.

And clause 5 was as follows:

If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge by reason of epidemics (a strike or lock-out of the shippers' or receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter if by the use of reasonable diligence they could have obtained other suitable labour), and in case of any delay by reason of the before-mentioned causes, no claim for damages shall be made by the shippers, the receivers of the cargo, the owners of the ship, or by any other party under this charter.

A cargo was duly loaded under the charter-party, and the *Anton* arrived at Gravesend on the 12th Oct. On that day the captain received a notice from the defendants directing him to discharge the cargo in the Surrey Commercial Dock.

Owing to the crowded state of the dock at that time it was impossible to get the vessel into the dock immediately, and she therefore remained at Gravesend.

On the 18th Oct. the vessel was able to get into the dock, and did enter the dock on that day; but, the dock being still crowded, she was unable to obtain a berth for discharging alongside the quay until the 20th Oct., which was a Saturday.

The discharge of the cargo commenced on the 22nd Oct., and, some further delay being caused by the crowded state of the dock, the discharge was completed on the 29th Oct.

The plaintiff alleged that the vessel arrived and was ready to discharge on the 12th Oct., and that the discharge of the cargo according to the terms of the charter-party ought to have been completed on the 18th Oct.

At the trial evidence was given on behalf of the plaintiff that, if it was impossible to commence the discharge of the cargo in the Surrey Commercial Dock on the 12th Oct., the vessel might have been discharged at that date either in the Milwall Dock, or at a tier in the river. Evidence was, however, adduced on behalf of the defendants that the Millwall Dock was at that time as much crowded as the Surrey Commercial Dock; that the vessel could have entered the West India Dock, but that it was impossible to discharge in that dock at that time owing to a strike of lightermen; and that it was impossible for a vessel of the size of the *Anton* to discharge at a tier in the river.

The action was tried before Phillimore, J. without a jury as a commercial cause The learned judge found as a fact that the defendants had used all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could; that they were not liable for the short delay which took place after the vessel was alongside the quay; and that, with the appliances which were available at the time, the vessel could not have been discharged more quickly than she was in fact discharged; and judgment was given in favour of the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C. and *D. C. Leek* for the appellant.—The judgment of the learned judge was wrong, and ought to be reversed. Upon the true construction of clause 3 of the charter-party the time allowed for the discharge of the cargo ought to be calculated from the time when the vessel arrived and was ready to discharge, that is, from the 12th Oct. The construction of this charter-party is not governed by the series of cases which decide that the obligation of the receiver of the cargo is to discharge as quickly as he can with the appliances which are available, and to use all means to procure for the vessel an opportunity to discharge as quickly as can be done:

Postlethwaite v. *Freeland*, 42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599;
Lyle Shipping Company v. *Cardiff Corporation*, 83 L. T. Rep. 329; 9 Asp. Mar. Law Cas. 128; (1900) 2 Q. B. 638;
Good v. *Isaacs*, 67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555;
Pyman v. *Dreyfus*, 61 L. T. Rep. 724; 6 Asp. Mar. Law Cas. 444; 24 Q. B. Div. 152;
Tharsis Sulphur and Copper Company v. *Morel*, 65 L. T. Rep. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647;
Hick v. *Raymond*, 68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22.

In those cases the charter-party was either entirely silent as to the time for discharge, or the obligation was to discharge as fast as possible under the circumstances with the special appliances available at the port. In the present case the obligation is to discharge as fast as the vessel is able to discharge without any reference to her ability to find a discharging berth, or to procure the use of special appliances:

Maclay and others v. *Spillers and Baker Limited*, 6 Com. Cas. 217.

This vessel was an arrived ship as soon as she got to Gravesend and was ready to go into dock:

Pyman v. *Dreyfus*, 61 L. T. Rep. 724; 6 Asp. Mar. Law Cas. 444; 24 Q. B. Div. 152.

She was then ready to go to a discharging berth, and the obligation of the receivers of the cargo was to find then a clear quay berth for her to discharge at, and their inability to do so does not absolve them from that obligation and from liability for the delay. Upon the proper construction of clause 3 of the charter-party the time for discharge is to be measured solely by the

ship's capacity to deliver the cargo, independently of the state of the docks or quays. This is not in any sense a case in which the discharge is to be effected by special port appliances of limited quantity. In this charter-party there is, in clause 5, an express exception of liability for delay caused by strikes or lock-outs, and that shows that there are not any other exceptions in respect of other matters which may prevent the receiver of cargo from taking the cargo as fast as the vessel is able to deliver. The receiver of cargo takes the risk of every matter, except that expressly specified, which may prevent him taking delivery of the cargo as fast as the vessel can deliver.

Robson, K.C. and *Loehnis*, for the respondents. —The judgment of Phillimore, J., was right and in accordance with all the authorities. The contention of the appellant is that the respondents by this contract undertook the obligation to procure the discharge of the cargo as fast as the ship could deliver, whatever obstacles there might be to prevent that being done, strikes and lock-outs only excepted. That is not the proper business view of this contract. This particular charter-party has already been construed in several cases, besides the present case, by Barnes, J., Mathew, J., Bigham, J., and Kennedy, J.

The Jaederen, 68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351;
Rodenacker v. *May and Hassell*, 6 Com. Cas. 37;
Wallenberg v. *Payne*, unreported;
Reid v. *Lee*, 17 Times L. Rep. 771.

And in all those cases the learned judges have construed this charter-party in the same way as Phillimore, J. has construed it in the present case. Ever since the case of *Postlethwaite* v. *Freeland* (*ubi sup.*) was decided in 1888 the construction of the clause in a charter-party that the cargo shall be discharged "as fast as steamer can deliver" has alway been that, looking at the circumstances of the port at the time, the discharge must be made as fast as it can reasonably be made. The appellant, however, is now contending that this provision means that the cargo must be discharged as fast as the steamer can deliver under the most favourable ordinary conditions of the port. It is now too late to contend for that construction, for the proper construction of this clause is now settled by a series of authorities and a continuous practice. The express exception in this charter-party in respect of strikes cannot alter the well settled construction of the previous clause; it was merely introduced *ex majore cautelâ*, and was not really necessary. This vessel had not performed the obligation to carry the cargo to the port of London until she had reached a place where, in the ordinary course and with the ordinary appliances which were available, she was ready to discharge, and could discharge, the cargo:

Nielsen v. *Wait, James, and Co.*, 54 L. T. Rep. 344; 5 Asp. Mar. Law Cas. 553; 16 Q. B. Div. 67.

The learned judge has properly construed the charter-party, and has come to a right conclusion upon the facts.

Leck in reply.

COLLINS, M.R.—This is an appeal from the judgment of Phillimore, J. at the trial of the action upon a claim by a shipowner for demurrage. The question in this case really turns upon the construction of the charter-party, the material clause of which (clause 3) is in these terms: "The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general, or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 30*l.* per day, and *pro ratâ* for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." It was also provided, in clause 5 of the charter-party, as follows: "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge of the cargo, or by reason of epidemics (a strike or lock-out of the shippers' or receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter, if by the use of reasonable diligence they could have obtained other suitable labour), and in case of any delay by reason of the beforementioned causes, no claim for damages shall be made by the shippers, the receivers of the cargo, the owners of the ship, or by any other party under this charter." The vessel arrived at the port of London and came, in effect, to the gates of the dock indicated by the defendants as the place of discharge. The state of that dock was such that it was impossible for the vessel to get into the dock for some time. Eventually the vessel did get into the dock, but there was then a further delay in getting a berth for discharging the cargo, owing to the crowded state of the dock. The same difficulty existed in the case of the other dock at which the vessel might have been unloaded, the West India Dock, because it was impossible to get lighters in that dock. The learned judge has found as a fact that when the vessel arrived at Gravesend there was no place to which she could have been ordered so as to be discharged without any delay; that Millwall Dock was full; that there was no tier at which this vessel could have safely discharged; and that the discharge could not have been carried out any more quickly at the West India Dock. He has also found that the defendants used all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could; and that, with the appliances available at the time, the ship could not have discharged her cargo more quickly than she in fact did. Upon those findings the charterers did all they could reasonably be expected to do in order to get the cargo discharged as quickly as possible.

Then the question arises whether the defendants are liable for demurrage under the terms of the charter-party, although they have done all that it was reasonably possible for them to do. The only point made by the appellants is that, on the terms of clause 3, inasmuch as the cargo is to be discharged "as fast as the steamer can deliver," the proper time for the discharge of cargo can be ascertained in all ordinary cases, and that the proper time in this case would be six days. If the appellants can fix the time in that way, then there was an absolute burden upon the charterers

to discharge within that time, and to pay demurrage if they did not unload within that time. Therefore the question is whether that clause in the charter-party is equivalent to a clause which expressly fixes the time for discharging the cargo. It is clear that it is not, and there is a clear line of authorities which show that it is not. It does not impose the same absolute unconditional obligation on the charterers as is imposed where a fixed number of days is allowed for discharging the cargo. There is, as I have said, a long line of authorities to that effect. The first is the case in the House of Lords, *Hick* v. *Raymond* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22), in which it was decided that, where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo, his obligation is to discharge within a reasonable time; and that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him. That case really only followed the decision in *Postlethwaite* v. *Freeland* (42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599), in which the words of the charter-party were, "the cargo is to be discharged with all dispatch according to the custom of the port," and those words were held not to be equivalent to a provision for discharge within a fixed number of days, and evidence of the circumstances of the case was admitted in order to show what was a reasonable time. It appears to me that the special difficulties which existed in those cases are not really material to the question. It seems to me that there was not anything particular about the actual difficulties in discharging the cargo in those cases. When once it appears that the receiver of the cargo is outside of the absolute obligation to discharge within a fixed number of days, the question then is whether he did all that he reasonably could do to procure the discharge of the cargo. The particular facts of the case are not really material With respect to the words which were used in the different cases, the words in *Postlethwaite* v. *Freeland* (*ubi sup*) were "with all dispatch," and stronger words than those could not be used. In the case of *Lyle Shipping Company* v. *Cardiff Corporation* (83 L. T. Rep. 329; 9 Asp. Mar. Law Cas. 128; (1900) 2 Q. B. 638), the words were, "the ship to be discharged with all dispatch as customary"; in the Scotch case of *Wyllie* v. *Harrison* (13 Court Sess. Cas. 4th series, 92) the words were, "as fast as the steamer can deliver after having been berthed, as customary"; and in *Good* v. *Isaacs* (67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555) the words were, "to be discharged at usual fruit berth as fast as the steamer can deliver, as customary, and where ordered by the charterers." The only way in which the appellant in the present case tried to distinguish this case from those cases was by showing that the particular conditions existing in those cases were not the same as those in the present case. But in the present case the learned judge has found that the defendants exercised all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could, and the evidence clearly justifies that finding. There is, therefore, authority that this evidence can be admitted in cases where it is stipulated that the cargo is to be discharged "as fast as the steamer can deliver." That concludes the whole case. This vessel got to the dock gates and, if the cargo had to be discharged within a fixed number of days, she was then an arrived ship, and the lay days would have begun from that time. But as the number of days was not fixed, assuming that she was an arrived ship, the question has to be considered whether she was detained beyond a reasonable time. Upon the finding of the learned judge she was not so detained, because it was impossible for the consignees to discharge the cargo more quickly than they did. It remains to observe that a charter-party in this form has come under the consideration of Barnes, J. in *The Jaederen* (68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351), of Mathew, J. in *Rodenacker* v. *May and Hassell* (6 Com. Cas. 37), of Bigham, J. in *Wallenberg* v. *Payne* (unreported), and of Kennedy, J. in *Reid* v. *Lee* (17 Times L. Rep. 771), and that all of those learned judges have taken the same view of the question.

I think that I ought to refer to the argument of the appellant based upon the existence of the strike clause in this charter-party, for I think that it does found some argument for the appellant. According to the argument of the respondents that clause was really unnecessary. In some of the cases to which I have referred there was a strike clause, but the existence of that clause did not alter the construction of the clause as to the discharge of the cargo. The words of this clause as to the discharge of cargo are clear of themselves, and it would not be fair to use the fact that the common strike clause has been inserted so as to alter the meaning of the clear words as to the discharge of cargo and prevent the application of the series of authorities as to its meaning. I think, therefore, that the judgment of the learned judge was right, and that this appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. Upon the question of the construction of clause 3 of the charter-party, in my opinion it cannot be distinguished from the clause in the charter-party in the case of *Lyle Shipping Company* v. *Cardiff Corporation* (*ubi sup.*). In that case all the authorities were considered, and they have all been referred to again to-day, and I adhere to what I said in that case as to the settled result of the authorities. This case, therefore, is really governed by the decision in *Lyle Shipping Company* v. *Cardiff Corporation* (*ubi sup.*), except only as to the argument founded upon the strike clause. No doubt that clause was unnecessary, considering the construction which has been placed upon the other clause as to discharge of cargo. It would, in my opinion, be wrong to say that the strike clause was a necessary clause so as to give a different effect to the well settled construction of the earlier clause which has been established by the authorities. Such a construction ought to be avoided in the case of charter-parties; additions to and alterations in a charter party are made from time to time without duly considering what effect they may have upon other clauses in the charter-party, and it would be rash to say, in the case of a charter-party, that every clause must be taken to be necessary and upon

that hypothesis to hold that they affect other clauses which have a well-settled construction and meaning. The construction of this clause is well settled. and therefore this appeal must fail because it is impossible to differ from the judgment of Phillimore, J., who came to the conclusion that the discharge of the cargo had been taken with with all reasonable dispatch. I agree, therefore, that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. I should have thought that by this time the meaning of this common clause in charter-party was well known and settled. We have, however, been once more brought to the consideration of this clause and of all the authorities. The clause in this char er-party is as follows: "The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the customs of the respective ports. . . . The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary." It is contended that "customary steamship dispatch" in this case means five days because the cargo could be discharged from this steamer within five days. I cannot so construe this clause. The vessel had arrived at the dock gates. What then is the meaning of "the cargo to be discharged with customary steamship dispatch as fast as the steamer can deliver?" In *Postlethwaite* v. *Freeland* (*ubi sup.*) light was thrown upon the meaning of this provision, and in the numerous cases which followed—*Good* v. *Isaacs* (*ubi sup.*), *Lyle Shipping Company* v. *Cardiff Corporation* (*ubi sup.*), *The Jaederen* (*ubi sup.*), *Wallenberg* v. *Payne* (*ubi sup.*), and *Reid* v. *Lee* (*ubi sup.*)—the same principle was adopted, and it was held that the shortest time within which the cargo could be discharged applied in ordinary circumstances but not in extraordinary circumstances. In my opinion we must put the same construction upon this clause as was put upon similar clauses in the numerous decided cases. So much for the construction of the clause. A further argument was urged that, because of the existence of the strike clause, the charterers were made liable for anything else which might prevent the discharge of the cargo. That would, I think, be an utterly unreasonable construction. This strike clause was not intended to deprive the charterer of the protection to which he is entitled upon the ordinary meaning of the well-known clause as to discharge of cargo. I agree that this appeal fails, and must be dismissed. *Appeal dismissed.*

Solicitors for the appellant, *Stokes* and *Stokes*.

Solicitors for the respondents, *Trinder, Capron*, and *Co.*

March 13, 14, *and* 25, 1902.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

MONTGOMERY AND CO. v. INDEMNITY MUTUAL MARINE ASSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — General average — Assured owner of both ship and cargo—Insurance on cargo—Sacrifice of mast—Right of assured to recover under policy—Liability of underwriter on cargo.

The fact that the assured under a policy of marine insurance on cargo is owner of the ship as well as owner of the cargo does not prevent him from recovering under the policy from the underwriters on the cargo in respect of a general average loss, as a general average act does not depend on the consideration whether there can be any contribution or not as between the respective interests.

The Brigella (69 *L. T. Rep.* 834; 7 *Asp. Mar. Law Cas.* 403; (1893) *P.* 189) *disapproved.*

A loss caused by the cutting away of the mast of a ship, which by the master's orders is cut away for the safety of the whole adventure, but which at the time it is cut away is not hopelessly lost and might be saved, is a general average sacrifice for which underwriters of a policy on the cargo against perils of the seas are liable to contribute, and they are none the less liable because the assured are owners of both ship and cargo.

Decision of Mathew, J. (84 *L. T. Rep.* 57; 9 *Asp. Mar. Law Cas.* 141; (1901) 1 *K. B.* 147) *affirmed.*

THIS action was brought by the plaintiffs, the owners of the ship *Airlie* and her cargo, to recover from the defendants a general average loss under a policy of marine insurance on cargo effected by the defendants; alternatively, to recover the defendants' proportion of suing and labouring expenses to avert a total loss of the insured cargo.

The insurance was against perils of the seas and other losses of the same character, and the policy contained the ordinary sue and labour clause, and a provision that general average was payable as per foreign statement or York and Antwerp rules, if so made up.

During the voyage the ship encountered very bad weather, and the main mast, which was of iron and hollow, settled down. The mast, however, was secured and remained in its position.

As the ship continued to roll, the master, fearing that the mast would break and so cause the loss of the vessel, ordered it to be cut away, and it was cut away and fell over the side.

The plaintiffs sought to recover, under their policy on the cargo, a general average loss incurred by the cutting away of the mast, as they contended that the cutting away of the mast was under the circumstances, a general average sacrifice, rendered necessary by the perils of the seas insured against.

The defendants said that the cutting away of the mast was not a general average sacrifice, and gave rise to no general average claim; that, as the plaintiffs were owners of both ship and cargo there could be no contribution to general average as between ship and cargo, and therefore the

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

plaintiffs could not claim under the policy on the cargo, and that the sue and labour clause did not apply.

The case was heard by Mathew, J., who held (84 L. T. Rep. 57; 9 Asp. Mar. Law Cas. 141; (1901) 1 K. B. 147) that the plaintiffs were entitled to recover a general average loss, thus differing from the opinion of Barnes, J. in *The Brigella* (69 L. T. Rep. 834; 7 Asp. Mar. Law Cas. 403; (1893) P. 189).

The defendants appealed.

Scrutton, K.C. and *Loehnis* for the appellants.—When the master ordered the mast to be cut away he believed it to be a wreck, and it was cut away to avoid the loss of the ship. There was, therefore, no general sacrifice in this case. The plaintiffs have no claim for general average loss against the underwriters on the cargo. They are the owners of both ship and cargo, and have not as cargo owners paid, and are not liable to pay, contribution to general average. The right to general average depends on the right of contribution as between ship and cargo. Where the same person is the owner of both, there can be no claim for general average. General average assumes separate persons whose property is at stake sharing the loss of one whose property was sacrificed for the benefit of the others, and that gives him a right of contribution from the other persons. Where there is no right of contribution the loss is not a general average loss, but a particular average loss. This case is within the judgment of Barnes, J in *The Brigella* (69 L. T. Rep. 834; 7 Asp. Mar. Law Cas. 403; (1893) P. 189). The decision of *Moran* v. *Jones* (7 Ell. & B. 503) was considered in *Walthew* v. *Mavrojani* (22 L. T. Rep. 310; 3 Mar. Law Cas. O. S. 382; L. Rep. 5 Ex. 116), and Bovill, C.J. says it was decided on the special facts of that case. A general average loss cannot be recovered under the sue and labour clause:

Aitchison v. *Lohre*, 41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755.

They also referred to

Dickenson v. *Jardine*, 18 L. T. Rep. 717; 3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 639;
Simpson v. *Thompson*, 38 L. T. Rep. 1; 3 Asp. Mar. Law Cas. 567; 3 App. Cas. 279;
Attwood v. *Sellar and Co*, 42 L. T. Rep. 644; 4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286;
Wright v. *Marwood*, 45 L. T. Rep. 297; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div. 62;
Anderson, Tritton, and Co. v. *Ocean Steamship Company*, 52 L. T. Rep. 441; 5 Asp. Mar. Law Cas. 401; 10 App. Cas. 107;
Svensden v. *Wallace*, 52 L. T. Rep. 901; 5 Asp. Mar. Law Cas. 453; 10 App. Cas. 404;
Kidston v. *Empire Marine Insurance Company*, 15 L. T. Rep. 12; 2 Mar. Law Cas. O. S. 468; L. Rep. 2 C. P. 357;
Xenos v. *Fox*, 19 L. T. Rep. 84; 3 Mar. Law Cas. O. S. 146; L. Rep. 4 C. P. 665;
Balmoral Steamship Company v. *Marten*, 85 L. T. Rep. 389; (1901) 2 K. B. 896, 902;
Lowndes on the Law of General Average, 4th edit., pp. 22, 23;
Carver's Carriage by Sea, sect. 374 c. note (*n*);
Phillips on Insurance, sect. 1374;
Benecke on Marine Insurance, pp. 232, 260;
Holt's Law of Navigation (1824), p. 482:
Parson's Law of Maritime Insurance, vol. 2, p. 208) edit. of 1869).

Carver, K.C. and *J. A. Hamilton*, K.C. for the respondents.—This is not a question of general average pure and simple. The question is what is the bearing of the doctrine of general average on this policy, what risk does the underwriter take? The cutting away of the mast was an act done for the safety of the whole adventure, the crew, cargo, and ship, and was therefore a general average sacrifice. A right of contribution is not essential to a claim to general average. The decision of Barnes, J. in *The Brigella* (*ubi sup.*) is wrong. The right to general average does not depend upon the right to contribution, and the right to recover here is not under the sue and labour clause. The obligation of the underwriters to contribute to general average is not under that clause but under the law maritime: (per Lord Blackburn in *Aitchison* v. *Lohre*, 41 L. T. Rep. 323, 326; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755, 764; and *Oppenheim* v. *Fry*, 8 L. T. Rep. 385, 387; 3 B. & S. 873, 884). The same principle is laid down in two American cases, *Potter* v. *Ocean Insurance Company* (3 Sumner, 27) and *Greely* v. *Tremont Insurance Company* (9 Cushing, 415), and also in the text-books, Emerigon (Meredith's edition), c. 12, s. 39; Phillips on Insurance, sects. 1274, 1412; Benecke on Marine Insurance, p. 473. The practice of average staters has always been to adjust general average irrespective of whether or not the different interests are owned by the same person. The dictum of Lord Campbell in *Moran* v. *Jones* (7 Ell. & B. 523, 533) is in favour of the respondents. They also referred to

Price v. "*A1*" *Ships' Small Damage Insurance Association Limited*, 61 L. T. Rep. 278; 6 Asp. Mar. Law Cas. 435; 22 Q. B. Div. 580;
Mouse's case, 12 Co. Rep. 63.

Scrutton in reply.

Cur. adv. vult.

March 25.—The written judgment of the court was delivered by

WILLIAMS, L.J.—This case raises a question of great importance. The circumstances of the case are such as, it is admitted, would give rise to a general average claim if the ship and cargo belonged to different owners; but it is said that there can be no general average claim, because the ship and cargo both belonged to the plaintiffs, and as there could be no contribution there was no general average loss. Mathew, J. has held that a general average act is not affected by the consideration whether there will be a contribution or not. This holding is contrary to the opinion expressed by Barnes, J. in *The Brigella* (*ubi sup.*); and we have now to consider which view is the right view. We agree with the view of Mathew, J. (now Mathew, L.J.), and, moreover, agree so entirely with the reasons he has given for the conclusion at which he has arrived that we should not feel it necessary to add a word to those reasons if it were not that we think we ought to deal particularly with the reasons expressed by Barnes, J. in his judgment in *The Brigella*, and ought to state the principles upon which we think the law of general average loss should be based. As we understand the judgment of Barnes, J., he is of opinion, first, that there cannot be a general average act, or a general average loss, unless there are separate interests in the maritime adventure, because contribution is of the essence

of the maritime law of general average; and there cannot be contribution unless there is diversity of interests; and we understand him to go further and say that even if there be a general average act in a case where ship, cargo, and freight belong to one adventurer only, yet the law of contribution cannot be applied, for the right of contribution only belongs to the adventurer who had an interest at risk against an adventurer whose goods have been saved by the general average act, and that it is impossible for an adventurer to enforce by legal proceedings a claim against himself in respect of the salvage of one part of his property by the sacrifice of another. It is said that such a right, if it existed, could only be enforced by the adventurer suing himself, which is impossible. It is said, further, that the fact that the ship, freight, and cargo have been insured with different underwriters can make no difference, because the only interest which the underwriters have is a subrogated right which they must enforce, if at all, in the name of the assured, as the owner of the property sacrificed, by the general average act against the same person, as the owner of the property saved by that sacrifice. It is said that the obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not, and that the circumstance of a party being insured had no influence upon the adjustment of the general average. It seems to us that the question whether contribution is of the essence of a general average loss or a mere incident of it must depend upon the occasion which is a condition of such an act. It is not, we think, true to say that it is only the danger to the ship, freight or cargo, which necessitates and justifies sacrifice by the master of either a portion of the cargo or a portion of the ship. This may be done in fear of death, and if it is done upon a proper occasion all must contribute to the loss. If there be one owner of ship, freight, and cargo he will bear it all. If there be several, each will contribute according to the value of his interest. The object of this maritime law seems to be to give the master of the ship absolute freedom to make what sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and in our judgment such a sacrifice is a general average act quite independently of unity or diversity of ownership.

Assuming that the general average act and the general average loss can occur independently of contribution, there still remains the question whether the underwriters on a policy on cargo can be held liable to pay to an owner of ship and cargo, by reason of his insurance of cargo, the contribution which the cargo owner, if he had been another person than the shipowner, would have had to pay the shipowner in respect of the general average loss incurred by cutting away the mast. It is said that the shipowner could not have recovered against himself as cargo owner this contribution, and that, as the only liability of the underwriter on cargo is to pay as a general average loss a contribution which the cargo owner could be compelled to pay, he has no obligation to recoup the cargo owner a contribution which he has not paid and could not be compelled to pay. In other words, it is said that, as the cargo owner has suffered no loss he can therefore claim no indemnity. If this is the true view, the converse view would also seem to be true—viz., that the underwriter on a policy on the ship must pay the whole of the ship's loss by the general average sacrifice without getting the benefit of any contribution from cargo belonging to the shipowner which had the benefit of the sacrifice. But we do not think that this is the true view. We will take first the case of the shipowner who has insured his ship, and there has been a general average sacrifice and loss by cutting away the masts to avert the instant perils of the sea. We will assume there is cargo on board belonging to the shipowner. What is the liability of the underwriter on the policy on the ship? It seems to us that his liability is to pay the loss incurred by cutting away the masts less the contribution by the shipowner on account of the cargo. I see nothing in *Dickenson* v. *Jardine* (*ubi sup.*) to prevent this, because the shipowner has already in his pocket his own contribution as cargo owner, and his loss is ascertained to be the costs of replacing the masts less his own contribution as cargo owner. It will be observed that in *Dickenson* v. *Jardine* jettison was expressly covered by the policy, and the assured had not received the contributions of the other owners, and that therefore the underwriters could, upon indemnifying the assured, recover the contributions in his name, whereas in a case like the present the assured has in his pocket his own contribution, so that there is no contribution to be recovered, and the assured's loss has been *pro tanto* reduced before he makes any claim on the underwriters. But suppose he has effected a policy on cargo. What is the liability of the underwriters of the policy on cargo? Surely they are liable to pay the loss of the shipowner by reason of the deduction made by the underwriters of the policy on the ship in respect of the shipowner's contribution as the owner of the cargo; and *mutatis mutandis* a similar result is arrived at if the general average sacrifice is by jettison of cargo, and ship and cargo have a common owner. With regard to the right of the underwriter, when the assured is owner of ship and cargo, to deduct the contribution due from the ship or cargo, as the case may be, we will quote the words of Shaw, C.J. in *Greeley* v. *Tremont Insurance Company* (9 Cushing, 419), who, after stating that the underwriter is liable directly to the assured for a loss in its nature a general average loss, that is, resulting from a voluntary sacrifice, without waiting to collect the contributory shares from other persons, says: "But the rule does not apply where the assured is owner of the vessel and cargo. Then, as owner of the cargo, being bound to contribute, he is deemed to have the contribution in his own hands, and therefore is clearly *pro tanto* indemnified, and cannot collect of the underwriters a sum of money to be recovered back by the underwriter himself." It seems to us that this passage is quite right and a working out of the principle on which the law of the general average is based. This view seems to us to obviate any difficulty arising from the fact that a man cannot sue himself and from the legal proposition that the only right of the underwriters in respect of collection of contributions is to sue in the name of the assured. There is nothing in this conclusion contrary to any English authority. It is true that no English case expressly decides the point. But there is a dictum

of Lord Campbell in *Moran* v. *Jones* (*ubi sup.*), and an opinion of Blackburn, J. in *Oppenheim* v. *Fry* (*ubi sup.*). In the former case Lord Campbell said (7 El. & B. 533): "And, where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by each, although the whole freight which was in peril is to be received by the owner of the ship, and without insurance the whole of the loss would fall upon him." And in the latter case Blackburn, J. said (8 L. T. Rep. 387; 3 B. & S. 884): "I think it is not necessary for the decision of this case to say whether the extraordinary expenditure was general average or not, though I have a strong impression that, where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average; whether the ship and cargo and freight belong to one only or to different adventurers." Against this there is the opinion of Barnes, J. expressed in *The Brigella* (*ubi sup.*). American authority, as we have already said, is strongly in favour of the view expressed by Mathew, J., and the whole question is well discussed by Story, C.J. in his judgment in *Potter* v. *Ocean Insurance Company*. He says (3 Sumner, 39): "But the argument is that here there was no cargo on board, and that there can be no contribution by freight or cargo; but the whole is to be borne by the ship; and that therefore it is a particular average on the ship and not a general average. The argument proceeds upon the ground that what is and what is not a general average, does not depend upon the nature and objects of the thing done, or sacrifice made, for the general good; but solely upon the point whether there are in fact different contributory subjects. I do not so understand the law. As I understand it, the rule as to what constitutes a general average or not, is founded upon the consideration whether it is for the benefit of all who are or may be interested in the accomplishment of the voyage; or only for the benefit of a particular party. Suppose a person to be owner of the ship and cargo, and, of course, ultimately of the freight also, and he should insure the ship, cargo, and freight in three different policies by different offices, if a jettison should be made or a mast be cut away, or any other sacrifice be made for the common benefit of all concerned in the voyage, there can be no doubt that this would be a case of general average, and the underwriters on ship, cargo, and freight must all contribute as for a general average. What possible difference in such a case could it make that the same underwriters were underwriters in one policy on the ship, cargo, and freight; or that the owner singly had no insurance at all, or an insurance upon one only of the subjects put at hazard? Must not the loss still be treated in the contemplation of the law as a general average or in the nature of a general average? As I understand it, the phrase 'general average,' as found in our policies of insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action or design. It looks to the efficient cause of the loss, and not to the effects of it. It looks to the consideration, whether the act is intended for the benefit of all concerned in the voyage, and not in particular to the consideration who are to contribute towards the indemnity. To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction, for it is a pure speculative inquiry. Not so when there is an insurance; for in such a case the underwriters are *pro tanto* benefited by the sacrifice or other act done, and they are in a just sense bound to contribute towards it." We have only to add generally that, in our judgment, the underwriters have throughout the adventure such inchoate property and liability to loss as to make it right, within the true principle of the law of general average, that upon the adjustment their right to contribution and their loss as underwriters, as the case may be, should be taken into consideration in the final account. Moreover, it is further worthy of observation that the view of the law which we have taken agrees with the practice of average-staters and underwriters, both before and since the decision in *The Brigella* and this practice is, in my opinion, really essential if the spirit of the law of general average is to be applied to the conditions of navigation of the present day. The appeal must be dismissed with costs.

Solicitors for the plaintiffs, *W. A. Crump* and *Son*.

Solicitors for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

Wednesday, May 7, 1902.
(Before WILLIAMS, ROMER, and MATHEW, L.JJ.)

Re AN ARBITRATION BETWEEN TYRER AND CO. AND HESSLER AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Time charter at periodical payments in advance—Power reserved to owners on default of payment to withdraw vessel—Waiver—Estoppel—Evidence.

By a charter-party a ship was let for nine months, the charterers to pay for the hire of the ship at an agreed rate, fortnightly in advance, and in default of such payment the owners to have the faculty of withdrawing the ship from the service of the charterers. The owners were to pay the wages of captain and crew, but the charterers were to pay for coals, port-charges, &c., and the captain was to be under their orders and directions as regarded employment. After the charterers had had the use of the ship for two months they made default in making the fortnightly payment due on the 21st June. The ship was then on a voyage to S. where she arrived on the 25th, and while there the captain telegraphed to H. to order the cargo to be ready. After lying two days at S. the ship started on the 27th for H. On the 28th the owners gave notice to the charterers of their withdrawal of the ship by reason of the charterers' default in the payment due on the 21st.

Held, reversing the judgment of the King's Bench Division (84 *L. T. Rep.* 653; 9 Asp. Mar. Law Cas. 186), *that upon these facts there was no evidence of any waiver by the shipowners of their right to withdraw the vessel, nor of any conduct on their part estopping them from insisting on their right.*

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

THIS was an appeal by Hessler and Co. from a judgment of the King's Bench Division (Kennedy and Phillimore, JJ.) upon an award in the form of a special case stated by arbitrators for the opinion of the court.

By a charter-party dated the 13th Feb. 1900 and made between Hessler and Co., as owners, and Tyrer and Co., as charterers, the steamship *Lagom* was let by the owners to the charterers "for the term of about nine calendar months."

The charter-party provided that the owners should pay the wages of the captain and crew, and that the charterers should pay for the hire of the vessel at the rate of 425*l.* per calendar month, commencing on the day of delivery, and at the same rate for any part of a month, "payment to be made in cash fortnightly in advance to owners in West Hartlepool, and in default of such payment or payments, as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers"; and that the charterers should provide and pay for all the coals, port charges, pilotages, agencies, commissions, expenses of loading and unloading, and that the captain, although appointed by the owners, should be under the orders and directions of the charterers as regarded employment.

The ship was handed over to the charterers on the 6th April 1900, and on that day the first fortnight's payment in advance was duly made. The second payment was due on the 20th April, and was paid on the 27th April. The third payment was due on the 6th May, and was paid on the 10th May. The fourth payment was due on the 20th, and was paid on the 26th May. The fifth payment was due on the 6th, and was paid on the 11th June.

No complaint was ever made by the owners about the hire not being paid on the day when it was due, and no suggestion was ever made that, if the hire was not paid on the actual date when it became due, the vessel would be withdrawn from the service of the charterers.

On the 21st June another fortnight's hire became due in advance. No application for payment thereof was made, and no debit note was sent therefor, and no intimation was given that if the hire was not paid the vessel would be withdrawn from the charterers' service.

On the 21st June the vessel had just commenced a voyage from Burntisland to Stockholm on the charterers' account. She arrived at Stockholm on the 25th June, and lay there until the 27th, when she proceeded to Hernösand to load her homeward cargo on the charterers' account. While at Stockholm the master telegraphed to Hernösand to order the cargo for the steamer to be ready.

On the 28th June the owners telegraphed to the charterers that, as they had not received the hire due on the 21st, they withdrew the steamer in accordance with the charter.

Prior to this telegram the owners never demanded payment of the hire or sent a debit note.

The dispute between the owners and the charterers as to the right of the owners to act in this way was referred to arbitration.

The arbitrators found as a fact that the owners had waived the immediate and punctual payment of the hire, and ought to have demanded payment of the hire before withdrawing the vessel from the service of the charterers; and that the withdrawal was not *bonâ fide* for the purpose of enforcing payment of the hire, freights at the time of the withdrawal having greatly increased; and that the withdrawal was an unlawful act on the part of the owners for which the charterers were entitled to damages.

The award was stated in the form of a special case for the opinion of the court, the question being whether, under the facts above stated, the owners were entitled to withdraw the ship from the service of the charterers.

The King's Bench Division (Kennedy and Phillimore, JJ.) were of opinion that the withdrawal was unlawful, and gave judgment for the charterers.

The owners appealed.

J. A. Hamilton K.C. (*Bigham* with him) for the owners.—The arbitrators have not found, nor is there in the facts any evidence that the owners waived their right to rescind. Nor have the owners done anything which could be construed as an intimation to the charterers that punctual payment would not be required so as to induce the charterers to alter their position by incurring expenses in dealing with the ship. The charter-party contains no provision that the owners shall give any notice to the charterers before demanding payment. The captain, so far as his employment is concerned, is, by the terms of the charter-party, under the orders and disposition of the charterers, and the fact of his continuing the voyage after the 21st June cannot be made use of as though he were for that purpose the "owner's" agent. The charterers chose to continue the voyage, knowing that they were in default with the payment; and what they did they did at their own risk. In the court below reliance was placed upon two cases:

Nova Scotia Steel Company Limited v. *Sutherland Steam Shipping Company Limited*, 5 Com. Cas. 106;

Williams v. *Stern*, 42 L. T. Rep. 719; 5 Q. B. Div. 409.

Carver, K.C. (*Bateson* with him) for the charterers.—The owners have waived their right to withdraw the ship. If they intended to exercise their right they should have given notice to the charterers on the 21st June. They allowed the ship to continue her voyage when they could by telegraphing have stopped her at once, and in consequence of their refraining to do so the charterers incurred expenses in dealing with the ship. Even if they were not bound to exercise their option on the 21st June, they ought to have exercised it within a reasonable time after. The master of the ship was their servant, and they were bound by his acts in continuing the voyage after the charterers had made default. A forfeiture clause such as this one on which the owners rely should be construed strictly against them. The same principles should be applied as those which at common law apply to a forfeiture for nonpayment of rent.

WILLIAMS, L.J.—In my judgment this appeal must succeed. I agree with the decision of the Divisional Court in so far as the learned judges there held that there was no necessity for a demand of payment being made by the shipowners before they were entitled to exercise their power

of rescinding the charter-party. The sole question is whether on the facts stated in the special case there is any evidence of a waiver by the shipowners of their power of rescission. In my opinion there is none. It was contended on behalf of the charterers that the owners' power of rescinding the contract ceased to exist unless the owners exercised it the moment they became entitled to it. There are no words in the charter-party requiring any such immediate exercise of the power, but it was argued that the owners' failure to exercise the power was evidence that they waived their right. I cannot agree to that. The argument involves this, that if the owners held their hand at all, while the expenses of the ship were going on, that of necessity operated as a waiver of their right to rescind. Reliance was placed upon the way in which the ship was employed between the 21st and the 28th June, and it was said that because the master of the ship was for some purposes the servant of the shipowners, the employment of the ship in that week amounted to a waiver by the shipowners of their right to withdraw the vessel. To my mind the facts show nothing of the sort. The charter-party expressly provides that the captain is to be under the orders and directions of the charterers as regards employment, so that what was done by him in prosecuting the voyage from the 21st to the 28th June was done under the orders and directions of the charterers. There is no ground whatever for relying on the mere lapse of time during which the owners held their hand as showing that the charterers were induced to alter their position by the conduct of the owners. The charterers were in default, and they must have known that they were in default, yet they ran the risk, and chose to go on and take the course they did. For these reasons I think that the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. It is possibly a hard case upon the charterers, but to my mind the question as it arises on this charter-party is perfectly clear. There is no provision in the charter-party that the owners, before exercising their right to rescind on default being made in payment of the hire, must give notice to the charterers and demand payment. Nor can any such term be implied in this agreement. The charterers knew that the owners had a right to rescind the moment default was made in paying the hire. In a mercantile contract of this sort the court cannot imply a term that the owners must take any such steps as those which the charterers suggest before insisting on their right to rescind, which arises in consequence of the charterers' default. I think that the owners were entitled to exercise their right without giving any prior notice to the charterers requiring payment. The charterers therefore can only succeed here by showing that the shipowners have waived their right or have estopped themselves from exercising their right. In my opinion there is nothing in the facts before us to justify the court in taking either view. The shipowners have done nothing at all. The master of the ship, in carrying out his duties as master and continuing the voyage of the vessel in accordance with the orders of the charterers, has not done anything which can be considered as an active step on the part of the owners bearing any relation to the question before us. The owners themselves have done nothing except to give the charterers a week's time in which to pay the money due from them. That is not such a delay as to justify the court in holding that the owners intended to abandon or waive their right of rescinding the charter-party. In my opinion, as at present advised, it would not be unreasonable for a shipowner, in a case like the present, to allow the charterers some little time in which to pay the money due before exercising a right to determine the charter-party. I should be sorry to hold that the owner lost his right unless he acted with absolute promptitude.

Then it is said that when the owners gave time to the charterers they must have known that the charterers would probably go on making use of the ship and incurring expenses in her management. The owners are therefore, it is argued, estopped from now insisting on their right. But, as the owners had given time to the charterers to pay, the charterers must be taken to have known that what they did in that time was done at their own risk. How can the charterers now say that their continued working of the ship during a period when they knew that the charter-party was liable to be determined by reason of their own default has given them a right of depriving the owners of their power of rescission? I see no ground for saying that the owners lost their power of rescinding the charter-party, and I agree that the appeal should be allowed.

MATHEW, L.J.—I am of the same opinion. On the words of the charter-party I think that the matter is clear. Nothing could have been easier than to have inserted in the agreement a clause that the power of withdrawing the ship should not be exercised except within so many hours after a demand for the hire in arrear. But no such provision is to be found in the agreement, so that on the plain construction of the document no notice on the part of the shipowners was here necessary before they exercised their right of rescission. That right was simply one given to the owners to put an end to the charter-party. It is a misdescription to talk of "forfeiture," and it is out of place to discuss the law as to the forfeiture of a lease for non-payment of rent with the view of explaining a mercantile contract of this kind. The intention of the parties as shown by the agreement clearly is that, without giving any notice, the owners were to have the right of determining it in case of default by the charterers in paying the hire. Then it was said that the circumstances set out in the special case are evidence of a waiver, and an estoppel of the owner's right. Reliance was placed on the fact that after the charterers had made default the master of the ship went on with the voyage, and it is said that the master was the agent of the owners. The answer to that is that by the express terms of the charter party the master was under the orders and directions of the charterers as regards his employment. I see no evidence on which we could say that the owners waived, or were estopped from exercising their right, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: for the owners, *W. A. Crump* and *Son*, for *Turnbull* and *Tilly*, West Hartlepool; for the charterers, *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimehurst*, Liverpool.

Wednesday, June 18, 1902.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ., and NAUTICAL ASSESSORS.)

THE OVINGDEAN GRANGE. (*a*)

Collision—Contributory negligence—Thames Bye-laws, 1898, *bye-law* 47.

The steamship F., *proceeding down the river Thames against the tide, committed a breach of bye-law* 47 *of the Thames Bye-laws in neglecting to wait at B. point until the steamship* O. G., *which was coming up with the tide, and which at the time was turning in the river preparatory to entering a dock, had passed clear. A collision occurred.*

Held, that although the O. G. *was to blame for not keeping a proper look-out and for turning without proper care, the* F. *was also to blame for hindering the manœuvres of the* O. G. *by not obeying the rule, and so contributing to the collision.*

The judgment of the President (*Sir F. Jeune*) *affirmed.*

THIS was an appeal by the plaintiffs, the owners of the Norwegian steamship *Forsete*, from a judgment of the President (Sir F. Jeune) pronouncing that vessel partly in fault for a collision between the *Forsete* and the defendants' steamship *Ovingdean Grange*.

The case is reported 85 L. T. Rep. 344; 9 Asp. Mar. Law Cas. 242; (1901) P. 127.

The *Forsete* was a wooden steamship of 526 tons gross register, and at the time of the collision was on a voyage from London to Grimsby in ballast.

The *Ovingdean Grange* was a steamship of 2413 tons gross register, and was on a voyage from Antwerp to Buenos Ayres, *viâ* London, with a general cargo and two passengers.

The collision occurred about 8.30 a.m. on the 22nd Aug. 1900 off Blackwall Point, Blackwall Reach, river Thames. The weather at the time was clear, the wind a fresh breeze from the S.W., and the tide one-third flood of the force of about two knots an hour.

The *Forsete* was coming down the river keeping to the southward of mid-channel, making four to five knots through the water. The *Ovingdean Grange*, having previously sounded four blasts on her whistle as a signal that she was about to turn in the river, and then three more as her engines were put astern, was swinging under a port helm with a tug towing on her starboard bow preparatory to entering the West India Dock.

The movements of the *Forsete* were hampered by a sailing barge coming up river, which passed close under her stern and struck her, and prevented the *Forsete* from porting and going under the stern of the *Ovingdean Grange* as she might otherwise have done. The *Forsete* struck the *Ovingdean Grange* on the port side about the main rigging.

It was admitted that the *Forsete* had neglected to stop and wait above Blackwall Point in breach of bye-law 47 of the Thames bye-laws.

Bye-law 47 of the Bye-Laws for the Regulation of the River Thames 1898 is as follows:

Steam vessels navigating against the tide shall before rounding the following points, viz.: . . . Blackwall Point, wait until any other vessels rounding the point with the tide have passed clear.

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

The President (Sir F. Jeune) found both vessels to blame.

Pickford, K.C. and *Stubbs* (*Aspinall*, K.C. with them) for the appellants.

Laing, K.C. (*Dawson Miller* with him) for the respondents.

Pickford, K.C. in reply.

The following cases were referred to

Cayzer, Irvine, and Co. v. *Carron Company*; *The Margaret*, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 371; 9 App. Cas. 873;

The Sanspareil, 82 L. T. Rep. 606; 9 Asp. Mar. Law Cas. 78; (1900), P. 267.

COLLINS, M.R.—This is an appeal from the decision of the learned President brought on behalf of the steamship *Forsete*. The learned President has found that the *Ovingdean Grange* was to blame, because she did not keep a sufficient look-out. He has also found that the *Forsete* is to blame, because the *Forsete* violated a rule of the Thames, and if she had regarded it she would not have been in the place where the collision actually occurred; and he has found as a fact, that, being in the place where she was, and having regard to the other circumstances, namely, the presence of barges there also, she hampered the *Ovingdean Grange* in carrying out the manœuvre she was attempting to carry out, and therefore it placed on the *Ovingdean Grange*, in order to avoid a collision, the obligation of taking more than ordinary care, which is a greater obligation than that which can be insisted upon by the owners of the *Forsete*. The circumstances are these: The *Forsete* was going down the river and approaching Blackwall Point. The *Ovingdean Grange* was coming up the river and was about to go into dock, and when she got opposite Blackwall Point she found it necessary to turn round. She had a steam tug in attendance which assisted her in the operation of turning round and going into the dock, which was further up the river. The *Forsete* was coming down the river as I have said, and under art. 47 of the Thames Bye-laws it is thus provided: [The learned judge then read the rule.] The *Forsete* saw the *Ovingdean Grange*, and the *Forsete* slowed, it is true, but as a matter of fact she continued upon her course and found herself in the position at which the collision ultimately took place, when it did take place. The learned judge has found that in not having waited within the meaning of that rule she did wrong; and that she did not wait in the sense of waiting until the manœuvre which the other vessel was carrying out was over is clear from the facts proved. It is clear she went on, and it seems to me, and the learned President has so found, that in going on she took the risk of hampering the manœuvre which the *Ovingdean Grange* was carrying out. The President has found that the *Ovingdean Grange*, in carrying out this manœuvre, was guilty of negligence and did not keep a sufficient look-out, but he does not find, and it is not contended, there was any element of negligence—that is to say, that she was wrong in turning at that place. He does not find that she came more than midway over towards the southern side. She was in charge of the tug, and is a large vessel, and obviously it would not be just, with any particular degree of nicety, to decide what particular area she was entitled

to cover. Therefore it is not suggested there was any negligence either in the place or manner in which she carried out this manœuvre, but the President has found that she did not keep a sufficient look-out, and he visited that upon her. If the *Forsete* had not contributed, in the sense of negligence on her part, to the collision, then the *Forsete* would clearly have been free from blame. But the collision takes place, and the *Forsete* is claiming damages against a vessel which the President has found to have been negligent. Then comes the question, What about the position of the *Forsete* herself? She broke the rule, but though she broke it, that in itself, as he properly says, does not alter the position of the *Forsete*—not in itself alone—but it is a factor in determining whether what the *Forsete* did, did form part of the negligence which brought about the collision. It is clear, on the President's finding, that the *Forsete* ought not to have been where she was at the time of the collision. That, again, is not enough, but he goes on to find that the fact that the *Forsete* was there, coupled with the fact that a couple of barges were there also—all these things together complicated the manœuvre which the *Ovingdean Grange* was carrying out in such a way that she was hampered by the act of the *Forsete*. The *Forsete* was wrong in being there, and the fact of her being there, with the fact that the barges were interfering with her when she was there, made it difficult for her to avoid the consequences of her own wrongdoing. She ought to have waited, and by not waiting she found herself in the presence of this manœuvre, and was then hampered by the presence of the barges. In those circumstances the President has found that the wrongful act of the *Forsete* did in fact contribute to the difficulty of the *Ovingdean Grange*, and cast upon her a burden greater than in point of law she is bound to bear; that is to say, cast upon her the burden of using more than ordinary care to avoid collision with the *Forsete*. In other words, he finds that the *Ovingdean Grange* could not by ordinary care have avoided collision with the *Forsete*.

If that be the fact, it does not matter that the *Ovingdean Grange* was negligent, because had she been diligent, had she used ordinary care, she would nevertheless have met with this collision. It is not disputed, I think, that the President has directed himself according to law. It seems to me, certainly, that he has directed himself exactly in accordance with law. I do not think it is material on this part of the discussion to consider whether or not the burden is thrown upon the *Forsete* of showing that her negligence did not contribute to the collision. In any case, we have got past that stage of the burden of proof. We are now dealing with all the facts proved before us, and whichever side the burden of proof is upon, the question is now gone. We have all the evidence before us, and our assessors are clear upon the matter that the actual circumstances of the *Forsete* having got to the position she was in at the time the *Ovingdean Grange* was carrying out this manœuvre, did hamper the *Ovingdean Grange* and require from her a higher degree of care than ordinary. It is said that there was not evidence upon which the President could have found what he did find. It seems to me that that really is based upon a conclusion which the learned President does not seem to have drawn. He does find, undoubtedly, that the *Ovingdean Grange* was well over towards the southern side, but that is quite compatible with her not being nearly so far over as is suggested by the *Forsete*. Therefore it seems to me that if you take, as he seems to have taken, rather a middle view between the two conflicting views of fact as to which side of the river this collision took place on, there is no inference to be drawn that there was that degree of negligence on the part of the *Ovingdean Grange* which would have made it impossible under any circumstances for the *Forsete* to have avoided a collision. It seems to me that on the President's finding of fact—I think there was abundant evidence for it—there was only such a degree of negligence on the part of the *Ovingdean Grange* as to admit of the *Forsete*, if she had exercised due care, herself avoiding the mischief. It was her own action which put her into such a position, and the *Ovingdean Grange* could not avoid the collision. I think the learned President has arrived at that conclusion without any misdirection in point of law, and therefore the appeal must be dismissed.

MATHEW and ROMER, L.JJ. concurred.

Solicitors for the appellants, *Thomas Cooper* and *Co.*

Solicitors for the respondents, *William A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, Nov. 25, 1901.

(Before WRIGHT, J.)

Re AN ARBITRATION BETWEEN LOCKIE AND CRAGGS AND SON. (*a*)

Contract — Building ship—Delay — Allowances— "Circumstances beyond builders' control.

A contract for building a ship provided that due allowance should be made for delays through certain causes "or other circumstances beyond the builders' control."

It was within the contemplation of the parties that the ship should be commenced as soon as a suitable berth became vacant, and the first berth which became vacant was one in which another ship was being built, and delay was caused in the completion of this ship by the same kind of causes which were provided for in the contract relating to the ship in question.

Held, that allowances were properly made for delay in building the ship in the contract owing to the delay in completing the former vessel.

SPECIAL case stated by an arbitrator.

By a contract in writing dated the 6th July 1898 it was agreed between John Lockie (therein called the purchaser) and R. Craggs and Son (therein called the builders) that the latter should build and sell and the former purchase a steel screw steamer.

The clause as to delivery was as follows:

The builders undertake to build and deliver the vessel complete and ready for sea after satisfactory trial trip not later than the 31st June 1899, due allowance being

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

made for delays through bad weather, strikes, fires, and accidents on board ship at shipbuilders' works or at any works upon which they may be dependent for supplies of material, delay in delivery of material, or other circumstances beyond builders' control or marine risks.

The arbitrator found as facts that it was contemplated by the parties that the steamer should be built at the builders' yard at Middlesbrough, and that the purchaser was at the date of the contract aware that the steamer (called No. 160) could not be commenced until a suitable berth was vacant; that the first suitable berth that became vacant was one in which another steamer (called No. 149) was being built at the date of the contract, and that the builders acted reasonably in arranging to build No. 160 in that berth; that the completion of No. 149 was delayed by the following causes, bad weather, strikes, accidents at ship and at builders' works, and delay in delivery of material; and that, owing to the non-completion of No. 149, the building of No. 160 could not be commenced until the 31st March 1899, when it was in fact commenced.

The arbitrator held that the delays in building No. 149 from the causes mentioned delayed the commencement and completion of No. 160, and that due allowance ought to be made in fixing the date at which No. 160 ought to be completed and delivered. He accordingly made due allowance for delays during the building of No. 149 due to the causes mentioned.

Scrutton, K.C. (*Mackenzie* with him) for the purchaser.—The question is whether the arbitrator can take into consideration causes which did not interfere with the actual building of the ship, but other circumstances altogether. The clause of exceptions which is inserted can only apply to the ship, the subject-matter of the contract, and, as they are in the favour of the builders, it must be construed against them. In *Re an Arbitration between Richardsons and M. Samuel and Co.* (77 L. T. Rep. 479; 8 Asp. Mar. Law Cas. 330; (1898) 1 Q. B. 261) the charter-party excepted "strikes, lock-outs, accidents to railway," and "other causes beyond charterers' control." It was held that the general clause excepting "other causes beyond charterers' control" referred to matters *ejusdem generis* with the antecedent exceptions. That principle applies here, and the words "other circumstances beyond builders' control" must be confined to matters *ejusdem generis*, as bad weather, strikes, fires, accidents, &c., and not to delays in the completion of another ship.

Hamilton, K.C. (*Roche* with him) for the vendors.—The case of *Re an Arbitration between Richardsons and M. Samuel and Co.* (*sup.*) is quite different to the present one, because the delay upon the railway did not in fact delay the loading. He referred to

The Alne Holme, 68 L. T. Rep. 862; 7 Asp. Mar. Law Cas. 344; (1893) P. 173.

The allowances here were properly made under the contract, and the finding of the arbitrator was right.

Scrutton, K.C. in reply.

WRIGHT, J.—The question here is a nice one, but upon the findings of the arbitrator I cannot say that the allowance in question was improperly made to the shipbuilders. I think that any abnormal delay to the first ship was intended to be included by the parties in the period of building. Taking the matter as one of construction upon the first two findings of the arbitrator, the parties took the chance of the first ship being out of the way, and the completion of that ship was a preliminary to the building of the second. The question is whether the provisions for an allowance for delay come into operation when the causes of delay apply to the former ship. Under the circumstances of the case, any specified hindrance which delays the first ship may be said to be beyond the builders' control if it affects the second ship, No. 160. I think I ought to hold that the delay was unavoidable, and that the delay in the predecessor, No. 149, is within the clause of the contract as to No. 160, as to delay under which allowance must be made. It seems to me, on the findings of the arbitrator, the builders ought to succeed. Could it be said that if the berth had been destroyed the builders would have been compelled to complete within the specified time? I do not think so. The case of *The Alne Holme* (*sup.*) is not in point, though the cases there cited are to some extent. I think that the allowance ought to be made.

Judgment accordingly.

Solicitors for the purchaser, *Nash, Field*, and *Co.*, for *W. Mark Pybus* and *Son*, Newcastle-on-Tyne.

Solicitors for the vendors, *King, Wigg*, and *Co.*, for *Wilkinson* and *Marshall*, Newcastle-on-Tyne.

Monday, Feb. 24, 1902.

(Before KENNEDY, J.)

MODESTO PINEIRO AND CO. v. DUPRE AND CO. (a)

Charter-party—Demurrage—Ship to go "to a loading place as ordered"—Commencement of time—Lien—Keeping goods on ship—Demurrage.

By a charter-party it was provided that a ship should proceed to Santander, excluding San Salvador old tip "to a loading place as ordered" and there take on board a cargo.

Held, that the ship could not be taken as an arrived ship for the purpose of the commencement of the lay days until she had arrived at the loading place as ordered, and that arrival at Santander was not sufficient.

A shipowner who has a lien on the cargo for freight or demurrage, when he has the opportunity of unloading the cargo, cannot keep the cargo on the ship and then claim for the detention of the ship.

COMMERCIAL CAUSE.

This was an action brought by the plaintiffs against the defendants to recover 400*l.* for demurrage on the s.s. *San Salvador*.

By a charter-party made between the parties, dated 3rd Nov. 1901, it was provided that the plaintiffs' steamship *San Salvador* should proceed to Santander, excluding San Salvador old tip, to a loading place as ordered, and there take on board, by day or by night if required, a cargo of iron ore, and, being so loaded, should proceed to Maryport (Senhouse Dock), and there deliver the cargo, as

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

customary, alongside lighters or at any wharf or usual landing place as directed by the consignees.

It was also provided that

The merchants shall be allowed, weather permitting, one working day for loading every 400 tons of cargo, and a proportionate period for any odd quantity, and shall be allowed a similar period for discharging every 400 tons and a proportionate period for any odd quantity. The periods in each case, whether for loading or discharging, not to commence until after a true written notice has been given during usual Customs hours that the vessel is wholly unballasted and in every respect ready to load, or, as the case may be, to discharge, and that she has been duly entered inwards at the Custom-house and is in free pratique. The following shall not be computed as part of the aforesaid running days: Sundays, Custom-house holidays, or any time of *force majeure*, war, epidemic, civil commotion, political disturbances, riots, lock-outs, strikes, or stoppage of workmen, or other hands connected with the working, delivery, shipment, or discharge of the cargo, whether partial or general, or accidents to the mines, works, or machinery, floods or frosts, stoppages on railway or canal, or time when by any cause, of what nature or kind soever beyond their personal control, the charterers or their agents may be prevented or delayed in supplying, loading, or discharging, or the conveyance of the cargo from the mines to the vessel may be prevented or delayed. Demurrage (if any) shall be ascertained by adding together the running days calculated as before stated, and all hours actually occupied over the aggregate running days allowed for both operations of loading and discharging shall be deemed to be demurrage, and shall be paid for at the rate of 16*s*. 8*d*. per hour. The merchants are to be at liberty to average the time for loading and discharging during the entire currency of this charter in order to avoid demurrage and to load the steamer on Sundays and holidays, any time used to count. Time between 1 p.m. on Saturdays and 7 a.m. on Mondays not to count at ports of loading or discharge unless used. Ship to work at night if requested to do so, charterers paying extra expenses. . . . It is agreed that all liability of the charterers shall cease as soon as the cargo is shipped, notwithstanding it may have been sold at a price to cover cost, freight, and insurance, in consideration of the vessel having a lien upon same for all unpaid freight, dead freight, and demurrage, which she is hereby bound to exercise. . . . The periods, whether for loading or discharging, not to commence until after a true written notice has been given during usual Customs hours that the vessel is wholly unballasted and in every other respect ready to load or, as the case may be, to discharge, and that she has been duly entered inwards at the Custom-house and is in free pratique.

The *San Salvador* arrived at Santander on the 18th Nov. 1900. Due notice was given under the charter-party, and the loading time commenced to run at 1 p.m. on the 19th Nov. 1900. The loading was completed on the 10th Dec. 1900 at 6.30 p.m. The vessel loaded 1947 tons. She arrived at Maryport an the 16th Dec. Due notice was given under the charter-party. She could have got into Senhouse Dock on the 18th, but not to a berth in the dock. On the 19th Dec. she was put into a discharging berth in the dock basin on the same terms as if she had docked, and discharge commenced on the same day. The discharge was completed on the 4th Jan. 1901.

The defence raised was that by the charter-party the plaintiffs agreed that their vessel should proceed to a loading place as ordered by the defendants at Santander, exclusive of San Salvador old tip, and there load a cargo of 2000 tons of iron ore at the rate of 400 tons per day, weather permitting. The vessel did not arrive at the loading place ordered by the defendants, and was not ready to load until Friday, the 7th Dec. 1900. She commenced to load at 9 p.m. on the 7th Dec., and was fully laden on Monday, the 10th Dec. at 6.30 p.m., having been engaged (excluding time between 1 p.m. on Saturday, the 8th Dec., and 7 a.m Monday, the 10th Dec., as per charter-party) 27½ hours or thereabouts in loading the cargo.

Hamilton, K C. and *Balloch* for the plaintiffs.

Carver, K.C. and *Noad* for the defendants.

KENNEDY, J.—This is an action for demurrage, and there are two parts; I will take the latter part first. The question arises as to what took place on the arrival of this steamship in bringing a cargo from Santander to Maryport, and as to the time which was consumed at Maryport, the port of discharge. The plaintiffs say that there was a delay there in taking the discharge; and the defendants repudiate any liability on that head. Now I am of opinion that, assuming that there was a delay at Santander—a demurrage, that is, for which the plaintiffs had a good claim at the port of loading—what they did at the port of discharge cannot be treated as in any respect wrong. Assuming that they had a claim for demurrage, there is this right, which is not disputed, given them by the terms of the charter-party: while all liability of the charterers shall cease as soon as the cargo is shipped, the vessel has a lien for all unpaid freight, dead freight, and demurrage, which she is hereby bound to exercise. The plaintiffs, in effect, when they got to Maryport, said: "We have a good claim." No question arises as to the freight; that was never disputed by those who had to pay the freight, but the question as to demurrage was known to be in dispute. I think Mr. Hamilton is right in saying that, as they had their right to exercise their lien, they had done nothing (assuming them to have a good claim for demurrage) which would prevent them from exercising their lien in the way in which they did. The other side, representing the cargo, offered a guarantee which no doubt would have been sufficient, but the shipowner was not bound to take a guarantee, or even to accept a lodgment of money, to abide the result, in either joint names, or in a single name; and the controversy which culminated in the actual stoppage of the discharge was, in substance, as I follow the correspondence so far as it has been cited to me, this: We claim to exercise our right of lien. You, say the shipowners, ask us to accept a guarantee. If we take that guarantee it must be with an admission that there is a good claim against you for demurrage at Santander. That may, or may not, have been, apart from any question of law, a perfectly fair way of settling a debatable dispute for time being, to procure the discharge and delivery of the cargo, but in law the shipowner was not bound to do it; he had the right to exercise his lien, and I do not think on the whole that there is anything which shows that, if there had been a tender of the actual money, whether under protest or not, claimed to be due for demurrage, the shipowner would have refused it; or would have told the charterers in effect: It is no use your making me an offer which will discharge my lien. Then it

still remains no doubt clearly the law that, if there is a right of the shipowner, as was the right of the plaintiffs here, to exercise a lien upon the cargo, whether for freight or demurrage, as there are facilities now given him by Act of Parliament for preserving his rights while discharging the ship, he cannot lay upon the receivers of the goods—the persons liable for the freight or demurrage, as the case may be—a larger burden in the shape of charges for the detention of his ship than the circumstances treated reasonably warrant. I think it is the law now, and I should so hold, that if a shipowner, having a right of lien, when he had the opportunities of unloading the cargo and keeping a stop upon it until the lien was discharged, made his ship into a warehouse, and then had a claim for detention, he would not be acting in a way which would be justified by law. But I think, on the whole, that that is not the case here. There are statements no doubt which, taken from the letters read by themselves, seem to signify that it would have been possible to put this cargo on shore somewhere at Maryport; but on the whole I think the balance of the evidence is that there were no trucks, and no other place reasonably fit for the storage of this cargo where the shipowner could have placed it to preserve his lien while discharging the cargo. So, on those points I should find in favour of the plaintiffs in the action. The whole result of the action, as I think the learned counsel who have given me so much assistance in the case agree, turns on what took place at Santander. Now, this is a charter-party under which the ship has to proceed with all convenient speed to Santander, excluding San Salvador old tip, to a loading place as ordered. Those are the initial words of the charter-party; and while, of course, the construction of these charter-parties, which now run into a very elaborate form, I do not say is generally easy, or easy in this particular case, I have formed the opinion that on the main point the defendants are entitled to succeed.

The main point which arises in this case is this: What is the place at which the ship must arrive in order to be treated as an arrived ship for the purpose of the commencement of the lay days? Is it to be Santander, or the river, as Mr. Hamilton suggests, which leads from Santander to the loading place for cargoes of this description; or is it, as Mr. Carver contends, the place which is ordered as the loading place inside the port of Santander? It seems to me the true interpretation of this is, that the ship is not to be taken for the purpose of demurrage as an arrived ship, not to be taken as a ship which is in a position to say, "My lay days are now commencing"—until she has arrived at the loading place which was ordered in the port of Santander. In effect, under the circumstances of this case, there is only one place to which she could be ordered and was ordered—viz, the new tip. There is the old tip, which is excluded by the terms of the charter-party. She was ordered to the new tip, and that is the loading place as ordered, and it seems to me the demurrage days did not arise until she got to that loading place, providing nothing was done to prevent her getting there earlier. Why is that so? I think it must follow from the fact that this is not a clause under which the vessel is to proceed simply to Santander only. If it had been, it might have been held that it was sufficient if the vessel proceeded to the port named, and to that usual place, be it a dock or that class of place at which the cargo to be loaded has, by the practice of the port, usually to be loaded. Here they describe the place where she is to go, and at which she would be arrived for the purpose of being at the charterers' disposal, as being not merely the port of Santander, but the port of Santander and the loading place at that port, and it seems to me that this place as ordered, the Santander new tip, is the place she must go to before she can say to the charterers, "I am here at your disposal." I think that makes the loading place as ordered, being a place in Santander, equivalent to the berth which was dealt with by the term, "Any safe berth as ordered on arrival in the dock at Garston," in the case of *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (65 L. T. Rep. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647). Here the vessel has to proceed and get—whether you call it a dock or loading place does not seem to me to matter—into the port of Santander, and she has to go to that particular place in it which was known as the new tip, and which is ordered by the charterers. It is said for the plaintiffs that those words are so qualified by the subsequent long clause beginning, "The merchants shall be allowed, weather permitting, one working day," and so on, that even if otherwise the view which I take to be the right one on the construction of the earlier words is correct, that view ought to be changed by the effect of that long subsequent clause; and, of course, I quite agree that the whole of a charter-party must be read together. But I think on that the comment of Mr. Carver is a good one. Certain things are there specified as being conditions precedent to be performed—or to happen—to the right of the shipowner to say: "My lay days are beginning"; and, it is said, that the periods for loading or discharging are not to commence until after the certain notices have been given which are there mentioned. I think that it is logically a very strong thing in support of the defendants' argument that this is a negative clause. You may read it as if the parties had said in first place: The point from which the right of the shipowner to claim to be loaded, or to have demurrage if he is not loaded in a specified time, is not to begin until the ship goes to the loading place ordered—the new tip; and, further, not only is that to be a condition precedent to the right to enforce any claim for demurrage, but that condition shall not be treated as the commencement of the period for loading until after certain notices besides have been given. In other words, there are certain additional things which the shipowner must do besides bringing his ship to the place in question. There are other words referred to by the learned counsel for the plaintiffs as supporting his view which I do not think, on consideration, affect the matter. There is a clause about the captain having to telegraph as to the probable date at which the steamer will be at Santander ready to load—that is, ready to take the cargo; and then there is the further clause about the cancelling date. Of course, if she was not in the port within the date mentioned, there would be the right to cancel. It may be—I do not know that it is

necessary to decide it—that "arrived" may not have meant "arrived at the loading place;" but it is expressly provided here that if she has not arrived at Santander within twenty-seven days, meaning, I think, ready to load so far as arrival in Santander is a necessary preliminary to her taking the cargo in at the particular point at Santander which the loading place ordered may be, there is a right to cancel. I think on these grounds the plaintiffs' case fails. In fact, she did not arrive at that place until a considerable time after her arrival at Santander. She could not get there because there were a number of vessels before her, but this is the first simple fact—she did not get there until the time at which she did arrive, and was loaded then in due time. It is not disputed that she was. Then it has been suggested by the defendants that even if I was wrong in deciding for them on the first point, there are certain clauses here which would act as a relief. It is said that there has been bad weather, which would be a sufficient ground for their not loading her earlier, and for not having her at the tip earlier to load. In my opinion that, I confess, I should be unable to decide in favour of the defendants. It seems to me that the argument which has been used, with regard to the construction of the long clause, does not make such weather as described in itself a sufficient protection, unless that weather was weather which affected the loading of this particular ship. It is not easy to distinguish the cases, but that is the view, if it was necessary—which it is not—I should be inclined to take; and I further think that the mere fact of there being a number of vessels in front of this vessel, by itself, would not be a sufficient protection. It seems to me that the fact of there being what has been called a glut of vessels was not a matter which fairly comes under the clause which protects the charterers or their agents, in case of "accidents to the mines, works, or machinery, floods or frosts, stoppages on railway or canal, or time when by any cause of what nature or kind soever beyond their personal control," they may be prevented or delayed in supplying, loading, or discharging, or the conveyance of the cargo from the mines to the vessel may be prevented or delayed. It is not necessary for me to deal with those points, because I think that the other point is sufficient; and therefore on the construction of the charter-party, as the days did not run, as it seems to me, against the charterer until the arrival of the ship, and the other conditions being fulfilled, they being ready to load, the case of the plaintiffs fails, and there must be judgment for the defendants.

Judgment accordingly.

Solicitors: *Botterell* and *Roche*; *W. A. Crump* and *Son*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 15 *and* 16, 1902.

(Before Sir F. JEUNE, President).

THE BERNARD HALL. (a)

Collision—Fog—Moderate speed—Duty of vessel in vicinity of fog to stop on hearing whistle forward of the beam — Regulations for Preventing Collisions at Sea, art. 16.

Where a fog signal is heard forward of the beam, the position of which is not ascertained, there is a duty under art 16 *upon the vessel hearing it to stop and navigate with caution until danger is over, although she herself may not be in a fog.*

The mere fact of there being fog in the vicinity of a vessel, if not ahead, does not in all cases make it obligatory to navigate at a moderate speed.

THIS was an action for damages by collision brought by the owners of the steamship *Holyrood* against the owners of the steamship *Bernard Hall*. The collision occurred about 4.55 p.m. on the 28th March 1902, in the Atlantic Ocean, in about lat. 49° 24′ N. and long. 10° 19′ W.

The plaintiffs' case was that the *Holyrood*, a steamship of 2715 tons gross register, was on a voyage from Portland Maine to London, laden with a general cargo. The weather was hazy, the wind light from the westward, and the current setting to the eastward of the force of about half a knot an hour, and the *Holyrood* was proceeding on a course E. ¼ N. true, making about five knots an hour through the water.

Under these circumstances a bank of fog was seen some distance to the northward on the port side of the *Holyrood*, and shortly afterwards the whistle of a steamer, which proved to be the *Bernard Hall*, was heard apparently a considerable distance off and about four points on the port bow. The engines of the *Holyrood* were immediately put to slow and her whistle was sounded a long blast in reply; and on the *Bernard Hall's* whistle being heard again, the engines were stopped and the whistle replied to. The whistle of the *Bernard Hall* was heard once again and answered, and then, shortly afterwards, three blasts were heard from her, whereupon the engines of the *Holyrood* were put full speed astern and three blasts sounded. The *Bernard Hall* then loomed into view about three ships' lengths off and about four points on the port bow, and struck the *Holyrood* on the port side abreast of the fore-rigging, and in consequence of the collision she sank shortly afterwards.

The plaintiffs charged the defendants (*inter alia*) with failing to keep a good look-out, with navigating under the circumstances at an improper rate of speed, and with not stopping and reversing when the fog signal of the *Holyrood* was heard forward of the beam. They also charged them with neglecting to comply with arts. 16, 19, 23, and 29 of the Collision Regulations.

The defendants' case was that the *Bernard Hall*, a steamship of 2677 tons gross register, was at the time of the collision on a voyage from Liverpool to Barbados. The weather was foggy, with a moderate breeze from the W.N.W., and the

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Bernard Hall was on a course S. 70° W., and had for some time been sounding her whistle and proceeding at half speed, making only about four knots an hour, as her speed was impeded by a very heavy swell on her starboard bow.

Under these circumstances a whistle from the *Holyrood* was heard close to. The engines of the *Bernard Hall* were at once reversed full speed astern and three short blasts sounded on her whistle, to which the *Holyrood* replied. After the *Bernard Hall* had been going astern about a minute, the *Holyrood* was seen coming up out of the fog at a great speed about three points on the starboard bow, and came on very fast, and, swinging to starboard across the bows of the *Bernard Hall*, she carried the latter's stem over to port and damaged her considerably.

The defendants charged the plaintiffs (*inter alia*) with a bad look-out, with failing to keep clear of the *Bernard Hall*, with navigating at an excessive rate of speed, with neglecting to stop her engines when the whistle of the *Bernard Hall* was heard, and with not sounding her whistle sufficiently often. They also charged the plaintiffs with neglecting to comply with arts. 15, 16, and 29 of the Collision Regulations, and counterclaimed for the damage done to their own vessel.

The material part of art. 15 of the Regulations for Preventing Collisions at Sea is as follows:

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be as follows—viz., (*a*) a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

Arts. 16 and 23 are as follows:

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel, hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Laing, K.C., *Scrutton*, K.C., and *Adair Roche* for the plaintiffs.

Pickford, K.C., *Aspinall*, K.C., and *Glynn* for the defendants.

The PRESIDENT (after dealing with the plaintiffs' case, and finding on the facts that the *Bernard Hall* was to blame for proceeding at an excessive speed).—Then with regard to the *Holyrood*. There is one point which appears to me to be a question of the construction of art. 16. I will accept her statement as to the fog for the purpose of this charge against the *Holyrood*—viz., that although there was on her port bow, at some distance, a fog out of which a sound came, and out of which a vessel eventually came, on the other hand, straight ahead and on the starboard hand, the weather was tolerably clear. The state of things is that a vessel not herself in a fog hears in a fog or out of a fog a whistle of a vessel that is in that fog. Under those circumstances what is the obligation imposed upon her by the second part of art. 16? [His Lordship then read art. 16.] Does the obligation under that article apply to a vessel which is not herself in a fog, but which hears the whistle of a vessel which is in a fog? I have come to the conclusion, after considering the matter, and also with the assistance of the Elder Brethren, because this is a matter upon which practical experience throws light, that that part of the article does apply, even though the vessel herself is not in a fog. It appears to me that in the reason of things it should be so, because although she might not herself be in a fog, there might be another vessel close to her in a fog. As danger arises, so comes the obligation to act with that particular kind of caution which this rule imposes. The subject matter appears to me to give rise to exactly the same necessity for caution as if the vessel is herself in a fog. The intention of the rule is clear. It is this—that where there is a vessel ahead, that is to say, forward of the beam, of which the position is unascertained, that is danger, and it becomes important to take precaution at the earliest possible moment. That being so, the danger is as great, and is of exactly the same kind, whether the vessel is herself in a fog or not. Under those circumstances it appears to me natural that the persons who drew the rule imposed upon her the same obligation as if she was in a fog. Therefore, even if the story of the *Holyrood* be accepted, it appears to me that she has not absolved herself from the obligation to stop her engines when she heard the first whistle from the *Bernard Hall*. It is clear she did not, and therefore I think she must necessarily be held equally to blame for that. An attempt was ingeniously made to argue that in this particular case there was sufficient ascertainment of the position of the *Bernard Hall* to free the *Holyrood* from the obligation under that rule. I have had occasion to consider what is the meaning of those words "not ascertained," and it appears to me that the real object of the words was to negative the obligation to stop in case of repeated whistles. When whistle after whistle is heard the position is ascertained, and therefore there is no obligation to stop for other whistles, but there is an obligation to stop with regard to the first whistle because at that time the position is not ascertained. It is quite true that the first whistle gives a certain indication where the vessel is, but it is obvious that if the position of the vessel is ascertained by the first whistle, the effect of the rule would be nullified. It is said in this case that there was a certain ascertainment. There was this. The vessel was not on the starboard side, and not right ahead, but was in a bank of fog on the port bow, and that fog was a certain distance. It cannot be disputed there was that amount of ascertainment. But the Elder Brethren point out that there would be extreme difficulty in knowing how far off the vessel would be in a fog, and therefore they do not think there was any such ascertainment as to justify the *Holyrood* in not complying with the clear terms of art. 16, by stopping her engines when she first heard the whistle of the *Bernard Hall*; and that it is impossible to say it would not have been a material matter if she had done so. She would not only have gained time, but also located with more precision the later whistles of the *Bernard Hall*, and although it is clear that she did stop at the second whistle, I think it is impos-

sible to say it would have been immaterial whether or not she had stopped at the first. I think, therefore, that the *Holyrood* must be held to blame for not obeying the second part of art. 16.

The other charge made against her is certainly more difficult to decide, because it involves the whole question as to the exact nature of the fog at the place where she was. It is clear according to the terms of art. 16, that the obligation to go at a moderate rate of speed applies only to a vessel which is herself in a fog, mist, falling snow, or heavy rainstorms, and not to a vessel which is near a fog. If a vessel is running into a fog ahead, I have held—and I think I may say rightly held, because I think the Court of Appeal took the same view—that there is an obligation upon her, although she is not actually in it at the moment, not only under the first part of art. 16, but under the general rules of seamanship, to go at a moderate speed. It seems to me only common sense, and according to the advice which competent sailors could not fail to give to this court. But a different state of things appears to me to apply if the vessel is not herself in a fog nor running into it. In this case the fog was not directly ahead, and I do not think the evidence shows that the vessel was running into a fog, and I cannot say there was any obligation, under the general principles of navigation, to go at a moderate rate of speed on account of fog being in the vicinity. That is the advice I receive. That assumes that I substantially accept the *Holyrood's* statement with regard to the fog, and although it is not easy to see how it could be exactly as she says, at the same time there is her clear evidence, and I am not prepared to say there is anything in this case to lead me to disregard it. I do not wish to go at great length into the questions which have been rather bandied about from side to side as to the witnesses who have not been called and ought to have been, or the documents which should have been produced and have not been. Although I regret that the fullest evidence has not been given, at the same time in this case I am not prepared to say that the absence of those witnesses or of that evidence has been sufficiently clearly shown to have been material to this case. Therefore I am not prepared to say that the statement given by those on board the *Holyrood* is not substantially accurate as to the state of the fog. It has also been suggested, and no doubt is the case, that the *Holyrood* had not a man exclusively on the look-out. I do not wish to depreciate the importance of having a proper look-out, but the Elder Brethren tell me that no serious blame ought to be attached to the *Holyrood* on that account. Where you have officers on the look-out themselves, as undoubtedly there were in this case, it would be stretching the matter rather far to say that serious blame is to be attached to the vessel because she had not one man on the look-out at a particular spot on the vessel. The result is that, on the grounds I have indicated, both vessels must be held to blame.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Rowcliffes, Rawle,* and *Co.*, agents for *Hill, Dickinson, Dickinson,* and *Hill*, Liverpool.

Monday, April 28, 1902.

(Before Sir F. JEUNE, President.)

THE ASSUNTA. (a)

Practice — Action in rem — *Misdescription of plaintiff—Practice of Court of Admiralty—Irregularity—Amendment—Order XLVIII.A, r.* 1—*Order LXX., rr.* 1, 2.

Order XLVIII.A, r. 1, *allows any two or more persons claiming as co-partners to sue in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action.*

A plaintiff issued a writ in an action in rem *for damage to cargo in the name of a firm of which he was the sole member, and indorsed it "the plaintiffs as owners of goods laden on board the steamship* A." *In a motion by the defendants to set aside the writ:*

Held, that as by the old Admiralty practice, which is not abrogated by the Judicature Acts, owners of a ship or cargo are entitled to sue as such, it would have been sufficient if the plaintiff had described himself as "owner" on the face of the writ, and that therefore this was a mere irregularity and might be cured by leave to amend under Order LXX., r. 1.

Held, also, that as the defendants, by applying for security for costs after knowledge of the irregularity, had taken a fresh step in the action, they were precluded by Order LXX., r. 2, *from taking advantage of the irregularity.*

Smurthwaite *v.* Hannay (71 *L. T. Rep.* 157; 7 *Asp. Mar. Law Cas.* 485; (1894) *A. C.* 494) *distinguished.*

THIS was a motion by the defendants to set aside the writ in an action *in rem* brought by the plaintiff in respect of damage to cargo.

The plaintiff had issued a writ dated the 21st March 1902 in the name of Louis Dreyfus and Co., residing at No. 3, Gracechurch-street, E.C., against the owners of the Italian steamship *Assunta*, claiming, "as owners of goods laden on board the *Assunta* on a voyage from the River Plate to England, compensation for damage done to the said goods during such voyage." The vessel was arrested on the same day, and a copy of the writ was duly served on board.

On the 26th March an appearance was entered by the solicitor for the defendants, and on the 10th April the vessel was released on bail and subsequently left this country.

It appeared that the sole member of the firm of Louis Dreyfus and Co. was Leopold Louis Dreyfus, who resided in Paris, and that the London address of the firm at the date of the writ was 194, Bishopsgate-street Without, E.C., and that the address of 3, Gracechurch-street, where the firm had carried on business for some years, and from which they had recently removed owing to the premises having been burnt down, had been inadvertently inserted in the copy of the writ by the plaintiff's solicitors.

On the 16th April the defendants applied to the registrar for an order to dismiss the action on the ground of non-compliance with the rules, or, in the alternative, that the plaintiff should give security for costs; but the application was refused.

The defendants now moved that the writ should be set aside on the grounds that it was improperly

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

issued in the name of Louis Dreyfus and Co., and did not contain the plaintiff's address.

Order XLVIII.A, r. 1, is as follows:

Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and certified on oath or otherwise, as the judge may direct.

Order LXX., rr. 1 and 2, are as follows:

Rule 1. Non-compliance with any of these rules shall not render any proceedings void, unless the court or a judge shall so direct, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.

Rule 2. No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

Leck for the defendants in support of the motion.—Before the Judicature Act there was no power to sue in the name of the firm, and Order XLVIII.A, r. 1, only gives this power when the firm consists of two or more persons. The writ therefore was improperly issued in the name of the firm, and the misdescription is more than a mere irregularity which the court can give leave to amend, as the plaintiff has begun the action in a manner not authorised by the rules. The writ is irregular within the decision in *Smurthwaite* v. *Hannay* (71 L. T. Rep. 157; 7 Asp. Mar. Law Cas. 485; (1894) A. C. 494), and ought to be set aside. A second objection to the writ is that it does not contain the plaintiff's address as required by Order IV., r. 1.

A. E. Nelson for the plaintiff, *contrà*.—There is a long-established practice in the Admiralty Court for plaintiffs to sue as "owners of the cargo" or "owners of the ship," and it was never intended that the rules should abrogate this antecedent practice. Order LXVIII.A, r. 1, does not apply to actions *in rem*, which are different from actions *in personam*:

The Freedom, 25 L. T. Rep. 392; 1 Asp. Mar. Law Cas. 136; L. Rep. 3 A. & E. 495;
The Longford, 60 L. T. Rep. 373; 6 Asp. Mar. Law Cas. 371; 14 P. Div. 34;
The Maréchal Suchet, 74 L. T. Rep. 789; 8 Asp. Mar. Law Cas. 158; (1896) P. 233;
St. Gobain v. *Hoyermann's Agency*, 69 L. T. Rep. 329; (1893) 2 Q. B. 96.

Even if the rule does apply, the insertion of the name of the firm on the writ was a mere irregularity which the court may give leave to amend. *Smurthwaite* v. *Hannay* only decided that each of the plaintiffs in that case had to bring a separate action. The indorsement on the writ properly described the plaintiffs as owners of the cargo. He referred to

Petty v. *Daniel*, 55 L. T. Rep. 745; 34 Ch. Div. 172;
Dickson v. *Law*, 72 L. T. Rep. 680; (1895) 2 Ch. 62.

The defendants' steamship is an Italian vessel now out of the jurisdiction of the court, and the effect of setting aside the writ would be to deprive the plaintiff of his remedy against the defendants. Further, by Order LXX., r. 2, the defendants are not entitled to make this application, as they have taken a fresh step in the proceedings by asking for security for costs after knowledge of the irregularity. The omission of the plaintiff's proper address is an irregularity which the court has power under LXX., r. 1, to cure.

Leck in reply.

The PRESIDENT.—The plaintiff in this case is really one person, but he sues in the name of Louis Dreyfus and Co.—the firm name which he apparently uses in business—the indorsement on the writ showing that he sued as the "owners of goods laden on board" a certain steamship. Now in one sense that is not an important matter, because it was known to the parties what the real facts were. The indorsement on the writ showed who the real plaintiff was, and anyone could ascertain at any moment who Louis Dreyfus and Co. in fact were. But in another sense it is an important matter, because, this being an action *in rem*, the effect has been that the defendants' ship has left the jurisdiction, and, if this writ is held bad, it will be necessary for the plaintiff to wait until he has an opportunity of arresting the vessel again. The question is whether that title of the plaintiff renders this writ null; whether it is wrong, and, if so, whether it is merely an irregularity. The rule relied on is Order XLVIII.A, r. 1. [His Lordship then read the rule.] By that rule any party to an action may apply, by summons, for a statement of the names and addresses of the actual partners. Before the date of that rule persons could not sue or be sued in the name of a firm. The names of all the partners had to be added; but this rule gives power to persons carrying on business under a firm name to sue in the firm name, although in point of fact there might be several partners, without stating the names of the partners, except in the limited way required by the latter part of the rule. Now, what is said is first of all that this rule does not apply to an action *in rem* at all, and there is a great deal of force in that observation. But it is not necessary for me to decide that actual question, because there is undoubtedly an old practice in the Admiralty Court of very great value to persons concerned in those matters, which enables the owners of a ship or cargo, in any Admiralty action, to sue as such —a proceeding which would have been regarded by the courts of common law with professional horror. But the courts of Admiralty allowed it for a very good reason, because, what they were really dealing with was one ship against another, and so long as you had the names of the vessels you had really all that was material, because you could ascertain the names of the owners from the register, or otherwise. Therefore you have an antecedent practice of a very peculiar kind in the Admiralty Court, and certainly I do not think it is too much to say that it is impossible to suppose that this general rule was intended to abrogate so old and valuable practice as that which obtained in the Admiralty Court. If one looks at the terms of the rule it does not apply to the case of owners of ships, because it speaks only of persons suing

and being sued in the name of their respective firms, whereas the owners of a ship do not constitute a firm in that sense at all. Therefore I feel no difficulty at all in saying that this rule does not apply in any sense to abrogate the former practice of the Admiralty Court, of allowing the owners of a ship to sue as such. But that does not carry us the whole way in this case, because this is not a case of the owners of a ship suing. Mr. Dreyfus did not in this case sue as "owner." He sued as Louis Dreyfus and Co., and I am not prepared to say that in its narrower sense, and I think in its truer sense, this rule does not apply to the Admiralty Division as well as to any other division.

If the question in this case was whether Order XLVIII.A, r. 1, applied to the Admiralty jurisdiction I am not prepared to hold that it does not, but a further question arises which, to my mind, is of great importance in this case. I have to decide not only whether there is a mistake in this case, but whether it is an irregularity which can be cured. I am told that it is more than an irregularity, because previously a partnership could not sue at all—it could only sue in the names of the real partners—and therefore, it is said, the terms of this order must be strictly complied with, or else the whole thing is a nullity. The case of *Smurthwaite* v. *Hannay* (*ubi sup.*) is relied upon. If these were proceedings in common law, I do not wish to decide whether or no that might not be the case. But what I do think is this, that in the Admiralty Court, having regard to the previous practice, which I do not think has been abrogated, and, having regard to the fact of the indorsement on this writ, it is a mere irregularity. What are the facts? Here is a person suing in the name of the firm, and the writ states on the back how he does sue. If he had sued as "owners" I think it would have been perfectly good. Therefore all it comes to is this, that instead of putting on the face of this writ, "Louis Dreyfus and Co., as owners," or "Louis Dreyfus, as owner," of the goods, he has put Louis Dreyfus and Co. on the face of the writ, and he has stated clearly on the back that he is suing as owner. I cannot regard that as more than the merest irregularity. It is perfectly different from the case of *Smurthwaite* v. *Hannay* (*ubi sup.*). There persons were suing together who could not sue together. There was a very material matter involved, and there was much more than a mere irregularity; but having regard to the Admiralty practice in this court, and having regard to the indorsement on the writ, I am of opinion that in the Admiralty Court, where the only mistake a man makes is in not putting on the face of the writ what he had put on the back, and which, if put on the face of the writ, would have been good, it is a mere irregularity. Therefore, I think under the circumstances that the mistake made is a mere matter of irregularity and that Order LXX. applies, and an amendment may be allowed. It follows that not only does Order LXX. apply, but Order LXX., r. 2, too—and in this case the defendants have taken a step—namely, the asking for security for costs, after they knew the facts of the real composition of Louis Dreyfus and Co. That is quite enough for me to say that I think in this case all that has happened is mere irregularity, which can be cured by an amendment, and that I am prepared to allow. I do not think it necessary to deal with the other matter, as to the address of the plaintiff, because to call that an irregularity seems to me to be using too high a term. The original writ was correct in that respect, but the copy of the writ was wrong.

Solicitors for the plaintiff, *Lowless* and *Co.*
Solicitor for the defendants, *Robert Greening.*

May 6 *and* 8, 1902.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE MARGERY. (*a*)

Salvage—Associated insurance clubs—Agreement by owners, as insurers in clubs, to render mutual assistance—Notice to masters—Arbitration—Rights of master and crew.

Where salvage services were rendered by one vessel to another, and both vessels were insured in associations under the articles of which compensation for salvage services was to be mutually settled by the committees of the associations.

Held, that the master and crew of the salving vessel were not bound by such settlement, as they were not parties, and could not be taken to have acquiesced in it.

THIS was an appeal by the defendant, the owner of the steam drifter *Margery*, against a decision of the judge of the County Court at Yarmouth awarding salvage to the master and crew of the steam drifter *Fifteen* for services rendered to the *Margery* in the North Sea.

The *Margery* was a ketch-rigged steam drifter of 31 tons register, and carried a crew of ten hands all told. On the 9th Oct. 1901, while fishing off the east coast, and when about thirty-six miles from Yarmouth, she lost her rudder. There was a heavy sea running at the time and a strong wind from the N.W., and two shapes were hoisted to show that she was not under command. The flag of the club she was insured in was also hoisted. About 3 p.m. the *Fifteen*, a steam drifter of 25.76 tons register, manned by a crew of ten hands all told, came up and gave the *Margery* a rope. The *Margery* at this time had managed to get within about fourteen miles of Yarmouth. The rope shortly afterwards parted and fouled the propeller of the *Margery*. A wire rope was then passed, and she was taken in tow by the *Fifteen* and brought safely into Yarmouth.

Both vessels at the time in question were insured in insurance clubs, the *Fifteen* in the Total Loss Mutual Steamship Insurance Company of Sunderland, and the *Margery* in the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields.

In the policy under which the *Fifteen* was insured was the following clause:

It is mutually agreed between the assured and assurers that the articles of association of the assurer's company shall be deemed part hereof, and be binding upon the assured and assurers as fully and effectually, to all intents and purposes as if such articles were inserted in this policy, and any breach thereof will invalidate the same.

By clause 92 of the articles of association:

Steamers insured in this association bind themselves to

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

give assistance to any vessel broken down or in distress, insured in this association, or in the associations of the United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields . . . it having been arranged that the vessels in these associations shall be bound to like conditions, and that the compensation for services rendered be decided and determined by the committees of the association or associations in which the vessels were insured.

In the insurance policy of the *Margery* was a similar clause, and a similar article was embodied in the articles of association of the club she was insured in.

In accordance with the rules of the two clubs, a committee, consisting of three directors of the United Kingdom Insurance and Indemnity Association and one director of the Total Loss Company of Sunderland, met on the 16th Dec. The statements of the two masters were read and discussed, and an award of 25*l.* made. This sum was paid to the owners of the *Fifteen* and accepted, and out of this amount they tendered 12*l.* 10*s.* to the master and crew of their vessel, but they refused to accept it.

On the 6th Jan. 1902 an action for salvage was instituted in the Yarmouth County Court by the master and nine members of the crew of the *Fifteen* against the *Margery*, and her nets and fishing gear, claiming the sum of 150*l.* At the trial of the action it was admitted by the master and crew of the *Fifteen* that they were aware of the arrangement as to mutual assistance, and that they had noticed the club flag the *Margery* was flying, and knew the reason why she was flying it, but they denied that they had ever heard of or agreed to the mode of settlement adopted by the two clubs.

In the agreement signed by the crew of the *Fifteen* was the following clause:

Every member of the crew, including apprentices and sea-fishing boys, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage, or salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement.

Under the heading "Salvage" against each name was written "half and half."

The various associations had published a card with illustrations in colours of their flags, and on it was printed:

Notice to Masters.—The above association is amalgamated with the under-mentioned associations and companies for the settlement of towage cases: United Kingdom Steam Tug and Trawler Insurance and Indemnity Association of North Shields (the names of other associations then followed). All masters of vessels insured in the Total Loss Insurance Company, Sunderland, are bound to render and accept assistance when necessary to and from any vessel insured in the above associations and companies.

One of these cards was on board the *Fifteen*.

The value of the *Fifteen* at the time of rendering the services was 3200*l.*, and of the *Margery* 2000*l.*, her nets and gear 300*l.*, and fish 1*l.* 10*s.*, making a total of 2301*l.* 10*s.*

The case was tried before the learned County Court judge, assisted by nautical assessors, and having held that the master and crew were not bound by the arbitration proceedings, he awarded the master and crew the sum of 60*l.* by way of salvage, which, he explained, was half of what he thought would have been a fair sum if the owners had been also parties to the action.

The defendant appealed.

Scrutton, K.C. and *Roche* for the appellant.—The master of the *Fifteen* knew he was bound to render assistance, and admitted that he knew of the arrangement as to vessels in the various clubs rendering each other assistance. He also admitted that he acted upon it when he saw the club flag flying on board the *Margery*. The owners are bound by the arrangement, and it is submitted the master and crew are too. The card with the "Notice to Masters" on it, which was exhibited on board, is sufficient to bring it to their notice. Further, in the agreements signed by the crews there is the provision that the division of salvage shall be on the basis of "half and half." The master can bind his officers and men by an agreement fixing the amount of reward for salvage services, and presumably the owner of the salving ship is in the same position as the master:

See Kennedy on Salvage, p. 224;
The Nasmyth, 52 L. T. Rep. 392; 5 Asp. Mar. Law Cas. 364; 10 P. Div. 41.

Batten for the respondents *contra*.—The master and crew of the *Fifteen* were not bound by the settlement arrived at between the respective owners. In any event, the sum awarded by the committee was absurdly inadequate. The right to salvage is dependent, not on contract, but is a right given in the interest of commerce to those who voluntarily undertake to save property, and even when an agreement is made, the court will always closely scrutinise it to see whether it is a fair one or not. The crew are no parties to the contract entered into by the owners and their underwriters. In order to bind the crew the contract must be put clearly before them, and they must be in a position to realise the logical consequences of their bargain. The "Notice to Masters," which has been relied on, only deals with towage, and only gives instructions that they are to assist, or take assistance from other club vessels when necessary, but the terms on which the assistance is to be rendered are not mentioned. The effect of such an agreement as that alleged to have been entered into by the crew, is to abandon the lien and oust the jurisdiction of the court. It is also submitted that it would be illegal under sect. 156 (1) of the Merchant Shipping Act 1894. But, putting these considerations aside, the owners had no power to bind the crew:

The Britain, 1 Wm. Robinson, 40;
The Sarah Jane, 2 Wm. Robinson, 110;
The City of Calcutta, 79 L. T. Rep. 517; 8 Asp. Mar. Law Cas. 442.

[He was stopped by the Court.]

Roche in reply.—The agreement was equitable:
The Phantom, 15 L. T. Rep. 596; 2 Mar. Law Cas. O. S. 442; L. Rep. 1 A. & E. 58.

In *The Enchantress* (2 L. T. Rep. 574; Lush. 93), which was a case decided by Dr. Lushington after the passing of sect. 182 of the Merchant Shipping Act 1854, it was held that agreements limiting the proportion of salvage money are to be maintained if equitable. See also

The Ganges, 22 L T Rep. 72; 3 Mar. Law Cas. O. S. 342; L Rep 2 A. & E. 370

In *The Britain* (*ubi sup.*) and *The Sarah Jane*

(*ubi sup.*) the agreements which it was attempted to set up against the salvor's claims, were made after the services had been already rendered. Here the agreement to refer to arbitration is a general one, and provided for salvage services being rendered at some future time. In *The Inchmaree* (80 L. T. Rep. 201; 8 Asp. Mar. Law Cas. 486; (1899) P. 111) the distinction between an agreement as to future and past services was made, and the amount fixed by the agreement as to future services upheld.

The PRESIDENT. — I think this case can be decided substantially on the ground upon which it has been decided in the court below — that is, a ground which really depends, in the last resort, on a question of fact. The action is brought by the master and crew of the *Fifteen* against the owner of the steam drifter *Margery*. It is not an action by the owners of the *Fifteen*, but only by the master and crew; and the circumstances in which it was brought were that the owners of those two fishing vessels appear to belong to institutions known as clubs, and the result of that is that those vessels are bound, according to the rules of those clubs, to render each other assistance on the terms that the price to be paid for such assistance shall be determined by a particular kind of arbitration, and for the moment I will assume that the owners of the vessels, and their vessels in that sense, are bound by that agreement. The question is whether the master and crew are bound; and in this case, after an arbitration had taken place as to the amount to be paid, the master and crew say they are not bound by that arbitration, and they ask to have the amount of their services determined in value by the court. The learned judge in the court below has agreed in the views they put forward. He has found, as we gather from his remarks, that they are not bound by the arbitration. I do not think he meant, or that it is suggested he meant, that they were not bound by the arbitration because the arbitration is invalid, but that they were not bound by the arbitration because they were not bound by any agreement. That is the point upon which I think the case turns. I should be prepared to admit that the owners may be bound, when a question arises as to salvage, to go to arbitration in the way mentioned, and have the amount determined; but in this case the very simple question is: Are the master and crew, who have independent rights in the matter, bound by that agreement? That, as I said, depends upon a question of fact, which, it appears to me, we have to determine. Now, the master and crew are bound as between themselves and their owners, to a certain extent, because they entered, under their articles, into an agreement that they, putting it shortly, should have half of whatever salvage amount should be taken. The words are very clear about that. To that extent, between themselves and their owners, they are bound; but there the matter appears to me to stop. We are asked to go very much further, and asked to say that not only are they bound as between themselves and their owners, but as between themselves and the owners of any other ship they may salve they are bound by an agreement made by their owners to allow the matter to go to arbitration and to take the money which the arbitrators give. That cannot be made out on any express agreement. There is none. There is no language to that effect in their articles, and no language to that effect anywhere; but it is said there is a certain notice exhibited on the ships, of which we have a copy, and which is in some way said to bind the master and crew. I am not at all prepared to say that under certain circumstances an agreement made by the owners on behalf of the crew might not bind them, just as an agreement made under certain circumstances by the master may bind the owners. It is clear that if, before the salvage service is rendered, the masters of the two ships meet together, they may make an arrangement by which, subject to the jurisdiction of this court to see whether it is equitable or not, the masters can undoubtedly bind the owners. I should not be prepared to deny that an agreement made under similar circumstances by the owners on behalf of the master and crew might bind the master and crew; but the reason for that is the necessity of the case. The service has to be rendered on the spur of the moment, and if the agreement cannot be made by the only persons who are there to make it, it cannot be made at all. Therefore *ex necessitate* an agreement so made binds; but that is a very different thing from saying that when there is no stress at all, an arrangement made by the owners binds the master and crew, without any notice to the master and crew. That proposition I am not prepared to adopt, nor is that seriously contended.

What is said is, that the master had notice of these terms and had acquiesced in them. That appears to me to be a question of fact upon which the matter turns, and I am not prepared to say that there was any such acquiescence by the master of the ship which binds him, much less his crew, to the settlement of this case by arbitration in the way the owners may, perhaps, have agreed. It is quite clear that in fact the master and crew knew nothing of the terms. We have the evidence of the master himself to the effect that he had never heard of any such agreement, and I do not think it can be disputed that, as to going to arbitration, that is a matter about which this particular master and this particular crew were wholly ignorant; but it is said, in spite of that, there was this card exhibited, and that in some way bound them. What is this card? No doubt it is called a "Notice to Masters," and it states [the learned judge then read the words of the notice]. I agree in what one of the learned counsel said, that it is possible that to an astute person it may convey the impression that disputes are to be determined by arbitration in a particular way, but further than that it does not seem to me to go. It does not say what the terms are. The very fact that it uses the word "towage," and not "salvage," appears to me to make it clear that it does not intend to give particulars of the agreement between the owners, and, as my learned brother has pointed out, there are cases of salvage in which the question of towage would not enter. Therefore, when we find the notice limited to "the settlement of towage cases," I think one is entitled to say that it hardly even gives notice that there may be an arrangement for the peculiar settlement of salvage cases. Then it goes on to say that they are bound to render assistance. That may be, but it does not say that they are bound to enter into the

service upon these particular terms as regards themselves. Therefore, assuming they had this card before them, it appears to me it falls very short indeed of giving them such notice of the arrangement as would cause them to be bound by acquiescence. Indeed, the highest that acquiescence can be put is that they went to sea and continued their fishing operations, and salving operations, with this in their minds. This appears to me wholly insufficient to fix them with acquiescence in a contract of which they knew nothing. Upon this ground, therefore, I am prepared to decide the case. I am conscious that this decision leaves open many questions, some of them of very great interest—for instance, how far this court would review the decision arrived at by arbitrators of this kind, apart from any question of the validity of the arbitration by reason of incapacity on the part of the arbitrators. I am not prepared to say, at present, that this court has any such power. Whether the power of the court can be extended to deal with arbitration made in pursuance of an agreement to arbitrate by persons supposed to be *sui juris*, having knowledge of the circumstances—whether in its application to a particular case the arbitration of such a tribunal would come under the jurisdiction of this court, I, at the present moment, must decline to say.

There is a further question in this case — namely, whether this particular arbitration is assailable on the ground that the arbitrators were not sufficiently independent. I entirely decline to express any opinion. It is not an easy question to decide, and it is one which I am glad to be able to avoid. Some day it may have to be argued whether, even as between owners, the agreement sufficiently avoids difficulties with regard to public policy; and there may also be a question, as regards seamen, whether it is not in contravention of the provisions of the Merchant Shipping Act. It is not necessary in this case to go into these questions, and I base my decision upon the ground that as between the master and crew of this vessel and the owners of the vessel salved, it is not shown that there is any agreement which ousts the jurisdiction of this court. My learned brother reminds me that something ought to be said about the figure at which the court below arrived. I think that stands upon very strong ground. The matter was considered by the judge below with nautical assessors, and the court arrived at a figure considerably in excess of the amount awarded by the arbitrators, but which, upon the facts of the case, does not appear to be at all in excess of what a reasonable tribunal might arrive at, so that I am not prepared to differ from it.

BARNES, J.—The learned President has dealt so fully with the case that I might content myself with saying that I agree; but, having regard to the importance of the matter, I desire to add a few words. The plaintiffs' claim is that of the master and nine of the crew of the steam drifter *Fifteen* for salvage in respect of services rendered to the drifter *Margery* off Yarmouth. It is sought to meet the claim by saying, on the part of the defendant, that the plaintiffs cannot recover on the basis of an ordinary assessment of salvage in this court, or the court below, but are bound by a decision of certain arbitrators, fixing an amount which would give to the present plaintiffs a sum of 12*l.* 10*s.* Now, it seems to me that in order to make out this defence, the defendant has to prove that the plaintiffs have agreed to submit their claims to the decision of the arbitrators who made the award. It is sought to do that in a very roundabout way. No direct agreement, no express agreement, between the salvors who are suing and the owner or master of the salved vessel is proved, or sought to be proved, but it is said that the *Fifteen* was insured in a mutual insurance club; that the terms of that insurance incorporated the rules of that club, which provided that steamers insured in it bound themselves to give assistance to any vessel broken down or in distress insured in that association or certain other associations; that it had been arranged that the vessels in those other associations should be bound by like conditions, and that the question of remuneration for services rendered should be determined by the committees of the associations. It is also said that the defendant ship was insured in another association, and that the policy by which she was insured in that other association incorporated the rules of that association, which had rules substantially to the same effect. Then, having both ships insured in that way, the secretary of one of the clubs was called as a witness, to say that there is a mutual arrangement between the clubs for the purpose of assessing salvage claims. So far there has been, in a roundabout way, an arrangement suggested between the owners of the ships; not a word about the master and crew. It is then said that the master and crew are fixed by this arrangement, and have become parties to it, because a notice was exhibited on board each ship. A copy of it has been furnished to the court. There the evidence really stops, because, though it is sought to say that the master and crew in some way assented to that state of things, so far as the evidence goes, the master says although he knew of this notice, he knew nothing whatever about the provision to go to arbitration, and that he never had been told anything about it and never agreed to it. The other evidence is substantially to the same effect; for instance, the engineer is called and says, "that has nothing to do with the crew." I think it is quite clear that the master and crew never, in fact, thought that they were bound, as salvors, by what it is suggested was an intimation to them that they were so bound; so that the suggested contract put forward by the defendant seems to me to fail entirely of proof, because he does not prove that the parties suing ever agreed in any way to be bound. I think there would be great difficulty in this case in establishing such a matter even with stronger evidence than is put forward, for the reason that the master and crew are employed by their owners on the basis of certain articles. Those are the terms of their employment, and amongst them there is a stipulation, that as between owners and master and crew any salvage shall be divided in halves. That enables the crew to say: "When you have got anything you must give us half of it"; but, then, how are they bound in any way afterwards to render salvage services at all? There appears to me to be nothing to show that they are. This card only shows that the association is amalgamated with other associations for the purpose of towage services, and it states that all masters are bound

to render and accept assistance when necessary to and from other vessels insured in the associations; but how bound? They never agree to be bound. They are on the ship, and the only contract they have made is to be employed by their owners upon the basis of the articles. They never agree to be bound to render or accept assistance, and unless a great deal more is proved, it seems to me they remain free agents to render services upon such terms as are usual. I think, therefore, that this case may be disposed of on those grounds as a pure question of fact, and I do not desire to enter into what seems to me a very difficult question—namely, what would be the position if it could be proved that the master and crew had agreed to go to arbitration. Then there would still be raised the question whether this court would have power to review any decision which might not meet, from any cause, the justice of the case. I do not wish to throw out any words now which should in any way lessen the jurisdiction of the court. There are other questions as to how far the provisions of the Merchant Shipping Act affect the case, and I do not wish to express an opinion on such a matter, which would require very careful consideration. Upon the merits it seems to me that we ought not to interfere with the judgment of the court below, as upon the facts there is nothing to show me that it has arrived at an erroneous conclusion.

Solicitors for the appellant, *Williamson; Hill, and Co.*, agents for *R.* and *R. F. Kidd*, North Shields.

Solicitors for the respondents, *Dubois* and *Williams*, agents for *H. Chamberlin*, Great Yarmouth.

March 25, *April* 10, *and June* 19, 1902.

(Before BARNES, J. and TRINITY MASTERS).

THE CAYO BONITO. (*a*)

Collision—Compulsory pilotage in London district—Ship carrying passengers—Constant trader—6 Geo. 4, c. 125, s. 59—Order in Council the 18th Feb. 1854—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 603 and 622.

The Order in Council of the 18th Feb. 1854, extending the exemptions from compulsory pilotage, contained in sect. 59 of 6 Geo. 4, c. 125, in so far as it deals with ships and vessels trading to ports between Boulogne inclusive and the Baltic, applies only to ships and vessels which are "constantly" trading between such ports.

The words "ship or vessel trading" are descriptive of the vessel, and not merely of a particular voyage, but, in order to constitute a constant trader within the meaning of sect. 59 and the Order in Council, it is not necessary that a vessel should be exclusively engaged in trading to ports between Boulogne and the Baltic.

THIS was a collision action brought by the owners of the steamship *British Prince* against the owners of the steamship *Cayo Bonito*. The *British Prince*, a steamship of 7326 tons gross register, was at the time on a voyage from New York to London and Antwerp with a general cargo, cattle, horses, and cattlemen. The *Cayo Bonito*, a steamship of 3427 tons gross register, belonging to the Cuban Steamship Company, was on a voyage from London to Goazacoalcos, *viâ* Antwerp, Havana, and Vera Cruz, with a part cargo, and carrying one passenger. The collision occurred about 10.15 p.m. on the 8th Feb. 1902 in the Thames estuary near the Black Deep Lightship. Both vessels were, it was alleged, compulsorily in charge of pilots at the time of the collision. At the trial of the action before Barnes, J. and Trinity Masters, the learned judge came to the conclusion on the facts that the collision was solely caused by the negligence of the pilot in charge of the *Cayo Bonito* at the time, and reserved the question as to whether the employment of the pilot was compulsory or not for further information. The case is reported on the question of compulsory pilotage in the London district.

The Pilotage Acts and Orders in Council referred to in the judgment are as follows:

By sect. 1 of 5 Geo. 2, c. 20, it is provided:

From and after the twenty-fourth day of June in the year of our Lord one thousand seven hundred and thirty-two, if any person shall take upon himself the charge of any ship or vessel as pilot down the river of Thames, or through the North Channel to or by Orfordness, or round the Long Sand-head into the Downs, or down the South Channel into the Downs, or from or by Orfordness up the North Channel, or the river of Thames, or the river of Medway, other than such person as shall be licensed and authorised to act as a pilot by the said master, wardens, and assistants [of the Corporation of the Trinity House] for the time being . . . every person so offending, and being thereof lawfully convicted . . . shall for every such offence forfeit the sum of twenty pounds: Provided, that nothing in this Act contained shall extend or be construed to extend to the obliging of any master or owner of any ship in the coal trade, or other coasting trade, to employ or make use of any pilot.

By sect. 2 of 48 Geo. 3, c. 104, it is provided:

That from and after the first day of October one thousand eight hundred and eight, it shall be lawful . . . for the Corporation of Trinity House of Deptford Stroud, and they are hereby required to appoint and license under their common seal, fit and competent persons, duly skilled, as pilots for the purpose of conducting all ships and vessels, sailing, navigating, and passing up and down or upon the rivers of Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, as well as between Orfordness and London Bridge, as from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel from the Isle of Wight up to London Bridge, which vessels shall be conducted and piloted by such pilots so appointed and licensed, by no other pilots or persons whomsoever, except pilots appointed by the Society or Fellowship of the Trinity House of Dover, Deal, and the Isle of Thanet (commonly called Cinque Port pilots) so far as such pilots are hereby authorised to pilot ships and vessels from the westward up to London Bridge, and from London Bridge downwards to the westward; that is to say, from any port or place between the Isle of Wight and the said bridge, according to the provisions in that behalf hereinafter contained, and also save and except, as well all colliers, as also all ships and vessels trading to Norway and to the Cattegat and Baltic, and likewise round the North Cape and into the White Sea, and save and except all constant trades inwards from the ports between Boulogne inclusive, and the Baltic, such ships and vessels having British registers, and coming up or going down the North Channel by

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Orfordness, but not otherwise; and likewise save and except all coasting vessels and all Irish traders using the navigation of the river of Thames as coasters.

The material part of sect. 2 of 52 Geo. 3, c. 39' is as follows:

Save and except as well all colliers and also all ships and vessels trading to Norway, and to the Cattegat and Baltic, and likewise round the North Cape, and into the White Sea; and save and except all constant traders inwards from the ports between Boulogne inclusive and the Baltic, such ships and vessels having British registers, and coming up the North Channel by Orfordness, and not otherwise; and likewise save and except all coasting vessels, and all Irish traders using the navigation of the river Thames as coasters.

Sect. 59 of 6 Geo. 4, c. 125, is as follows

Provided always, and be it further enacted, that, for and notwithstanding anything in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either by the North Channel but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burden of sixty tons, and having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel.

By sect. 1 of 16 & 17 Vict. c. 129 so much of 6 Geo. 4, c. 125, as related to the Cinque Port pilots was repealed, and the Trinity House and Cinque Port pilots were amalgamated.

Sect. 21 is as follows:

And whereas it is expedient to give facilities for amending the system of pilotage . . . Be it enacted that it shall be lawful for every pilotage authority, by regulation or bye-law made with the consent of Her Majesty in Council from time to time to do all or any of the following things in relation to pilots and pilotage within their respective districts—viz.: To exempt the masters of any ships or vessels, or of any classes of ships or vessels, from being compelled to employ pilots, and to annex any terms or conditions to such exemptions, and from time to time to revoke and alter any exemptions so made, and to revise and extend any exemptions now existing by virtue of any Act of Parliament or charter, upon such terms and conditions and in such manner as such authority, with such consent as aforesaid, may think fit.

Order in Council, 18th Feb. 1854:

Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of the 59th section of the Act 6 Geo. 4, c. 125, submitted by the Corporation of Trinity House for the consideration of Her Majesty in Council, pursuant to the provisions of the 21st section of the Act 16 & 17 Vict. c. 127:

The masters of the undermentioned ships and vessels shall, subject to the provisions contained in the 59th section of the Act of Parliament, 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage—viz.: Of ships and vessels trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, when coming up by the south channels. Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south channels. Of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits nor anchoring therein.

Sects. 353 and 379 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) are as follows:

Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall continue in force.

Sect. 379. The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district and in the Trinity House outport districts, that is to say . . . (3) Ships trading to Boulogne or to any place in Europe north of Boulogne.

The material part of the Order in Council of the 21st Dec. 1871 is as follows:

And whereas the Trinity House of Deptford Strond, being the pilotage authority for the said districts, hath submitted for the consideration of Her Majesty in Council the following bye-law (that is to say:) That all ships trading from any port or place in Great Britain within the London District or any of the Trinity House outport districts to the port of Brest in France, or any port or place in Europe north and east of Brest, or to the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from Brest, or from any port or place in Europe north and east of Brest, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man to any port or place in Great Britain within either of the said districts, when not carrying passengers, shall be exempted from compulsory pilotage within such districts. Now, therefore, Her Majesty . . . is pleased to declare her consent to the same.

Sects. 603 (1) and 625 of the Merchant Shipping Act 1894 (57 & 58 Vict. 60) are as follows:

Sect. 603 (1). Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force.

Sect. 625. The following ships when not carrying passengers shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts (that is to say:) (3) Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man. (4) Ships trading from the port of Brest, or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any

port in Great Britain within the said London or Trinity House outport district.

The evidence called showed that the *Cayo Bonito* belonged to the Cuban Steamship Company, and was one of several vessels regularly engaged in two lines—one running between London, Antwerp, Cuba, and America and back, and the other between London and New Orleans, calling sometimes at Bermuda. The prospectus of the company was also put in.

Aspinall, K.C. and *Dawson Miller* for the plaintiffs, the owners of the *British Prince*.

Laing, K.C. and *Bullock* for the defendants, the owners of the *Cayo Bonito*.

The arguments of counsel sufficiently appear from the judgment.

Besides the various Acts of Parliament set out above, the following cases were referred to in the course of the argument:

The Agricola, 2 Wm. Robinson, 10;
Reg. v. *Stanton*, 8 E. & B. 445;
The Earl of Auckland. 5 L. T. Rep. 558; 1 Mar. Law Cas. O. S. 117; Lush. 387; 15 Moo. P. C. C. 304;
The Wesley, Lush. 268;
The Lloyds, or Sea Queen, 9 L. T. Rep. 236; 1 Mar. Law Cas. O. S. 391; Br. & L. 359;
The Hanna, 15 L. T. Rep. 334; 2 Mar. Law Cas. O. S. 434; L. Rep. 1 A. & E. 283;
The Hankow, 40 L. T. Rep. 335; 4 Asp. Mar. Law Cas. 97; 4 P. Div. 197;
The Vesta, 46 L. T. Rep. 492; 4 Asp. Mar. Law Cas. 515; 7 P. Div. 240;
Courtney v. *Cole*, 57 L. T. Rep. 409; 6 Asp. Mar. Law Cas. 169; 19 Q. B. Div. 447;
The Sutherland, 57 L. T. Rep. 631; 6 Asp. Mar. Law Cas. 181; 12 P. Div. 154;
The Rutland, 76 L. T. Rep. 662; 8 Asp. Mar. Law Cas. 270; (1897) A. C. 333;
The Columbus, 80 L T. Rep. 203; 8 Asp. Mar. Law Cas. 488.

Cur. adv. vult.

June 19.—BARNES, J.—This was the case of a collision which took place on the 8th Feb. last between the *British Prince* and the *Cayo Bonito*, in the estuary of the Thames, near the Black Deep Lightship, and the question of fault was heard before me some time ago. I held that the *Cayo Bonito* was in fault for the collision, but that the fault rested with the pilot of that ship, and the question of whether or not the pilot was compulsorily employed was reserved for consideration. It was argued before me a considerable time back, and then the case stood over for some further information with regard to the service on which the *Cayo Bonito* was engaged. It is only within the last few days that that information has been furnished to me. The *Cayo Bonito* was a large vessel belonging to the port of London, of 3427 tons gross register, and at the time of the collision she was on a voyage from London to Antwerp, and then from Antwerp to Goatzacoalcos, which I think is near Vera Cruz, Mexico. She had some cargo on board and one passenger, and it was in the course of the passage from London to Antwerp that the collision between her and the *British Prince* took place, about the place which I have mentioned. The plaintiffs contended that the employment of the pilot was not compulsory by law, but the defendants contended that it was so compulsory, and that, therefore, they ought to be acquitted from the judgment in this case. The question of compulsory pilotage in this present case is one of very considerable difficulty, and the difficulty arises from what I cannot help considering the present unsatisfactory state of the legislation which affects the question of pilotage and the exemptions from pilotage in the Thames and its estuary. If one looks through the Acts it is extremely difficult to come to any satisfactory conclusion upon them, and although I have examined them as carefully as I can, I feel that in the decision which I am about to give I cannot arrive at that conclusion with any confidence. There are two questions. One, I think, is entirely a question of law, and the other is either a simple question of fact, or possibly it may be termed a question of mixed law and fact. The legal question is, what is the true meaning of the Order in Council which the case turns upon, and the second is, when one has placed a meaning upon that order, whether this vessel is to be treated as falling within the exemption which that order provides for, having regard to the circumstances of her trading. Now, pilotage in this locality is compulsory under sect. 622 of the Merchant Shipping Act 1894, which provides that, subject to any alterations made by the Trinity House and the exemptions under this part of this Act, pilotage shall be compulsory within the London district and the Trinity House outport districts; and therefore, unless the exemptions there referred to apply to this ship her pilotage would have been compulsory. The exemptions which the plaintiffs rely upon in this case, or rather the one exemption which is material, is an exemption in the Order in Council of 1854. As this vessel had a passenger on board, the provisions of sect. 625 of the Merchant Shipping Act 1894 do not apply, because the exemptions in that section only apply when the ship is not carrying passengers; but there are two sub-clauses to that section which have a bearing upon this case, because of a construction placed upon the word "trading" in them, which, it is contended, affects the decision in this case. Now, the exemptions conferred by sect. 625 not being applicable, the plaintiffs have to rely upon other exemptions, which, as I have already said, are exemptions in the Order in Council; and it is to be noticed that the exemptions in the Order in Council were held in the case of *The Earl of Auckland* (*ubi sup.*) to have been preserved by the Merchant Shipping Act 1854, and so it was conceded they were preserved by the Merchant Shipping Act 1894 in the same way as they had been preserved by the Act of 1854. The 603rd section of the Act of 1894 is the section which was relied upon as still continuing those exemptions. Now, the Order in Council is one which was made on the 18th Feb. 1854, and it is shortly stated, but sufficiently fully for my purpose, in Lushington's Admiralty Reports, p. 167. [His Lordship then read part of the Order in Council set out above.] The plaintiffs say that this exemption applies in this case, and that the words "ships and vessels trading" practically mean the same as ships and vessels on a voyage from the port of London to a port or ports between the ports on the Continent, mentioned in that clause, which I have named; while the defendants' contention is that the words "ships and vessels trading" mean "constant traders," because they contend that that Order in Council must be read with the 59th section of

6 Geo. 4, c. 125. In reply to that contention, in addition to the point already referred to which the plaintiffs make, they make a further point by saying that even if it is to be construed as referring to "constant traders," this vessel was, within the true meaning of such words, a constant trader from London to Antwerp, which is included in the area mentioned, and was so trading at this time.

Now, the legislation is somewhat voluminous, and the Acts, I think, require a careful consideration, and are not easy to follow very accurately, at first, without bearing in mind that at one time there were two bodies connected with the pilotage of the Thames—namely, the Trinity House pilots and the Cinque Ports pilots; the latter being engaged in piloting vessels coming from the west to the Thames and Kentish ports. The first Act I think it necessary to refer to is 5 Geo. 2, c. 20, which dealt with the Trinity House pilots. [His Lordship read part of sect. 1.] That is the first exemption to which I have been referred to. The next Act is 48 Geo. 3, c. 104, s. 2. Stating its terms briefly from a marginal note, there is this provision: "From the 1st Oct. 1808 the Corporation of Trinity House of Deptford shall license fit persons as pilots to conduct all vessels within certain limits, and none others shall act, except as herein stated." There is an exception of pilots appointed by the Society or Fellowship, of Pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port pilots. [His Lordship then read sect. 2.] It is to be observed that the exemption is to constant traders inwards, from ports mentioned, such vessels having a British register, and coming up and going down the North Channel, and my impression is, from an examination of the Acts, that the words "going down" were erroneously introduced—that the intention at that time had been to exonerate ships coming inwards from the ports mentioned, to London, having British registers, and in that way, for reasons which are mentioned in various reports to Parliament and so forth, to favour British ships coming inwards, as against foreigners coming inwards. That Act was an Act only to be in force for four years from the passing of it, and the subject was again dealt with by the Legislature by the 52 Geo. 3, c. 39, which became a more permanent Act. It is in the 2nd section again provided that the Corporation of the Trinity House shall license fit persons as pilots within certain limits, and those limits were for all vessels and ships passing up and down or upon the Thames and Medway, &c. Then there were powers given to the Lord Warden of the Cinque Ports to license pilots for ships and vessels sailing and navigating from the westward up to the Thames and Medway—"that is to say, from Dungeness up to London Bridge and Rochester Bridge, and from the Buoy of the Brake to the westward—that is to say, from the said buoy to the west end of the Owers." Then there was this exemption: [His Lordship then read the portion of the section dealing with the exemption.] That, so far as is material, is practically the same as the Act I have referred to, except that the words "going down" are omitted in the considered Act passed in 1812. There was a report of a Committee in Parliament on the question of these Acts in 1824, I think, which made certain recommendations, but as far as I can make out the recommendations were not fully carried out. The next Act of Parliament which dealt with the subject is the one which is referred to in the Order in Council, and is an Act of 6 Geo. 4, c. 125, and sect. 59 is the one which contains the exemptions provided by the Act. [His Lordship read the section.] Now, the word "either" seems to be a mistake. The section otherwise is very much the same as the Act of 1812, providing for the freedom from pilotage of "constant traders" inwards from ports north of Boulogne, coming up by the north channel. Then came the statute of 1853, which is the 16 & 17 Vict. c. 129, which amalgamated the Trinity House pilots and the Cinque Port pilots, and by the 21st section gave power for every pilotage authority by regulation and Order in Council to do certain things. [His Lordship then read the material part of the section.] It was in pursuance of that section that the Order in Council of Feb. 1854, which I have already referred to, was made. Now, upon that state of things there are two cases to mention. The first is *Reg.* v. *Stanton* (*ubi sup.*) which decided that, "The exemption given by stat. 6 Geo, 4, c. 125, s. 59, from the necessity of employing licensed pilots to masters piloting their own ships on the voyages there specified, without the aid of an unlicensed pilot, is continued by the Merchant Shipping Act 1854, and this exemption applies as well to ships carrying as to ships not carrying passengers, and is not affected by the exemption given in sect. 379 of the same Act to ships on particular voyages not carrying passengers." That was the case of a regular trader to the Baltic, which had passengers. There was also the case of *The Earl of Auckland* (*ubi sup.*), which was the case of a vessel whose ordinary occupation was carrying goods and passengers between London and Rotterdam, and had passengers on board, and which case decided, in the same way as *Reg.* v. *Stanton* that the exemptions given by 6 Geo. 4, c. 125, s. 59, supplemented by the Order in Council of 1854 were maintained by the Merchant Shipping Act of 1854. Then, as I have already mentioned, the Act of 1894 kept these exemptions alive, and therefore if they are applicable to the present case those cases show those exemptions are treated as still existing, and of course I must follow those decisions.

Now, in addition to the exemptions I have already referred to, there were in sect. 379 of the Merchant Shipping Act of 1854 exemptions of the following ships, when not carrying passengers, in the London district and Trinity House outport districts, amongst others: namely, ships trading to Boulogne or any place in Europe north of Boulogne. That exemption was somewhat modified by an Order in Council on the 21st Dec. 1871, which had practically the effect of extending the coast line, if I may so express it, from Boulogne to Brest, making therefore an exemption of vessels not carrying passengers, trading from London to any port between Brest and any place in the north of Europe. These exemptions, although the words were "trading to," were held in *The Wesley* (*ubi sup.*) to apply to vessels both ways, that is going outwards or coming in, though there seems possibly some doubt whether, on the language of the exemptions, that was correct. This class of exemption was further provided for by the 625th section of the Merchant Shipping Act of 1894, which I have already

referred to. [His Lordship then read the section.] Those provisions clearly provide for the inward and outward trading, when not carrying passengers, but they are not applicable to the present case, because the ship was carrying a passenger. They are material to the discussion of the case because of the language, which is "ships trading," and certain decisions upon the meaning of "ships trading," and the argument of Mr. Aspinall, for the plaintiffs, that those decisions really concluded this case. Now, the first of those decisions is *Courtney* v. *Cole* (*ubi sup.*). In that case "A British ship was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London. On a return voyage from the East she went, as usual, to London. She there discharged part of her cargo and her crew, and then, with the bulk of her cargo and a crew of runners, but without passengers, proceeded to Holland. Held, that she was a ship 'trading to' a place north of Boulogne, and therefore exempted from compulsory pilotage in the London district." Lord Coleridge and the late Master of the Rolls (then Smith, J.) decided the case upon the construction placed by them upon the 379th section of the Act of 1854, and they held that the vessel was, within the meaning of the words of the section, a ship which was trading to a place north of Boulogne. The judgment of Smith, J. contained this passage (57 L. T. Rep. at p. 413; 6 Asp. Mar. Law Cas. at p. 173; 19 Q. B. Div. at p. 457): "This being so, in my judgment the words in sub-sect. 3 are not to be read as meaning the constant trading to Boulogne or any place in Europe north of Boulogne, but as meaning what they say—*i.e.*, when a ship in fact is trading to Boulogne or north thereof, and, I would add, from (and possibly to) the London district and the Trinity House outport districts, she is exempt. The argument addressed by the pilots, that in sect. 59 of 6 Geo. 4, c. 125, the word 'constant' is used, and that by sect. 353 of the Act of 1854 compulsory pilotage was to be enforced as theretofore, in my judgment avails nothing in the face of the fact that the word 'constant' is expressly omitted in the later section—viz., 379. I would add that, should I be wrong in the interpretation I put upon the words of sect. 379, sub-sect. 3, the findings in the case, especially those in pars. 5 and 9, show that the *Cardiganshire* was a constant trader from London to Amsterdam and back; for it seems to me impossible to hold that the words of the sub-section mean only trading to Boulogne and north thereof, which must be the pilots' contention if they are correct upon their interpretation of the sub-section as applied to the facts of this case." So it was held there that when a ship not carrying passengers was in fact trading from London to Europe north of Boulogne she was within the exemption of the 379th section of the Act of 1854, and that that was so although that was not her only trade. It is to be noticed in that case it was a ship which was a trader to Japan and the East, as part of her trading. She made the passage from London to Amsterdam and Hamburg and back as part of that trade. That case was followed by *The Rutland* (*ubi sup.*). That was the case of a ship laden with cargo, from the River Plate to Rotterdam, with cattle, for London. She had discharged the cattle in London and proceeded with the cargo to Rotterdam, and it was held that whilst the ship was proceeding from London to Rotterdam she was, although she took no cargo in in London, trading between London and Rotterdam, within the meaning of the section, and therefore exempt from compulsory pilotage in the London district. She had no passengers, and the question, of course, was whether at that time the 625th section of the Act of 1894, sub-sect. 3 was applicable. The view which I understand the House of Lords took in that case may be gathered from one short sentence in the judgment of the Lord Chancellor, when he said (76 L. T. Rep. at p. 663; 8 Asp. Mar. Law Cas. at p. 271; (1897) A. C., at p. 335): "For my own part I cannot adopt the view that you are entitled to change the participle into an adjective, and I do not think it would carry us to a right conclusion if you did. A 'vessel trading' points to the particular act of trading, which is the matter that was in the mind of the Legislature." Lord Watson said: "I can find nothing in the Act of 1894 which requires that the words of sub-sect. 3 shall be construed in any other than what I venture to term their ordinary and natural import; and, when so construed, I think they include every ship which has left the port of London and is on her way to Brest or to any of the other ports which are named in the statute, in pursuit of a commercial adventure." Now, Mr. Aspinall argued that those two cases were applicable to the present case, and that it was sufficient to bring a ship within the exemption contained in the Order in Council, if she was on the particular occasion trading from London to a port within the limits of the coast-line referred to; and that in substance the words "ships or vessels trading" should be construed in the Order in Council practically in the same way as they were construed in the 379th section of the Merchant Shipping Act of 1854, and the 625th section of the Act of 1894. There seems to me to be very considerable difference between the considerations applicable to the one set of exemptions and the other. Possibly there is some difficulty in distinguishing the exemptions in the Order in Council and the exemptions in the Act of 1854, sect. 379, but there is clearly not so much difficulty in distinguishing between the Order in Council and the Act of 1894, s. 325, because the language of sub-sects. 3 and 4 seems to point to a particular act of trading, rather than to a description of a vessel engaged in a trade. I do not myself consider that the question before me is determined by the two decisions to which I have just referred, and I think that it is necessary to consider what is the true meaning of the Order in Council which is relied upon by the plaintiffs. Now, I think it is necessary to notice, in the first place, that it has been decided in *The Vesta* (*ubi sup.*) that "ships and vessels" in the Order in Council mean British ships, and that the reason for so treating the Order in Council is that it ought to be read with 6 Geo. 4, c. 125, s. 59, which provides that the ships and vessels referred to are all to have British registers, and therefore as the Order in Council will extend the exemptions existing under the 6 Geo. 4, c. 125, the words "ships and vessels" are not to be read as referring to all ships and vessels, but to ships and

vessels having British registers; and that therefore the Order in Council is not to be read literally. Sir R. Phillimore, in giving judgment in *The Vesta* (46 L. T. Rep., at p. 496; 4 Asp. Mar. Law Cas., at p. 519; 7 P. Div., at p. 245), said: "I am of opinion that this absurdity does not arise, and that the exceptions in this Order in Council do not apply to foreign vessels, but that the words 'ships and vessels' when used in the portion of the Order in Council I have read, must mean British ships and vessels, which alone are dealt with by the material portions of the 59th section of 6 Geo. 4, c. 125, to which section the Order in Council in question, so far as it relates to exemptions, is subsidiary, and of which it is explanatory. I think, moreover, that this was the opinion to which Dr. Lushington inclined in the cases of *The Earl of Auckland* (*ubi sup.*) and of *The Hanna* (*ubi sup.*)." Now, if the Order in Council is to be read in the way that Sir R. Phillimore read it, not literally, but as subsidiary to the 59th section of 6 Geo. 4, one must see what is meant by the words "ships or vessels trading." In the 59th section it is used of ships or vessels trading to Norway or the Cattegat or Baltic, on inward or outward voyages, and I cannot help thinking that "ship or vessel trading" is there descriptive of the vessel, and not merely a particular voyage with which she is for the moment concerned. Then, again, "of any constant trader"—that, I think, cannot refer to one particular occasion on which a vessel is proceeding, but to a description of the vessel; and so, also, Irish trader was to mean ships or vessels employed in the regular coasting trade of England. Therefore, I think, it seems probable that the words "ship or vessel trading" were used in the Order in Council, especially having regard to the words "to ports between Boulogne and the Baltic on their outward passages, and when coming up by the south passages," as descriptive of a class of vessel, and not simply of the particular voyage on which the vessel happened to be engaged at the moment. Now, having regard to these considerations, the inference which I draw from the use of the words in the Order in Council is that it refers, as I have said, to a description of vessels—one which, speaking in general terms, may be distinguished as engaged in the trade between London and the continental ports included in the coast area.

The question then comes to be, whether this vessel was so engaged, or was not. That is the second question in the case, and it is necessary now to see what the facts are. The *Cayo Bonito* belonged to the Cuban Steamship Company, which had several other vessels, and evidence has been given as to the nature of the employment of these vessels and other ships which, I think, they charter from time to time. Substantially it comes to this, that the vessels were worked in two lines. The prospectus of the company was put in, and that described the company as having been formed under the above title for the purpose of developing and carrying on on a more extensive scale a line of steamers between London, Antwerp, and Cuba. Then a list was put in of the ships and their advertised times of sailing from London and Antwerp to Havana, Vera Cruz, &c. I find the "fine screw steamship *Cayo Bonito*" is mentioned. Under that there is a description of the Cuban Line of steamers from London to New Orleans direct. The *Cayo Bonito* is also put down as one of the steamers serving in that line. It appears that, shortly stated, this vessel, with others, was engaged in working two lines. One may be described as a line from London to Antwerp, and then on to America and back, and the other as a line from London to New Orleans direct, with liberty to call at Bermuda. So that you have a very difficult question of fact to determine. The vessel in this case, if I recollect the evidence rightly, had made one voyage previously to this action, going from London to Antwerp, and then on to Mexico. On the voyage in question she was on the same round from London to Antwerp, and then on to Mexico, and I think I am right in stating that since the disaster she has made another voyage from London to Antwerp and Mexico, with part of the same cargo. A schedule or statement of the working of the ships of the Cuban Line has been handed in, but substantially it seems to me that you have a vessel belonging to a company which is employed, so to speak, in two lines, because although she has been on the voyages she has made—I think she is a new ship—only on this round from London to Antwerp and then to America, she is advertised, and it was stated she might be used, to go to Bermuda direct, and thus fulfil the service of both lines. Although we may analyse and examine this statement more fully, I do not think I should come to any other statement of the position than that which I have done. Possibly I might add this, that it does not appear that vessels going to Antwerp always go to Antwerp, but they appear to do so generally. That presents this matter for consideration. If the Order in Council is to refer, using a neutral term for a moment, to regular traders, is a ship so engaged a constant or regular trader between London and Antwerp, which is included in the coastal area? I think that is an exceedingly difficult question to determine, because there may be two views taken. There may be the view that the word "constant" is used in the sense of a vessel doing nothing else but going between London and the Continent, and here the use of the word "constant" is that which is used in mathematics—namely, an inflexible, unalterable quantity, as opposed to a fluctuating, variable quantity. The other is that it is used in a business sense, of a vessel which is regularly engaged in the particular trade, but not so absolutely constantly going backwards and forwards that there is never any departure from the voyage between the Continent and London. The only light I can obtain upon this question appears to me to be that which is found in the judgment of Smith, M.R., in *Courtney* v. *Cole* (*ubi sup.*), where he says that, if it were necessary to find that the vessel in *Courtney* v. *Cole* was a constant trader, it was impossible to hold that the words of the sub-section of which he was speaking (sub-sect. 3, sect. 379, of the Act of 1854) meant only trading to Boulogne or any place in Europe north of Boulogne. His view, certainly, was that a vessel would still be a constant trader if part of her duty or business was to go from London to the Continent, though the remaining and larger and more substantial part seemed to go from this side of the Atlantic to ports in Japan and the East, and the voyage between London and Antwerp or Boulogne, or Hamburg or Amsterdam, whichever it was, is a very small portion of that larger business in

which the ship is engaged. So that the view which he took of a constant trader does not simply limit the ship to going backwards and forwards between the port of London and the Continent. Therefore, if this ship were absolutely regularly engaged, so that she never did anything except go between London and Antwerp and then on to America, she would be, within the language which the late Master of the Rolls used, a constant trader, although she did not only go backwards and forwards between London and the Continent. That leaves a further matter. Does the word trading, as used, or constant trader, allow any departure from always going to a continental port after leaving London by being taken off the regular line, which includes calling at a continental port, and going, on occasions, direct from this country to other than a continental port? In other words, is a ship which is to come within that definition of constant trader one which must never depart from it, and never make any other voyage except that which would include going to a continental port? I have thought about this matter a good deal, and I do not feel able, having regard to the general terms of the Act, to place such a strict meaning upon it, because it seems to me it would involve this remarkable result, that, if a ship which was habitually—so habitually as never to do anything else—engaged in going from London to Antwerp, we will say, and back, were for any particular voyage taken off and run to some other port—for instance, London to Bordeaux—for a voyage, and then to be put back on to her regular trade, it would destroy her constancy, so to speak; and the ship would never, although in an ordinary business sense regularly engaged in going backwards and forwards, dare to depart, for business purposes, for fear of destroying her constancy, and thus being taken out of the exemption which otherwise she would avail herself of. I cannot help thinking that the true result to arrive at is that the use of these terms must be regarded from a business point of view, and that if it is a part of the regular business of a ship to proceed from this port of London to the Continent, between the limits mentioned, she is, within the meaning of the Order in Council and the section, a constant trader, and therefore exempt from the compulsion to take a pilot. That is the conclusion I have come to, and in the result I hold, therefore, that this vessel was as a matter of law and fact within the exemption, and that her pilotage was not compulsory. That leaves the defendants responsible for the collision, and therefore there will be an order of the *Cayo Bonito* alone to blame.

Solicitors for the plaintiffs, the owners of the *British Prince*, *Thomas Cooper* and *Co.*, agents for *Hill*, *Dickinson*, and *Co.*, Liverpool.

Solicitors for the defendants, the owners of the *Cayo Bonito*, *Hollams*, *Sons*, *Coward*, and *Hawksley*.

Wednesday, Dec. 11, 1901.

(Before Sir F. JEUNE, President, and TRINITY MASTERS.)

THE PORT VICTORIA. (*a*)

Action in rem—*Negligence—Putting out to sea to avoid collision — Loss of anchor and chain—Consumption of extra stores—Liability of wrongdoing vessel for losses incurred in consequence.*

A steamship slipped her anchor and put out to sea in order to avoid a collision with another steamship, which had negligently been allowed to drag her anchor and cause danger of collision.

Held, in an action in rem, *that the plaintiffs were entitled to recover the value of the anchor and chain lost, and the coals and stores consumed in consequence of having to put to sea.*

THIS was an action *in rem* brought by the owners of the steamship *Norman* against the owners of the steamship *Port Victoria* to recover the value of an anchor and chain lost, and of coals and stores consumed, by reason of their vessel having had to put to sea in order to avoid a collision with the *Port Victoria*.

The plaintiffs' case was, that on the 5th Oct. 1900 the *Norman*, a twin-screw steamship of 7537 tons gross register, belonging to the Union-Castle line, while on a voyage from East London to Durban with mails, passengers, and a general cargo, was lying at anchor in the outer anchorage ground, Port Natal. The *Norman* was in a safe and proper berth and was riding to a single anchor with seventy-five fathoms of chain, the weather was clear but threatening, and there was a strong breeze increasing to a moderate gale from the east with a rough and rising sea and a heavy swell. About three-quarters of a mile ahead of her the *Port Victoria*, a steamship of 3378 tons gross register, was lying with her port anchor down and forty-five fathoms of cable out, contrary to the provisions of art. 7 of the Port Regulations, which requires vessels to lay with not less than seventy fathoms of chain. About 3.20 p.m. it was noticed the *Port Victoria* was dragging her anchor and getting dangerously close to the *Norman*. The engines of the *Norman* were accordingly put slow astern and the cable veered out to 135 fathoms, but about two hours afterwards the *Port Victoria* fouled the cable of the *Norman*. Signals were then made to the *Port Victoria*, which had a tug in attendance, to slip her cable and keep clear, but nothing was done, and the *Port Victoria* continued to drift down upon the *Norman*. Eventually she came so close that the master of the *Norman* decided to slip his cable and put out to sea, where he remained until daylight the following day, when he considered it safe for him to return.

It was agreed between the parties that the expenditure incurred for loss of anchor and chain and coals and stores consumed amounted to 308*l.* 1*s.* 6*d.*

The defendants admitted that the *Port Victoria* dragged her anchor and fouled the *Norman's* chain, but alleged that the *Norman*, when she arrived, anchored too close to leeward of the *Port Victoria*. As soon as the port anchor was found to be foul of the *Norman's* cable the starboard anchor was also let go, but this also fouled the cable. Both anchors were subsequently hove in

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

again and the chains cleared, and the *Port Victoria* was manœuvred under her own steam until this had been done. It was only after this had been done that the *Norman* slipped her cable and put out to sea. They contended that it was not necessary for the master of the *Norman* to have slipped and put out to sea, that there was no actual collision between the vessels, and that, under the circumstances, an action *in rem* would not lie to recover the loss.

By art. 7 of the Regulations of the Port and Harbour of Port Natal, issued in 1900 by the Natal Harbour Department:

> Vessels should lay at single anchor with not less than seventy fathoms of chain out, having the second anchor ready for letting go. The anchor should be weighed and sighted occasionally, especially after bad weather. Should any accident occur by which a vessel may drift or lose an anchor, the facts of the case must be notified in writing to the port captain.

Scrutton, K.C. and *Mackinnon* for the plaintiffs.—The master of the *Norman* did the only prudent thing under the circumstances, and the plaintiffs are entitled to recover the loss they have suffered. In an American case it has been held that where a vessel is obliged to slip her anchor in order to avoid a collision she is entitled to recover the value of the anchor and chain from the wrong-doing vessel:

> *The Perkins*, cited in 2 Mar. Law Cas. O. S. Digest, No. 548.

Aspinall, K.C. and *Lewis Noad* for the defendants *contra*.—The master of the *Norman* was unduly apprehensive, and there was no real necessity for him to slip and put out to sea. The *Port Victoria* was under control, and was able to use her engines when it became necessary for her to do so. There was no collision, and under the circumstances an action *in rem* will not lie to recover the alleged loss.

Scrutton, K.C. in reply.

The PRESIDENT.—I believe this is the first case exactly of this kind which has been brought in the Admiralty Court; but the principle governing the case appears to be clear, and, apparently, in America the principle has been applied in similar circumstances. It seems to me clear that if a vessel by negligence drags down towards another, and if it is a natural consequence that the other vessel is obliged to take a step which involves her in some expenditure, that is damage for which the first vessel is liable. Applying those principles to this case, the first question is, Was the *Port Victoria* negligent? Now, certainly the *Norman* was not negligent in taking up the position she did, because she appears to have given the other vessel a berth of three-quarters of a mile, and the Elder Brethren tell me that was a proper allowance to make, and that no fault is to be alleged against the *Norman* on account of the position she took up. Then the *Port Victoria* undoubtedly dragged down towards her. As regards negligence, I should have thought it was almost a case of *res ipsa loquitur*. It seems to me that the *Port Victoria* was driving because she had an insufficient scope of cable. She appears to have been violating the rule of the local authorities, which is that a vessel riding in that anchorage should not have less than seventy fathoms of chain—a rule no doubt prescribed on account of the knowledge possessed by the authorities of the locality, and the dangers to which vessels are there exposed. I do not inquire what exact legal force that rule has, but the *Port Victoria* chose to ride with forty-five fathoms of chain, and afterwards veered out to only sixty-five. Therefore she was not complying with that rule, and it is shown that she was using an insufficient scope of cable. Then there certainly was a bad look-out, because it was clear that nobody on board her was aware of her dragging until she had dragged a very considerable distance, indeed until she was tolerabiy close to the *Norman*. The result of that bad look-out was important, because the master of the *Port Victoria* may be right in saying that when he got so near to the *Norman* it might have been unwise to let go the starboard anchor, because it might bring him towards the *Norman* and prevent his going past her as he intended to do. But if those in charge of the *Port Victoria* had, in sufficient time, noticed her dragging, they could have used their starboard anchor and never have got near the *Norman* at all. That appears to me to show clearly that the *Port Victoria* was negligent in this matter. I do not say anything about the steam. No doubt the *Port Victoria* ought to have had her steam effectually available, but it is difficult to ascertain exactly what the fact was with regard to her steam; and it is not necessary to go into that question, because, on the other fact which I have mentioned, it is clear to my mind that the *Port Victoria* was negligent. Under these circumstances, was the expenditure which the *Norman* has been exposed to so far the consequence of the *Port Victoria's* negligence as to make her liable? All that can be said against that is said in the phrase used in the argument, that the master of the *Norman* was unduly apprehensive. That is a matter upon which I have consulted the Elder Brethren, and the view I take upon their advice is that the master of the *Norman* was, if anything, unduly patient. There was a vessel coming down towards him with the possibility, at any rate, to say nothing more, of the propeller fouling the chain in the same way as the anchor fouled the chain, and the wonder to me is that the master of the *Norman* did not take action sooner than he did. He appears to me to have exercised a great deal of patience, and to have abstained from taking any step until a time when it must have been getting on for dark, and it was high time, for the safety of the ship, to take some action. I do not see what action he could have taken except that which he did take—namely, slipping the cable and himself getting away out to sea. In those circumstances it seems to me that the *Port Victoria* is liable for what occurred, and the natural consequence appears to have been a loss of 308*l.* 1*s.* 6*d.* There will be judgment for the plaintiffs for that sum with costs.

Solicitors for the plaintiffs, *Parker, Garrett, Holman*, and *Howden*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

July 8 *and* 9, 1902.

(Before Sir F. JEUNE, President, and TRINITY MASTERS.)

THE USKMOOR. (*a*).

Collision—Duty of steamship to indicate her course by whistle—Regulations for Preventing Collisions at Sea—Application of art. 28.

The obligation under art. 28 *of the Collision Regulations on a steamship in sight of another to indicate by signals on her whistle that she is taking any course authorised or required by the rules is imperative.*

The words "taking any course authorised" mean everything which by the rules of good seamanship it is necessary and proper should be done.

THIS was a collision action brought by the owners of the steamship *Minnetonka* against the owners of the steamship *Uskmoor*.

The collision occurred about 10.45 a.m. on the 9th June 1902 in the English Channel, off the *Royal Sovereign* lightship.

The plaintiff's case was that the *Minnetonka*, a twin screw steamship of 13,400 tons gross register, was proceeding up Channel in the course of a voyage from New York to London with a general cargo and passengers, and was between Beachy Head and the *Royal Sovereign* lightship.

The weather was fine and clear, there was a light N.N.E. wind, and the tide was flood of the force of from two to three knots an hour.

The *Minnetonka* was proceeding on a course of S. 76deg. E., and was making about fifteen knots an hour through the water.

Under these circumstances the *Uskmoor* was seen about two and a half miles off, and bearing about three-quarters of a point on the starboard bow with her masts open on the starboard side in a position to pass all safe starboard to starboard.

The *Uskmoor*, however, instead of keeping her course, was seen to port, and the helm of the *Minnetonka* was accordingly also ported and the *Uskmoor* brought on to the port bow, when it was steadied, but very shortly afterwards the *Uskmoor* was seen to be starboarding, whereupon the helm of the *Minnetonka* was starboarded and steadied, and the vessels brought starboard to starboard. The *Uskmoor* was then seen to be again porting, and the helm of the *Minnetonka* was also ported, a short blast sounded on her whistle, and the starboard engine put full speed astern. The *Uskmoor*, however, again starboarded, and came on, and with the bluff of her starboard bow struck the *Minnetonka* a heavy blow on the port bow, and then on the port side aft. When the *Uskmoor* was seen to be starboarding the port engine of the *Minnetonka* was also put full speed astern.

The plaintiffs charged the defendants (*inter alia*) with improperly altering her helm from time to time when the vessels were in a position to pass each other all clear, with neglecting to sound her whistle and give any indication of her course, and with not stopping and reversing, and with failure to obey arts. 18 and 28 of the Regulations for Preventing Collisions at Sea.

The defendants' case was that the *Uskmoor*, a steamship of 3587 tons gross register, was proceeding down Channel on a voyage from Blyth to Cape Town with a cargo of coals, and was to the eastward of the *Royal Sovereign* lightship. She was steering a course of W. ¾ S. southerly, and was making about eight knots an hour through the water with engines working at full speed.

In these circumstances the *Minnetonka* was seen coming up Channel about seven miles off, and bearing about two and a half points on the starboard bow.

The *Uskmoor* continued on her course, and shortly afterwards, when the *Royal Sovereign* was abeam, the course was altered to W. by N. magnetic.

The *Minnetonka* at this time was still a long distance off and on the starboard bow, and in a position to pass starboard to starboard, but when about two miles off she was seen to port her helm and pass under the stern of another steamer which she had been overtaking.

The *Minnetonka* continued under a port helm as if intending to cross the bows of the *Uskmoor* until she bore about ahead, when she starboarded her helm and straightened up again a little on the starboard bow of the *Uskmoor* and to the southward of the other steamer. As soon as the *Minnetonka* was seen to be starboarding the engines of the *Uskmoor* were stopped, but the *Minnetonka* continued to come on gradually broadening on the starboard bow of the *Uskmoor*, but when a short distance off she ported, and although the engines of the *Uskmoor* were put full speed astern, collided with the *Uskmoor*.

The defendants charged the plaintiffs (*inter alia*) with improperly failing to pass the *Uskmoor* starboard to starboard, with improper porting, with not indicating her course by the whistle, and with not stopping and reversing. They also charged them with neglecting to comply with art. 28 of the Collision Regulations.

Art. 28 of the Regulations for Preventing Collisions at Sea is as follows:

The word "short blast" used in this article shall mean a blast of about one second's duration. When vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle or siren—viz: One short blast to mean "I am directing my course to starboard." Two short blasts to mean "I am directing my course to port." Three short blasts to mean "My engines are going full speed astern."

The case is reported on the question of the proper interpretation of art. 28.

Pickford, K.C., *Aspinall*, K.C., and *Arthur Pritchard*, for the plaintiffs. They referred to

The Mourne, 83 L. T. Rep. 748; 9 Asp. Mar. Law Cas. 155; (1901) P. 68.

Robson, K.C. and *Dawson Miller* for the defendants, *contra*.

The PRESIDENT (after dealing with the evidence, continued:)—Under these circumstances it appears to us very important that the *Minnetonka* should give the *Uskmoor* the clearest possible indication of the course she intended to take. She saw this vessel describing these extraordinary manœuvres in front of her, and it was important she should give that vessel at the earliest possible moment the clearest possible indication of what she intended to do. From this point of view it is important to come to a

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

conclusion about the whistling rule. It is not easy to construe it so as to deal with all possible cases. The words of the rule are not at all easy to make out. Its application is limited in two ways. Vessels must be in sight of one another, and must be "taking any course authorised or required by these rules." It is not easy to put a clear interpretation upon the second limitation, although the first one is intelligible enough. The rule does not apply where a vessel in conducting manœuvres in the ordinary course of navigation, quite apart from seeing any other vessel, thinks it right to port or starboard her helm. But the rule is also limited to "taking any course authorised or required by these rules." It has been sought to put a rather narrow interpretation upon the rule. Of course the word "required" is clear enough. There are certain things required by the rules to be done. But the word "authorised" is very much larger, and I am inclined to think that a large interpretation ought to be given to it; that everything is authorised which by the rules of good seamanship it is necessary and proper should be done, although it is quite true there are certain cases where you may say a more distinct authorisation arises. For instance, an overtaking vessel, which has to keep out of the way of the overtaken vessel, would be authorised in going to port or starboard, according as the circumstances of the case might require, and of course, under the crossing rule, the vessel which has to keep out of the way is authorised to do so by either one of several means, as the case may seem to require. I do not think the matter ought to be tied down to any narrow interpretation of the rule. But even if it was so, I think in this case it is right to say that the course taken by the *Minnetonka*, according to her own story, was a course authorised by the rules. According to her case, when the other vessel which was approaching her ported, she thought it right to port also, and it is by no means certain that might not be brought within the crossing rule, which imposes a duty of keeping out of the way, and authorises it to be done by any appropriate means; but that in the larger sense of the word her course was authorised by the rule appears to me clear. On the whole, therefore, it appears to me that under the circumstances of this case the obligation of whistling was imposed upon the *Minnetonka* at an earlier time than the officer who was in charge thought it necessary to whistle. He did at a later period whistle, and quite rightly. The reason he gave for not doing so before, which I do not wish to press against him, though it probably reflects the mind of a good many sailors, was that he did not think it was necessary to obey the rule, except in the case of vessels meeting in narrow waters. I wish emphatically to say that the rule is not so limited, and it is necessary to say that with some emphasis, because the experience of this court shows that the rule has not been followed by the nautical world with the completeness which its terms demand. I hope captains in future will err, if they err at all, on the side of whistling. I am obliged, therefore, to say that in this case I think the officer in charge of the *Minnetonka* was wrong. I think, when he took action corresponding to the somewhat extraordinary manœuvre which the *Uskmoor* was pursuing in front of him, it was his duty to give the clearest possible indication to the *Uskmoor* of what he was doing, and in that duty he failed. Then it is said that it could not and would not have affected the collision, but after considering the question with the Elder Brethren, I am unable to accept that view. If he had given the *Uskmoor* a very clear indication at that time that he was porting—and the inference would be that he would pass port to port—I think it might have been borne in upon the mind of those on the *Uskmoor* that they had to pass port to port; and it might have prevented the *Uskmoor* from afterwards attempting the extraordinary manœuvre she did perform. I think the *Uskmoor* did not have the help which would have been afforded her by a very clear whistle. Then I have to consider the closely analogous question of the *Minnetonka's* stopping. She did at a later stage help matters by stopping one of her two engines, and later on she put the engines full speed astern. She recognised at a later stage, at any rate, that it was her duty to bring herself to a standstill, and I cannot help thinking, and the Elder Brethren agree with me, that it was her duty under the circumstances to have stopped and brought herself to a standstill at an earlier time. The result is that I am compelled to hold both vessels to blame.

Solicitors for the plaintiffs, the owners of the *Minnetonka*, *Pritchard* and *Sons*.

Solicitors for the defendants, the owners of the *Uskmoor*, *Botterell* and *Roche*.

July 7 and Aug. 6, 1902.

(Before BARNES, J.)

THE LEITRIM. (a)

General average—Time charter—Loss of hire by sacrifice—Right of shipowner to contribution—Usage of average adjusters.

By the uniform practice of average adjusters a loss of time charter freight is never included in general average.

Where such practice is not in conflict with legal principles it ought to be followed.

A fire occurred on board a vessel which was under time charter, and in order to extinguish it a sacrifice was incurred. Whilst the vessel was undergoing repairs the hire ceased under the terms of the charter-party.

Held, that the shipowner was not entitled to any compensation in general average for the delay caused by the sacrifice.

ACTION brought by the owner of the steamship *Leitrim* against the British and Foreign Marine Insurance Company claiming the sum of 66*l.* 18*s.* 6*d.*, their proportion of a general average contribution under a policy for 4000*l.* on the steamship *Leitrim*.

The following was the agreed statement of facts:—

1. The plaintiff is the registered managing owner of the steamship *Leitrim*, and is suing on behalf of himself and all others the owners of that vessel. Such owners were at all material times fully interested in the policy for 4000*l.* upon the *Leitrim* issued by the defendant company and dated the 18th June 1900.

2. The *Leitrim* is a steel screw steamship of 4284 tons gross and 2811 tons net register. For the purpose

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

of carrying frozen meat her No. 2 lower hold is insulated by means of two layers of match boards between which are charcoal and paper. Inside the chamber, and fixed to these boards, run brine pipes for the purpose of refrigeration. These pipes are carried along the sides and the top and bottom of the chamber, and pass from it through a cross-bunker to the refrigerator engine.

3. By a charter-party dated the 2nd Feb. 1900, to which defendants refer for its terms, the *Leitrim* was chartered by Messrs. William Milburn and Co. for five calendar months from the date of her delivery to the charterers, with an option to the charterers (under clause 16) to continue her employment for a further period of five calendar months. This option was exercised, and, at the time of the events giving rise to the action, the period of employment under this charter-party was to determine on or about the 20th Jan. 1901.

4. By a charter-party dated the 5th Sept. 1900 Messrs. William Milburn and Co. sublet the *Leitrim* to Messrs. Houlder Brothers and Co. for a voyage from Barry to Cape Town with a full cargo of coals.

5. In pursuance of the last-mentioned charter-party the *Leitrim* after bunkering at Liverpool proceeded to Barry, and on the 12th Sept. 1900 began loading the cargo of coals into No. 2 hold. On the 13th Sept. No. 2 hold was completed. On the 15th Sept., while the loading was proceeding in the other holds, fire broke out in No. 2 hold, and this fire spread to the bunker coals stowed in the cross-bunker abaft that hold.

6. In order to extinguish the fire it was found necessary to pour large quantities of water into both No. 2 hold and this cross-bunker. After the fire was extinguished the coals from No. 2 hold and from the cross-bunker were landed and sold, and were eventually replaced by new shipments.

7. A portion of the insulation in No. 2 hold was damaged by the fire, and parts of the steel work of that hold and in the cross-bunker were burned and buckled. In addition to this fire damage to insulation, the employment of water to extinguish the fire so damaged the charcoal and paper of the insulation as to necessitate the renewal of nearly all of it, and, in order to replace and repair it, all the brine pipes in this hold and in the cross-bunker were necessarily removed.

8. The time occupied in extinguishing the fire, discharging the damaged coals, and entirely repairing and refitting the vessel extended from the 15th Sept. to the 24th Oct., a period of thirty-nine days. The time necessary for the repair of the insulation damaged by water, together with the incidental removal and reinstatement of the brine pipes, would by itself have been thirty-one days.

9. In respect of the period of thirty-nine days Messrs. Milburn and Co. claimed, and were properly allowed by the plaintiffs, a deduction from the hire of the vessel of 2160*l.* under clause 17 of the charter-party of the 22nd Feb. 1900.

10. Either party may refer without further proof to the following documents (a list of documents then followed).

11. It is admitted that the disbursements and expenses appearing in the statements above mentioned (*e*) and (*f*) were in fact incurred, and properly incurred. The correctness of the various calculations and apportionments therein made is also admitted, if the statements are made up upon correct principles, but no admission is made as to such principles.

By clause 17 of the charter-party entered into between the plaintiff and Messrs. Milburn and Co. it was agreed:

That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, or should she in consequence put into any other port than that to which she is bound, the port charges and pilotages at such port to be borne by the steamer's owners, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense.

The question for the opinion of the court was whether the plaintiff was entitled to compensation in general average for any portion of the loss he had incurred by reason of the hire ceasing whilst the vessel was undergoing repairs.

Evidence was called by the defendants at the trial to prove that, according to the practice of average adjusters, a loss of time charter freight was in no case included in general average.

Carver, K.C. (*Cambier* with him) for the plaintiff. — This is clearly a general average sacrifice, and comes within the definition of Lawrence, J. in *Birkley* v. *Presgrave* (1 East, 220), who says at p. 228: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested." The pouring of the water into the hold, and consequent damage to the insulating plant, was for the preservation of ship and cargo. The ship-owner here has sacrificed the hire during the time his ship was being repaired in consequence of a sacrifice for the common benefit, and the practice of adjusters not to allow for loss of time does not give proper effect to the principles of general average. He referred to the following cases:

Power v. *Whitmore*, 4 M. & S. 141;
Attwood v. *Sellar*, 42 L. T. Rep. 644; 4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286;
Anglo-Argentine Live Stock and Produce Agency v. *Temperley Shipping Company*, 81 L. T. Rep. 296; 8 Asp. Mar. Law Cas. 595; (1899) 2 Q. B. 403.

Scrutton, K.C. and *Hamilton*, K.C. (*Mackinnon* with them) for the defendants, *contra*.—It is not in accordance either with principle or with the practice of average adjusters to include a loss of time charter freight in general average. This is an attempt to bring into general average a loss of freight under a time charter with which the cargo owner has nothing to do. There was no reason why the repairs should not have been done at the termination of the voyage at Cape Town. This is a case of first principle. There are no authorities in point, and it is submitted that the universal custom of average adjusters should be followed. Such custom is not in conflict with the law. The consequences which follow from delay to various interests are never included in general average, *e.g.*, demurrage, wages and provisions of ship's crew at port of refuge, loss of interest on freight and cargo. In *Anglo-Argentine, &c.*, v. *Temperley Shipping Company* (*ubi sup.*) the wages of cattlemen and expenses of water and fodder were claimed, but disallowed by Bigham, J. They referred to:

Lowndes on Average, 4th edit., pp. 239, 296, 304, and 316;
Carver on Carriage by Sea, 3rd edit., sect. 435;
York Antwerp Rules 1890, rr. 11 and 18.

Carver, K.C. in reply.

Cur. adv. vult.

BARNES, J.—This is a case in which a Mr. Hudson, as managing and part owner, claimed on behalf of himself and the other co-owners of the steamship *Leitrim* a sum of 66*l.* 18*s.* 6*d.* alleged to be due on a policy of marine insurance on the said steamship, dated the 18th June 1900. The defendants, the British and Foreign Marine Insurance Company, dispute the claim, and, the matter having been brought before me, it was agreed that the question for the decision of the court was whether an item of 1340*l.* 2s. 11*d.* for sacrificing time of hire was rightly included in a certain adjustment of general average. If it is rightly included, it was agreed that there is to be judgment for the plaintiffs for 66*l.* 18*s.* 6*d.*, and if it was not rightly included, there is to be judgment for the defendants. The plaintiff sues on a policy for 4000*l.* on the *Leitrim*. She was a large vessel, fitted for carrying frozen meat in her number two hold. She was chartered by time charter, dated the 2nd Feb. 1900, to Messrs. William Milburn and Co., and her period of hire was to expire about the 20th Jan. 1901. The hire, according to the charter-party, was at the rate of 1680*l.* British sterling per calendar month, and there was a cesser clause in the charter which was in these terms: [His Lordship then read clause 17 of the time charter.] There was also in the time charter a power to sublet, the charterers remaining responsible for the due fulfilment of the conditions of the charter. The vessel was sublet by a charter dated the 5th Sept. 1900 to Messrs. Houlder Bros. and Co. Limited for the purpose of carrying a cargo of coals from Cardiff, Penarth, or Barry to Cape Town. Freight was to be paid at the rate of "35*s.* per ton of 20 cwt. or 1015 kilos. delivered, or on bill of lading quantity, less 2 per cent., at receiver's option, to be declared in writing before cargo is broken." On the 13th Feb. last, whilst she was loading coals at Barry, a fire broke out in her No. 2 lower hold, and the following statement of what occurred is taken from the admissions of facts: [His Lordship then read the agreed statement of facts.] An average statement was made up, which was put before me when the case was argued, and according to that statement, as originally prepared, the 4000*l.* insured with the British and Foreign Marine Insurance Company was to pay 210*l.* 5*s.* 6*d.* At the instance of the plaintiffs the average statement appears to have been reconsidered, and an addition is to be found in a further statement towards the end of the document. That is, "net loss of time freight resulting from detention under repair of general average damage exclusively, after crediting wages and provisions of crew, already allowed in general average, 1340*l.* 2*s.* 11*d.*" Then the statement goes on, "Allow for general average 1340*l.* 2*s.* 11*d*," &c. That really represents the deduction, so to speak, of the time hire which the charterers have made as against the ship owners in respect of the thirty-one days which I have already referred to in the statement of the facts, which was the time necessary for the repair of the insulation, damaged by water, together with the incidental removal and reinstatement of the brine pipes. It is to be observed that it is not the full amount of the deduction, because, there has been included already in the general average statement the wages and provisions of the crew. That appears to have been done because the sub-charter included the York-Antwerp rules. The net result of what I have stated is that the sum of 1340*l.* 2*s.* 11*d.* is introduced into the general average statement as "the net loss of time freight resulting from detention under repair of general damage." Then there is an apportionment further on in the statement, in which the matter is thus treated; the steamer is put down as of net value, including made good, of 34,810*l.*. and its proportion of general average at 3038*l.* 7*s.* 5d.; the insulation, including made good, is put down at 8050*l.*, and its proportion of general average at 702*l.* 12*s.* 8*d.* Then there comes the part of the apportionment which gives rise to the difficulty—namely, "total freight at risk, less port charges, wages, &c., 7026*l.*"; of which there was at risk of charterers 5544*l.*, and at risk of shipowners 1482*l.*, add made good on account of loss of time hire 1340*l.* The total amount of shipowners' time freight is put down at 2822*l.* Then, freight which is put down as at the risk of the charterers—namely, 5544*l.*, is made to bear in general average a contribution of 483*l.* 18*s.* 1*d.*, and the freight at risk of shipowners has to contribute 246*l.* 6*s.* 4*d.* The cargo then, "as per previous statement," is put down at 4726*l.*, and has to bear 412*l.* 10*s.* 2*d.* Then, when that is apportioned so as to apply to the policy affecting the defendants, the original figure which I have mentioned as payable by them—namely, 210*l.* 5*s.* 6*d.*, becomes 277*l.* 4*s.* The balance to pay is 66*l.* 18*s.* 6*d.*, the amount sued for in this action.

The question that is raised by these facts is both interesting and difficult, and so far as I am aware it has not been considered in the courts. It was, however, well argued before me by Mr. Carver for the plaintiffs and Mr. Scrutton and Mr. Hamilton for the defendants, and I cannot help feeling I should like to have read, prior to the argument, all the books to which I was referred and others to which I have myself referred, because there is no doubt that when a point of this kind is presented for the first time, when one proceeds to consider it after the argument various points occur to one which have not necessarily been as fully dealt with in the argument as if one had been prepared with full knowledge of the law and cases applicable to the point. However, if this case is ever re-argued the parties will have an opportunity of reconsidering the various matters with which I am proposing to deal. At the hearing before me, evidence was given by experienced average adjusters to the effect that according to the practice of average adjusters a loss of time charter freight in such cases is never included in general average. No evidence to the contrary was given, and I think, therefore, it may be taken that the practice of average adjusters is uniform on this matter. So that the question comes to be whether this practice is right, because, although it was suggested by the defendants' counsel that as the sub-charter provided that in case of average the same was to be settled according to the York-Antwerp Rules, 1890, and under rule 18 of those rules—which is as follows: "Adjustment, except as provided in the foregoing rules"—which, I may mention do not apply to the present case—"the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment

had the contract of affreightment not contained the clause to pay general average according to these rules"—the adjustment should be in accordance with the practice, yet that rule does not, in my opinion, mean that the adjustment is to be in accordance with practice if the practice conflicts with the law. I have therefore to determine what is the law applicable to this case. The real question appears to me to be whether the shipowners are entitled to some compensation in general average for the delay caused by the sacrifice. I do not think that the question is whether they are entitled to be compensated in general average for the particular consequences of the delay in this case, because that would be to make the rights and liabilities of the cargo owners, depend entirely on the contract of time charter, to which they are in no way parties. The shipowners' loss of freight is caused by the operation of the cesser clause which I have already referred to. If that clause had not been inserted the time charterers would have remained liable to pay the freight in accordance with the principle upon which the old case of *Ripley* v. *Scaife* (5 B. & C. 167) was decided, and in my opinion the cargo owners ought not to be affected by the question of whether the loss of time falls, by the contract between the shipowners and time charterers, to be borne by the one or the other. If the time charterers had to continue paying freight during the delay the measure of their loss would appear to be the loss of the freight which would have accrued to them but for the delay. Mr. Carver relied upon the well-known passage in Lawrence, J.'s judgment in *Birkley* v. *Presgrave* (*ubi sup.*), which is "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested." He argued that the hire for thirty-one days was lost by the sacrifice, and that therefore it ought to be borne proportionately by all who are interested. But in my opinion the words "all loss" in this and other statements of the principle of general average have not the width of meaning attributed to them by Mr. Carver. They ought not, I think, to be held to extend to include losses which, to use a term which has been employed, are the result of "accidental circumstances" affecting the loser and are not losses which the other persons interested ought in ordinary course to be treated as concerned with. This term is to be found in the judgment of Lord Esher in *Rodocanachi* v. *Milburn* (56 L. T. Rep. 594; 6 Asp. Mar. Law Cas. 100; 18 Q. B. Div. 77). That was an action by charterers against shipowners for non-delivery of cargo, and the plaintiffs had sold the cargo to arrive. It was held that in estimating the damage the market value at the time when the cargo should have arrived must be looked at, and not the price at which the plaintiffs had sold the cargo. Lord Esher said: "But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern, but the contract price. I think that if the law were so, it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods, independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods. That rule gives the mode of estimating the value which is to be taken for the purpose of arriving at the damages." Then he proceeds to other matters which do not concern my present purpose. It is for similar reasons that although, where goods have been sold to arrive and have been jettisoned in circumstances giving rise to a general average loss, the actual loss to the merchant is the price at which the goods were sold, yet the market value of the goods at the time of the ship's discharge is the basis of compensation. So, also, in my opinion, the reason why where a ship has been chartered at one rate of freight and goods have been shipped at a different rate of freight the chartered freight is left out of consideration in assessing the compensation for freight lost by jettison of goods, is that chartered freight is a matter with which the owners of cargo are not concerned, and its loss may be the result of "accidental circumstances" peculiar to the shipowner. I am led to the conclusion that the cargo owners have no concern with the contract between the shipowners and the time charterers, that the loss of freight under it caused by the delay is the result of an accidental circumstance peculiar to the shipowners and time charterers, and that the question is whether the shipowner is entitled to be compensated in general average on the basis of the ordinary consequences of the delay as if the ship were carrying the goods simply under the contract under which they were shipped.

It is a different question from that which has been discussed in text-books as to the allowance in general average, to the owners, of the expenses of maintaining and paying the crew during the delay caused by the execution of repairs rendered necessary by a general average sacrifice. I know it has been thought by some that by common law these expenses are not to be included in general average in such a case, but the cases which are referred to by Mr. Lowndes and criticised by him on p. 241 do not appear to me to go this length, and I agree with what Lord Thesiger said in *Atwood* v. *Sellar* (42 L. T. Rep. at p. 647; 4 Asp. Mar. Law Cas. at p. 287; 5 Q. B. Div. at p. 291), that "As a matter of fact it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our courts, as constituting a claim for general average, in a case where a ship has put into the port to repair damage, itself belonging to general average." The wages and provisions of the

crew during the delay in question have been allowed in general average in the present case, apparently under the York-Antwerp Rules, which are referred to in the sub-charter, and I have not to decide anything about them, though as at present advised there appear to me to be strong reasons for holding that at any rate wherever the delay is to repair damage, which is itself the subject of general average, the wages and maintenance of the crew during such delay should be allowed by law in general average. But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed. In the first place, so far as I can ascertain a loss of this character has never been claimed in general average. It is not introduced in the York-Antwerp Rules, nor can I find any trace of its being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in general average of the wages and maintenance of the crew. It may be said, why on principle should not the loss of time be compensated for where that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that although possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present the loss of time is common to all the parties interested and all suffer by the delay, so that the damages by loss of time may be considered proportionate to the interests, and may be left out of consideration. Were this otherwise, great inconvenience would arise and enormous difficulty be found in attempting to ascertain what was the proper amount of loss on each of the numerous interests which go to make up a shipping adventure. An average adjuster has a heavy task now when he has to deal with actual losses and values, but if he were also to have to assess speculative and estimated losses his task would be still heavier. Moreover, this inconvenience and difficulty is practically obviated by treating everyone's loss of time as proportionate to his interests, and not bringing it into account. This appears to work substantial justice, for, referring to what I have said about "accidental circumstances peculiar to a party," it seems clear that if the losses by delay —I am not dealing with expenses—were to be investigated the accidental circumstances would be excluded, with the result that all that could be considered would be the loss of the profitable employment during the delay of the capital invested in each interest concerned; and it would be unreasonable to embark upon an examination of what, upon such a basis, would be the loss on each interest; so that for all practical purposes the losses may be considered as proportionate to the interests, and left out of consideration altogether. Mr. Carver felt the difficulty there is in allowing claims for delay of a general character to be introduced into a statement of general average, and he endeavoured to distinguish between such claims and that in the present case, the former, as he said, being speculative and the latter definitely ascertainable. But, as I have already noticed, this definite loss is due to arrangements between the actual owners and the owners *pro hac vice* of the vessel, which ought not to affect the cargo owners who had no cognisance of such arrangements, and are not parties thereto, and place their goods on board the vessel on the terms that they shall be subjected to the ordinary incidents involved in so doing. In my opinion, therefore, the practice affecting this matter, proved by the average adjusters who have been called, is in accordance with legal principles, and is right, and I answer the question submitted to me in the negative. The consequence is that judgment will be for the defendants, with costs.

Solicitors: For the plaintiff, *Botterell* and *Roche*; for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

HOUSE OF LORDS.

June 19, 20, *and Aug.* 5, 1902.

(Before Lords MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON, and LINDLEY.)

BALMORAL STEAMSHIP COMPANY *v.* MARTEN. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Valued policy—Ship valued in policy at less than real value—General average loss—Salvage—Adjustment—Liability of underwriters.

Where a ship is insured for an agreed value by a valued policy of insurance, and a general average loss is sustained, or a salvage award is paid by the owners, based upon a value larger than the value in the policy, the underwriters are only liable for the proportion of the loss which the value in the policy bears to the true value, and not for the whole loss.

Judgment of the Court of Appeal affirmed.

THIS was an appeal from a judgment of the Court of Appeal (Smith, M.R., Williams and Stirling, L.JJ.) affirming a judgment of Bigham, J. at the trial in the Commercial Court.

The judgment of the Court of Appeal is reported 85 L. T. Rep. 389; 9 Asp. Mar. Law Cas 254; (1901) 2 K. B. 896; and that of Bigham, J. 83 L. T. Rep. 282; 9 Asp. Mar. Law Cas. 139; (1900) 2 Q. B. 748.

The action was brought by the appellants, Messrs. Raeburn and Verel, of Glasgow, as plaintiffs, on a policy of marine insurance on the steamship *Balmoral*, subscribed to by the respondent with other underwriters, to recover a portion of general average charges and salvage charges incurred in respect of the *Balmoral* and her cargo.

The policy sued upon was a time policy, dated the 20th Dec. 1898, for a period of twelve months from noon of the 5th Dec. 1898, and was against the usual risks.

The following clause is material for the purposes of this action:

The said ship, &c., goods and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at say on: Hull, tackle, apparel, furniture, &c., valued at 20 000*l.*; machinery, boilers, &c., and everything connected therewith, valued at 13,000*l.*—total, 33,000*l.*

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The policy was underwritten by the respondent for the sum of 480*l.*

On the 22nd and 23rd June 1899, during the currency of the policy, certain salvage services were rendered to the *Balmoral* and her cargo (her machinery having broken down) by the steam trawler *Amroth Castle;* general average expenses were also incurred for the hire of tugs to tow the ship and cargo to London.

In an action in the High Court of Justice (Admiralty Division) by the owners of the *Amroth Castle* for salvage, the value of the *Balmoral* was proved by her owners in the usual affidavit of values at 40,000*l.*, and an award of 500*l.* and costs was made on the basis of that value.

The same value was also adopted as the value of the ship for the purpose of assessing its contribution to the general average expenses by Messrs. May and Meikle, of Glasgow, average adjusters.

The average adjusters, in apportioning the general average expenses and salvage charges between the interests at risk, made the ship valued at 40,000*l.* pay 58*l.* 6*s.* 8*d.* general average and 472*l.* 2*s.* for salvage charges.

They then dealt with these amounts in respect of the insurances on ship as follows:

The ship pays general average, 58*l.* 6*s.* 8*d.*; if contributory value 40,000*l.*, pays 58*l.* 6*s.* 8*d*; insured value 33,000*l*, will pay 48*l.* 2*s.* 6*d.*; the ship pays salvage charges, 472*l.* 2*s.*—520*l.* 4*s.* 6*d.*

The adjusters thus charged to the insurers on ship in respect of general average thirty-three fortieths of the sum paid by the ship, and in respect of salvage charges the entire sum paid by the ship.

The appellants having claimed to recover from the respondent on the basis that the underwriters were liable to pay the whole of the general average payable by the ship—viz., 58*l.* 6*s.* 8*d.*—and not the thirty-three fortieths of such amount shown in the average statement, and also the whole of the salvage charges payable by the ship—viz., 472*l.* 2*s.*—the respondent contended that the underwriters' liability to compensate the appellants in respect of general average and salvage charges was limited to thirty-three fortieths of the sums of 58*l.* 6*s.* 8*d.* and 472*l* 2*s.* respectively, that being the proportion which 33,000*l.*, the agreed value of the *Balmoral* in the policy, bore to 40,000*l.*, the value on which the salvage award was made, and the ship's contribution to general average assessed.

The courts below decided in favour of the respondent.

J. A. Hamilton, K.C. and *Leck* appeared for the appellants, and contended that the ship being fully insured by a valued policy, though it was under-valued, the owners were entitled to an indemnity up to the amount of the policy. The insured is not entitled to make a profit, but only to receive an indemnity if the ship is over-valued, and in the same way he is entitled to an indemnity if the ship is under-valued. There is a difference between a salvage claim and a general average claim. These were volunteer salvors, and the salvage is a particular average loss from perils of the sea, not under the suing and labouring clause. See *Aitchison* v. *Lohre* (41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755), where the rule now contended for was not referred to at all. See also

Dickenson v. *Jardine*, 18 L T. Rep. 717; 3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 639;
North of England Iron Steamship Insurance Association v. *Armstrong*, 21 L. T. Rep. 822; 3 Mar. Law Cas. O. S. 330; L. Rep. 5 Q. B. 244.

As to an over-valuation in the case of a constructive total loss, see *Irving* v. *Manning* (1 H. L. C. 287), which decided that the real value must be taken. The appellants have paid their share of salvage and general average. Their loss is ascertained, and it is within the limit of the policy. The value cannot be reopened in adjustment, but the appellants are fully insured, and have paid premiums on a sum to cover the whole risk, and are entitled to recover their whole loss and not only thirty-three fortieths of it. See

The Knight of St. Michael, 78 L. T. Rep. 90; 8 Asp. Mar. Law Cas. 360; (1898) P. 30;
Dixon v. *Whitworth*, 40 L. T. Rep. 718; 43 L. T. Rep. 365; 4 Asp. Mar. Law Cas. 327; 4 C. P. Div. 371.

See also

Muirhead v. *Forth and North Sea Mutual Insurance Association*, (1894) A. C. 72;
Lewis v. *Rucker*, 2 Burr. 1167.

The rule as to goods is different from the rule as to ships, and gives colour to the appellants' contention. In that case the percentage of depreciation has to be calculated on the arrival value of the goods, which is applied to the insured value. It being on goods as arrived, not on goods as shipped, the case of the ship is not analogous. The rule has been applied to a ship in the case of *Pitman* v. *Universal Marine Insurance Company* (46 L. T. Rep. 863; 4 Asp. Mar. Law Cas. 544; 9 Q. B. Div. 192), which was a very special case. The question has been discussed in America in

International Navigation Company v. *Atlantic Mutual Insurance Company*, 100 Federal Rep. 304.

It was said in the courts below that this is a rule of long standing, not to be departed from, and that the contract was subject to it, but this is not borne out by the evidence. See also

Atwood v. *Sellar*, 41 L. T. Rep. 83; 4 Asp. Mar. Law Cas. 283; 4 Q. B. Div. 342; on appeal, 42 L. T. Rep. 644; 5 Q. B. Div. 286;
Svendsen v. *Wallace*, 52 L. T. Rep. 901; 4 Asp. Mar. Law Cas. 550; 10 App. Cas. 404.

The case of *The Mary Thomas* (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108), referred to in the judgments below, is not in point.

Pickford, K.C. and *Scrutton*, K.C., for the respondent, argued that the contract was to indemnify the assured up to the limit in the policy if he was fully insured, which in this case he was not. The agreed value is conclusive, and the assured is estopped from setting up a higher value. The same rule applies as in the case of damage to goods, and it is an established rule which has been acted upon by English average adjusters for a long time. See 2 Phillips on Insurance, s. 1410, p. 150, 5th edit.

Hamilton, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 5.—Their Lordships gave judgment as follows:—

Lord MACNAGHTEN.—My Lords: The question in this case is of little consequence as regards the money value of the claim. It is important in its bearing on a rule of practice which has prevailed with underwriters and average staters in this country for a long period. Ship, cargo, and freight have had to contribute to general average and salvage charges. For the purpose of contribution the values of the ship, cargo, and freight at risk were ascertained. There is no question as to the value of the cargo or of the freight. The value of the ship was taken to be 40,000*l.*, being the amount at which it was valued in the salvage proceedings. Contribution from the ship in respect of general average and salvage charges works out at 530*l.* 8*s.* 8*d.* This amount is claimed from the underwriters. The underwriters say: "That may be the proper amount of contribution as between ship, cargo, and freight, but as between us and you the policy on the ship was a valued policy. It was stipulated that 'for so much as concerns the assured by agreement between the assured and assurers' the ship, with its machinery and everything connected therewith, was valued at 33,000*l.* As the value in the policy is so much less than the contributory value, we are only bound to pay a proportionate amount, or thirty-three-fortieths of the ship's contribution." To this the shipowners answer: "You are opening the policy. The ship was fairly valued at 33,000*l.* That value as between you and us must hold good for all purposes. You have nothing to do with the value put upon the ship at a different time and for a different purpose. It is impossible to determine with any degree of accuracy the value of a thing which is not an article of commerce. The agreed value in the policy is, or was at the time of the agreement, just as truly the 'real value' as the value arrived at somehow or other in the salvage proceedings. The ship was fully insured, and you must make good the loss just as you would have had to reimburse the cost of repairs made necessary by sea damage." Many authorities were cited, and all available text-books were referred to. But, speaking for myself, I must say that I think that little help is to be obtained from text-books or reported cases. No case was cited which has more than a very remote and indirect bearing upon the question. Mr. Phillips, who upholds the English practice as against the New York practice, for which the appellants contend, puts the case very fairly when he says (s. 1410): "There is nothing in the policy that favours one of these modes of construction in preference to the other, each being consistent with the language of the instrument." His conclusion is that the question must depend upon the application of "the general principles of insurance." But I do not think that we get rid of the difficulty by referring it to the general principles of insurance. It seems to me that there is as much to be said on the one side as on the other. And although I think, if the matter were *res integra*, that I should prefer the English rule, my preference would be based on this consideration, that the law of marine insurance in this country, although anomalous in many respects, in eminently practical. Just as the agreed value of the ship is disregarded when the question is whether a prudent uninsured owner would repair or abandon, so where there has been a value put upon the ship by a competent authority or adopted by a competent authority, or treated as binding in a business transaction, it seems to me that that value, whether it has or has not the better right to the title of "the real value," cannot be left out of consideration. And I think it a salutary rule and not unreasonable that the underwriters' liability under the policy should be adjusted with regard to it. However that may be, I do not think that Mr. Hamilton, in his able argument, succeeded in proving that the English rule is contrary to principle. That being so, there is, in my opinion, an end of the case, and discussion on the comparative merits of the English rule and the New York rule becomes academical.

The rule that prevails with English average staters is a rule that has been long established. It is well known, and it must have helped to form the basis of a vast number of contracts which are still running, and some of which may run for twelve months to come. In that state of things it seems to me that if the English rule is to be altered, it must be altered by Parliament and not by a decision of this House. It would be open to Parliament, if it should see fit, to enact a new rule, to fix a date for its coming into operation, and so avoid any semblance of injustice to those who have contracted on the footing of the old rule. Stirling, L.J. in his judgment in the Court of Appeal, expresses an opinion that, theoretically, the sum recoverable would be that which would be payable if the agreed value in the policy had been employed in the average adjustment. I venture to think so too. The mode of calculation adopted by the average staters seems rather too favourable to the underwriters. Suppose the value of the ship in the policy, and also for the purpose of contribution, to be 16,000*l.*, the value of the cargo and freight to be 12,000*l.*, and the total amount required to be 840*l.*, the ship would then pay four-sevenths, or 480*l.* Then suppose the ship, for the purpose of contribution, was valued at 18,000*l.*, the value of cargo and freight remaining the same the ship would pay three-fifths, or 504*l.*, that is 24*l.* more than if the value for the purpose of contribution had been the same as the value in the policy. But if you reduce the ship's contribution in the proportion of eighteen to sixteen, the underwriters have only to pay eight-ninths of 504*l.*, or 448*l.*, that is 32*l.* less than would have been payable if the contributory value had been the same as the value in the policy. But there again the rule is well understood, and, though I do not think it quite accurate, I do not think that it ought to be disturbed. Though the rule only speaks of general average, it has always been treated as applying to salvage expenses also. I do not think that any distinction ought now to be made between these two heads of expenditure. The first part of the rule, which says that the insurers are not to pay more than the ship's contribution, although the contributory value be less than the value in the policy, seems to me to be unobjectionable, as the contract of insurance is a contract of indemnity. In the result, therefore, I move your Lordships that the appeal be dismissed with costs.

Lord SHAND.—My Lords: I am also of opinion that the appeal should be dismissed, and the judgments of Bigham, J. and of the Court

of Appeal affirmed with costs. I confess that I think the case a very clear one, and the ground of my judgment may be stated very shortly. The policy of insurance provides that the ship, for so much as concerns the assured, by agreement between the assured and assurers in this policy, is and shall be valued at, say, 33,000*l.* In all questions of indemnity, therefore, the parties to the policy, insurers and insured, have agreed that, though the ship may in truth be much more valuable, her value is to be taken at 33,000*l.* only. There is no exception. The agreement is to apply in all cases of indemnity which may arise. So if the question were one of principle merely, and the rule of custom and practice, which has been so much referred to, had never existed, the House must give effect to this stipulation or agreement between the owner of the ship and the underwriter or insurer, who asks that the terms of his special contract shall receive effect. An owner may insure so as to cover his whole risk, or he may insure only to cover part of his risk, and prefer to be his own insurer in part, or, to put it in other words, to leave his ship in part uninsured. This he does if he insures his ship below her true value. Thus, having a ship worth 40,000*l.*, he may insure her for 20,000*l.* only, with a clause such as that above quoted, declaring that he has agreed that between him and the underwriter the ship shall be taken to be of that value only. What is the effect of this? Not only that the owner becomes his own insurer for one-half of the value of the ship, but he gets a present benefit. He pays only one-half of the premium which he must have paid had he insured his ship at her true value, and, on the other hand, the underwriter undertakes only the risk corresponding to the reduced premium on one-half of the real value of the ship. In questions of salvage and general average, which at once give rise to claims of indemnity under an insurance policy, the value of the ship is necessarily a material element, for the value of the ship will, with the circumstances in which the salvage services have been given, enter deeply into the question of the remuneration to be given. Of course that value in a question with salvors must be the real value at the time when the salvage services are rendered. Accordingly, in this case the ship was taken at her full value, and the owner had to pay a larger sum than if the value had been 33,000*l.* only. It seems to me that when he claims full relief by way of indemnity, the underwriter in his defence is simply asking that effect shall be given to his stipulation in the policy that in all questions of indemnity the ship shall be valued at 33,000*l.* only. It follows that he is liable to pay only the proportion which the value in the policy bears to the actual value on which the statement has been made up. I therefore agree with Bigham, J. in holding that the rule or custom founded on is in accordance with sound principle; but even if that were open to question, the rule has been so long recognised and acted on that I am further of opinion with your Lordships that effect should now be given to it, and that it should continue to receive effect unless altered by legislation.

Lord BRAMPTON.—My Lords: The steamship *Balmoral*, by a marine policy dated the 20th Dec. 1898, and underwritten by the respondent, was insured for twelve calendar months against all ordinary perils of the seas. By the policy it was agreed that, for so much as concerned the assurers and the assured, she should be valued at 33,000*l.* In June 1899, while on a voyage from Philadelphia to London, when near the Isle of Wight, the *Balmoral* met with so strong a gale, and so heavy and irregular a sea, that her tail shaft was fractured, and it became necessary to accept the voluntary assistance of the steam trawler *Amroth Castle* to tow her, as she did, during two days, when two tugs, which had been engaged and hired for that purpose, took her in charge in the Downs and towed her to the Millwall Dock, London. The cost of these two tugs was 100*l.*, and formed the item of general average in dispute, and the owners of the *Amroth Castle* were awarded by the Admiralty Court as salvage the sum of 500*l.* In the course and for the purposes of the salvage action it was proved that the contributory value of the *Balmoral* was 40,000*l.*, so that, having regard to the agreed policy value, she was underinsured to the amount of 7000*l.* In adjusting these two items as between the owners of the ship, cargo, and freight, the adjuster, taking the contributory value of the ship to be 40,000*l.*, assessed the amount to be contributed by the owners for general average at 58*l.* 6*s.* 8*d.*, and for salvage 472*l.* 2*s.*, making a total of 530*l.* 8*s.* 8*d.* payable by the *Balmoral*. The question has now arisen between the shipowners and the underwriters, the shipowners claiming that the whole of those amounts is payable by the underwriters, as insurers of a fully-insured ship, the underwriters contending that their liability is limited to such proportion of those sums as the agreed value of the ship bears to the contributory value proved in the Admiralty Court. This would reduce their liability to thirty-three fortieths of the plaintiffs' claim, which they have always been prepared and are willing to pay. Before Bigham, J. it was proved by a highly experienced average adjuster, that for many years a custom had existed which certainly in and since 1874 had been adopted as a rule at Lloyd's, that when a ship is insured for less than the contributory value, the underwriter pays on the insured value. It was proved also that such custom applied to salvage as well as general average, and that salvage had until recently been always adjusted as part of a general average. The owners of the ship contended that the rule was inconsistent with the terms of the policy, for that the *Balmoral* was a fully-insured ship, being valued as a whole at 33,000*l.*, and being so insured they were entitled to a full indemnity against the claims. Bigham, J. overruled that contention, and refused to disregard the rule, on the basis of which, as he said, policies for many millions had been made, and acting upon it he gave judgment for the underwriters.

In that judgment I entirely agree. I can well understand that in one sense, but in one sense only, the *Balmoral* may be said to have been fully insured as a ship—that is to say, every part of her structure forming a complete ship was in fact covered by the policy, but not to her full value, for it was expressly agreed in the policy that for all purposes of it her value should be limited to 33,000*l.*, being only thirty-three fortieths of her contributory or real value, in respect of which the salvage was awarded. In adjusting the liability of the underwriters, therefore, the amount of salvage payable by them was properly arrived at

having regard to the proportion which the agreed value of the ship bore to the contributory value as proved in the Salvage Court. This was in exact accordance with the custom and rule proved. Based, as the amount of a salvage award invariably is, upon the true contributory value of the ship, and the property saved, I cannot conceive anything more unreasonable or unjust than that an owner should seek to recover from an underwriter salvage based upon a value far in excess of the insured value, and so get the benefit of an insurance without paying the premium largely in excess of the smaller value which as between themselves they have agreed for all purposes of the policy to treat as the true value and to be bound by. Another consideration presents itself to me. It cannot be denied that the ship being for all purposes of the insurance insured for 33,000*l.* only, the property of the owners saved by the salvors was worth 7000*l.* more than the insured amount. What sound or just reason can possibly be urged in support of the claim of the owners to be so indemnified by the underwriters who have received from the owners no consideration for such indemnity? I can see none. Let me suppose that the owners, having insured with the defendants in 33,000*l.* on the ship valued at that sum, had effected another insurance with other underwriters, valuing the ship at 7000*l.* to make up its full value. Would anybody question that the salvage payable on the full value of the ship would be rightly claimed and payable by contributions from both sets of underwriters in the proportions which the sum insured by each bore to the whole value of the property salved—viz., 40,000*l.*? If the assured, whether with a view of saving the premiums or for any other reason, preferred to leave the 7000*l.* uninsured, they became their own insurers to that amount, and I see no reason in law or good sense why they should not bear the burden which they now seek, as I think, improperly, to fix upon the underwriters. I have considered carefully the very able arguments of the learned counsel for the appellants and the cases cited in support of them, but they have not substantially affected the views which I have expressed and entertain. The rule and custom of Lloyd's, upon which Bigham, J. acted, is, in my opinion, sound, sensible, and legal, and I am therefore content to rest my judgment upon it, and agree that this appeal should be dismissed with costs.

Lord ROBERTSON concurred.

Lord LINDLEY.—My Lords: This case turns on the effect of expressing, in an ordinary marine policy, an agreed value at which the ship insured by it is to be taken as between the assured and the underwriter. The effect has to be considered with reference to two losses sustained by the assured—viz., (1) his share of a general average loss; and (2) his share of a loss sustained by reason of salvage services for which payment had to be made. The assured's share of these two losses is 530*l.* The ship was valued in the policy at 33,000*l.* In ascertaining the amount payable by the assured for general average and for salvage the ship was valued at 40,000*l.* The underwriters thereupon contend that they are liable to pay thirty-three fortieths of the above-mentioned 530*l.* The assured, on the other hand, say that they are entitled to be paid the whole of this sum, as it does not exceed the limit of 33,000*l.* The underwriters contend that their view is correct in principle, and is in conformity with a long-established custom or practice at Lloyd's invariably followed in this country. The assured do not deny that the last statement is true, but they contend that the custom or practice is contrary to principle, and ought not to be judicially recognised. Bigham, J. who tried the case, and the Court of Appeal have both decided in favour of the underwriters, and your Lordships are asked to reverse their decision. Let us consider the principles applicable to the case independently of any custom or practice at Lloyd's or amongst underwriters. The sum of 33,000*l.* mentioned in the policy is a sum agreed upon between the assured and the underwriter. No one else is in any way bound to value the ship at that sum. If, as here, a general average loss has been sustained and has to be borne by ship, freight, and cargo, according to their respective values, it is plain that the real value of the ship must be ascertained in order to apportion the loss between them, and that the conventional value of 33,000*l.* must be disregarded. So as regards salvage; the salvors are in no way affected by the fact that the ship has been valued at a particular sum in her policy of assurance. The real value of the ship saved must be ascertained, because the amount awarded for salvage depends (*inter alia*) and to a great extent on the benefit which accrues to the owner of the ship, and this benefit can only be measured in money by the value of the property saved. But, whatever the real value of the ship, when the amount payable by the underwriter to the assured has to be ascertained, her value must be treated as 33,000*l.*; and if the owner makes any claim on him based on the ship being worth more, the underwriter is entitled to say that the claim is not in accordance with the bargain between them. I confess that I see no answer to this argument. It seems to me to follow from the decision of your Lordships in *Irving* v. *Manning* (1 H. L. Cas. 287), where the true effect of a valuation clause in a policy was carefully considered and finally settled. For the sake of avoiding all disputes in settling what the underwriter has to pay, the value of the ship is to be taken at an agreed sum. In order to prevent fraud by over-insuring this principle may require qualification, but where, as here, the ship is under-insured, no qualification is necessary. The notion prevalent at one time, and supported by the high authority of Mr. Benecke, that although the valuation in a policy is conclusive in the case of a total loss, yet that in the case of a partial loss the valuation may be opened, has long been exploded: (see 3 Kent's Com. 274, 1 Parson's Marine Ins. 272; 1 Arnould Ins. 299 and 2 *Ib.* 939, edit. 6). There are numerous decisions showing this to be the case in valued policies on goods and freight (the most recent being *The Main*, 70 L. T. Rep. 247; 7 Asp. Mar. Law Cas. 424; (1894) P. 320); and I am unable to discover any reason for applying to ships a doctrine repudiated as unsound when applied to goods or freight. At the same time, I have not discovered any direct decision on this point. The principle that the valuation in a policy on ships is to be regarded in cases of partial loss was assumed to be correct in *Pitman* v. *Universal Marine Insurance Company* (46 L. T. Rep. 863; 4 Asp. Mar. Law Cas. 544; 9 Q. B. Div. 192), and was not questioned on appeal. The

owners, however, contend that the underwriters have no concern with the mode in which the amounts payable for losses insured against are arrived at. The owners say that they are fully insured up to a certain limit, and that if that limit is not exceeded all losses insured against must be fully paid. This appears to me to ignore the difference between valued policies, as understood in this country, and open policies, and to be erroneous according to English law. The introduction of the word "fully" occasions the fallacy in the plaintiff's reasoning. It is not true to say that the plaintiffs are fully insured. If the word "fully" is introduced, it must be qualified, so as to show its true meaning—*i.e.*, fully for a ship of the value mentioned in the policy. If, in this case, the ship had been totally lost the owners would have found themselves uninsured to the extent of the ship's real value over 33,000*l.* To say that the whole value, as fixed in the policy, is insured, and then to treat the assured as fully insured, appears to me misleading. The contract is not fully to insure the shipowner up to a certain limit, but to insure him on the footing that his ship is to be taken to be of the value of 33,000*l.* for the purpose of ascertaining what is payable under the policy. The foregoing observations are as applicable to losses owing to salvage as to ordinary general average losses. There is more difficulty in dealing with salvage losses, as the sum awarded for salvage services is arrived at by considering the risks and dangers encountered by the salvors as well as the value of what is saved; but this value is always a very material matter for consideration; and, other things being the same, it may, for all practical purposes, be fairly regarded as regulating the amount awarded when the sum payable under a valued policy has to be ascertained. So the matter stands on principle.

Let us now consider the custom or practice or rule on which the underwriters also rely. The rule does not mention salvage; but it was proved at the trial that the rule is always applied to losses occasioned by salvage as well as to ordinary general average losses, and I have endeavoured to show that this is correct in principle. The rule, as framed, treats over-insurances and under-insurances differently. It first deals with over-insurances, and says: "If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assured on the contributory value." If this rule is applied to a valued policy, it infringes the principle of taking the agreed value for better and for worse in ascertaining what the underwriter has to pay. This deviation from that principle may perhaps be justifiable in cases of over-insurance, on the ground that it avoids all danger of fraud and endless disputes between over-insured owners and underwriters. But this part of the rule is inapplicable to the present case, and it is unnecessary to say more about it. The second part of the rule applies to under-insurances and to the present case; and there being no danger of fraud, the rule says: "But when insured for less than the contributory value the underwriter pays on the insured value." The rest of the rule is consequential on this. The rule is, in my opinion, not wrong but right in principle, and is calculated to save infinite trouble. The actual method of working out the rule adopted by underwriters may not be arithmetically accurate, but it is simple and convenient; there is nothing unfair in it, it has long been adopted, and there is no justification for disturbing it. It is true that in New York the practice appears to be in favour of the appellants, but in this respect I believe New York stands alone; and although uniformity in these matters is greatly to be desired, your Lordships cannot, in my opinion, judicially do otherwise than dismiss this appeal. So far as the actual words of the policy go, they appear to me consistent with both rival contentions; but the English rule is more consistent than the other with the interpretation which has for years been put on valued policies in this country. The appeal should be dismissed with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondent, *Waltons, Johnson Bubb*, and *Whatton.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 8, 1902.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

STEEL, YOUNG, AND CO. *v.* GRAND CANARY COALING COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Construction—Time for loading—Stoppage by strikes—"Stoppage for six days from time of vessel being ready to load"—Charter to "become null and void"—Stoppage commencing after expiration of time for loading.

By a charter-party it was agreed that the vessel should load a cargo of coal for the charterers, "to be loaded in 140 *running hours commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load"; and it was provided that in the event of a stoppage arising from strikes "continuing from the period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided however that no cargo shall have been shipped on board the steamer previous to such stoppage." It was agreed the charterers should pay* 16*s.* 8*d. per hour demurrage.*

Notice that the vessel was ready to load was given on the 8*th Aug., and the time for loading expired on the* 15*th Aug. On the* 20*th Aug. a stoppage arising from a strike commenced and continued for six days. No cargo had been shipped, and the charterers gave notice that the charter was cancelled.*

Held (reversing the judgment of Phillimore, J.), that the charter became null and void if at any time after the vessel was ready to load a stoppage continued for six days and no cargo had been shipped, and that the charterers were therefore entitled to treat the charter as cancelled.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

APPEAL by the defendants from the judgment of Phillimore, J. at the trial of the action as a commercial cause.

The plaintiffs were the owners of the steamship *Nith*, and brought this action to recover damages from the defendants for breach of a charter-party relating to that ship.

By a charter-party dated the 29th July 1900 it was provided that the *Nith* should proceed to Newport and there load a full and complete cargo of steam coal for the defendants for carriage to Teneriffe or Las Palmas at 10*s*. 6*d*. per ton freight.

By the charter-party it was provided as follows:

The cargo to be loaded in 140 running hours (excluding bunkering time, Sundays, custom house, colliery and local holiday, Easter Monday and Tuesday, Whit Monday and Tuesday, and three days following Christmas day, and from 5 p.m. on Saturday or the day previous to any such holiday to 7 a.m. on Monday, or the day after any such holiday, unless used), commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between business hours of 9 a.m. and 5 p.m., or 1 p.m. on Saturdays. Any time lost through riots, strikes, lock-outs, or any dispute between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the coal for which the steamer is stemmed, or by reason of accidents to mines or machinery, obstructions on the railway or in the docks, or by reason of floods, frost, fog, storms, or any cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time). In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this charter will become null and void, provided however that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages. In case of partial holiday or partial stoppage of colliery or collieries from any or either of the aforesaid causes, the lay hours to be extended proportionately to the diminution of output arising from such partial holiday or stoppage. If longer detained, charterers to pay sixteen shillings and eightpence per running hour demurrage. No deduction of time shall be allowed for stoppages unless due notice be given at the time to the master or owner.

The vessel was completely discharged in all her holds and was ready to load on the 8th Aug., and written notice was duly given.

The 140 hours for loading expired on the 15th Aug., but no cargo had then been loaded.

On the 20th Aug. a colliery strike caused a stoppage of the coal for which the steamer was stemmed, and that stoppage continued for six running days. No cargo had then been put on board.

On the 28th Aug. the defendants gave notice to the plaintiffs that, inasmuch as the stoppage had continued for six days and no cargo had been put on board, the charter had become null and void and was cancelled.

The plaintiffs were unable to obtain another charter until the 3rd Sept., when another charter was obtained at a lower rate of freight.

The plaintiffs claimed damages for delay from the 8th Aug. to the 3rd Sept., and also for the difference in freight. The defendants paid into court a sum for demurrage from the 8th Aug. to the 26th Aug.

At the trial before Phillimore, J. the learned judge gave judgment in favour of the plaintiffs.

The defendants appealed.

J. A. Hamilton, K.C. and *Lush*, K.C. for the appellants.—The learned judge was wrong in construing the clause in question in this charter-party as meaning that the period of six days must run from the time when notice is given that the vessel is ready to load, and in holding that therefore the provision as to stoppage for six days did not apply if the stoppage commenced after the vessel was ready to load. The proviso that "no cargo shall have been shipped on board the steamer previous to such stoppage," shows that a stoppage commencing after the vessel was ready to load must have been contemplated and intended to be included. Cargo would not be shipped before the vessel was ready to load, and it could not be shipped afterwards if a stoppage was preventing the loading of the vessel. The construction of the clause adopted by the learned judge deprives that proviso of any effect at all. The clause must have been intended to apply to any stoppage continuing for six days at any time, provided that no cargo had been put on board.

Carver, K.C. and *L. Noad* for the respondents.—The learned judge adopted the right construction of this clause. His construction gives their natural meaning to the words of the clause, and carries out the object of the parties. The words are that the charter "shall become null and void," and that is the apt language to be used if our construction of the clause is the right one, but not if the appellants' construction is adopted. The meaning of the clause clearly is that the position between the parties is to be as if the charter-party had not been made, if, when the vessel is ready to load, there is a stoppage which continues for six days; that the charter is then to be wiped out, and neither party to have any right of action. It cannot mean that the vessel might be kept on demurrage by the charterers for any length of time after she was ready to load without loading any cargo, and that then the charterers, if a stoppage occurred, might say that the charter was null and void, and they were not libale to pay any damages for loss caused by a reduction in the rates of freight. The words "for a period of six running days from the time of the vessel being ready to load" cannot refer to a stoppage commencing at any time after the vessel is ready to load. By the charter it was agreed that the vessel should be loaded within 140 hours from the time when she was ready to load. That time expired on the 15th Aug., and there was then a breach of contract by the charterers. The stoppage commenced after that date, and it cannot possibly be said that the charterers, who had then committed a breach of contract, could be entitled to treat the charter as null and void by reason of the subsequent strike and stoppage. The defendants are endeavouring to take advantage of their own breach of contract in not loading the vessel according to the terms of the charter. Proper effect can be given to the proviso as to no cargo having been shipped at the time of the stoppage if our construction of the clause is adopted. Cargo might well be loaded before all the inward cargo was discharged, by arrangement between the parties.

Hamilton, K.C. in reply.—There is no foundation for the suggestion that cargo might be loaded before notice was given that the vessel was ready to load; there was no evidence that such a thing was probable or possible; such a thing would not be feasible in the case of a cargo of coal, according to the ordinary practice; the discharging and loading do not take place at the same part of the port. The charter could not in any case become null and void *ab initio*, because something must necessarily have been done under it before the continuance of a stoppage for six days can have been ascertained.

COLLINS, M R.—This is an appeal by the defendants from the judgment of Phillimore, J. at the trial, in an action brought by the shipowners against the charterers of the ship. The question in the case turns upon the construction of a clause in the charter-party. [His Lordship read it.] Notice was given on the 8th Aug., within the terms of that clause, that the vessel was ready to load, and the running hours for loading ended on the 15th Aug. No cargo was loaded at all, and on the 20th Aug. a strike began at the colliery from which the coal was to be loaded, and continued for six running days. The charterers then asserted that they were entitled to say that the charter had become null and void. Accepting the obligation to pay demurrage from the 15th Aug. to the 20th Aug. and for six days afterwards, they say that they are absolved from any further liability in respect of the charter, because the charter had become null and void under the terms of the above clause. Phillimore, J. did not accept that contention, but held that the stoppage for six running days within the clause must be from the time when the notice was given that the vessel was ready to load. The question which we have to decide is whether the learned judge was right in taking that view of the meaning of the clause. Now, I agree that *primâ facie* the first part of the clause with respect to the written notice does seem to make that the point of time from which the six days must run. But the same clause goes on to say, "provided that no cargo shall have been shipped on board the steamer previous to such stoppage." That undoubtedly contemplates a time between the time when the notice is given and cargo is loaded, because it contemplates an interval of time between the notice and the commencement of a stoppage during which cargo may have been put on board, and provides that if any cargo has been put on board, the clause with respect to stoppage for six days is not to operate. Looking at the reason of the whole thing, that is not an unreasonable view; this clause was inserted for the benefit of both parties with a view to the expected possibility of a difficulty in procuring cargo; and the period of six days was provided in order that the parties might be able to form a judgment as to whether the strike was likely to prove serious or not. This was a provision for the benefit of both parties, sometimes more for the benefit of one party than the other when greater loss might occur to the one than to the other. What, then, is the proper construction of the clause? The plaintiffs say that the stoppage for six days must run from the time when notice is given that the vessel is ready to load, because the charter is to "become null and void," which means that the contract is to be wiped out and is inconsistent with anything being done under the contract; that this provision must be applicable only to the inception of the matter when nothing has been done under the contract; and that, if the provision were to refer to any later time, the words "null and void" would not be a proper expression. The plaintiffs were, however, compelled to admit that the expression "null and void" might, in some circumstances, be applicable to a stoppage at a later period than the notice of readiness to load. It seems to me that, if we were to accept the contention of the plaintiffs, it would be impossible to give any fair and proper effect to the words, "provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage."

It has been suggested that cargo might have been put on board before notice that the vessel was ready to load. That was a mere suggestion without any facts or evidence to support it, or to justify us in construing this clause upon such a supposition. It would not be according to the usual practice that cargo should be so loaded. The natural meaning of those words is that the parties were contemplating the ordinary and natural course of loading. The parties were contemplating the possibility of a stoppage for six days after cargo had been put on board, or of a stoppage for six days when no cargo had been put on board though notice of readiness to load had been given. Apart from the mere suggestions of the plaintiffs, there is no possible construction of that proviso which is compatible with the construction of the clause for which the plaintiffs contend. In my opinion, the appellants' construction of this clause is the right construction, and, as they have paid into court all the damages for which they can be liable, judgment must be entered for them. By the provision as to demurrage the charterers only agree that, beyond the number of days allowed for loading, they must take further time for loading at their own expense; they do not commit any breach of contract by not loading within the limited time. Therefore, there was no breach of contract on the part of the charterers, and there was nothing to prevent them taking advantage of the clause in the charter-party. I think, therefore, that the judgment of Phillimore, J. was wrong, and that the appeal must be allowed.

MATHEW, L J.—I am of the same opinion. A somewhat surprising construction of this contract has been suggested by the plaintiffs. The cargo was to be loaded within 140 hours from the giving of notice that the vessel was ready to load, and it was agreed that if the charterers took a longer time for loading they would pay 16*s.* 8*d.* per hour demurrage. Is there any reason to doubt that this was a contract for the payment of money for the use of the vessel for loading for any time beyond the agreed 140 hours. Therefore, there was no breach of contract on the part of the defendants in not loading within the agreed 140 hours. It cannot be doubted that in contracts like this the parties contemplate the occurrence of calamities for which neither party shall be made liable. The case of a strike is provided for. The charter-party provides that "any time lost through strikes . . . is not to be computed as part of the loading time, unless any cargo be actually loaded during such time." The running

of the agreed time for loading might therefore be stopped by a strike. Then the clause in the charter-party proceeds: "In the event of any stoppage or stoppages arising from any of these causes continuing for the period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided however that no cargo shall have been shipped on board the steamer previous to such stoppage." It is contended by the charterers that, if no cargo has been put on board and a stoppage from a strike has continued for six days, the charter becomes null and void. On the other side, it is contended that this clause has no operation if there was no stoppage from a strike at the particular moment when the vessel was ready to load. I think that this latter contention is not a reasonable one. The object of the clause is to provide for the case of a strike stopping the loading of the vessel for six running days, if no cargo has in fact been loaded. From that proviso as to no cargo having been loaded, it seems to me to be clear that we cannot adopt the narrower construction of the previous words of the clause. It seems to me that the meaning of the clause clearly is that, if there is a stoppage from a strike for six days at any time before any cargo is put on board, the charter-party is to become null and void. I think that the contention of the charterers is right, and that they are entitled to succeed in their appeal.

COZENS-HARDY, L.J.—I am of the same opinion, and have nothing to add.

Appeal allowed.

Solicitors for the appellants, *Botterell* and *Roche*, for *F. Vaughan*, Cardiff.

Solicitors for the respondents, *W. A. Crump* and *Son*.

Thursday, July 3, 1902.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

ROYAL EXCHANGE ASSURANCE CORPORATION *v.* SJÖFORSAKRINGS AKTIEBOLAGET VEGA. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Policy for more than twelve months—Continuation clause—Definition of risk—Validity—Stamp Act 1891 (54 *&* 55 *Vict. c.* 39) *s.* 93.

A ship was insured for twelve months by a policy which contained a clause providing that, should the vessel be at sea or abroad on the expiration of the policy, she should be held covered "until arrival at her port of final destination in the United Kingdom, or on the continent of Europe, at a pro rata *daily premium to the within." At the date of the expiration of the policy the ship was abroad, and was afterwards lost on her homeward voyage.*

Held, affirming the decision of Bigham, J. reported 85 *L. T. Rep.* 241; 9 *Asp. Mar. Law Cas.* 233; (1901) 2 *K. B.* 567, *that the policy was invalid under sect.* 93, *sub-sect.* 3, *of the Stamp Act* 1891.

APPEAL by the plaintiffs from a decision of Bigham, J. at the trial of the action without a jury.

The action was brought by an insurance company upon a policy of marine insurance, whereby they had reinsured themselves against certain risks.

The owners of the steamship *Merrimac* effected with Messrs. Gray, Dawes, and Co., underwriters, an insurance for 4200*l.* on the hull and machinery of the *Merrimac* against all risks for twelve months, from the 18th Oct. 1898 to the 18th Oct. 1899. The policy was in the ordinary form of a Lloyd's policy, and contained at the foot of it the words: "Including printed clauses as attached." Attached to the policy was a printed slip headed: "Elder, Dempster, and Co. Time clauses." Among those clauses was the following:

7. Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the continent of Europe at a *pro rata* daily premium to the within.

Four days later, Messrs. Gray, Dawes, and Co. effected a reinsurance with the plaintiff company on part of their risk on the *Merrimac*. This policy was expressed to be

A reinsurance of Gray, Dawes, and Co., underwriters, subject to terms, *pro rata* returns, continuation, valuation clauses, and conditions of the original policy and to pay as may be paid thereon.

The plaintiffs then reinsured with the defendants, a Swedish company, part of the risk accepted by them. The policy was drawn up in English and was in the ordinary Lloyd's form, but was executed by the defendant company in Sweden. It covered the same period of time as the original policy, and contained a clause: "Continuation clause as per original policy." It was expressed to be

A reinsurance to the Royal Exchange Assurance Corporation subject to all the same clauses, terms, conditions, continuations, &c., that do or shall attach to the original policy and (or) policies, and to pay and (or) receive as may be paid and (or) received thereon, anything herein to the contrary notwithstanding. All claims and (or) losses payable in London. In the event of claim the Vega Company agree and undertake to pay upon the claim note of the Royal Exchange Assurance Corporation, stating such claim to have been already settled by same. In case of any dispute under this policy, the Vega Company agree to be bound in all things by the jurisdiction and decision of the English law courts.

During the currency of these policies the *Merrimac* sustained heavy damage and put into Quebec, where temporary repairs were effected with the intention of bringing the vessel home for permanent repairs. On the 25th Oct. 1899, the twelve months named in the policy having then expired, the *Merrimac* sailed from Quebec and was totally lost on that voyage home.

The defendant company refused to pay under the policy which they had underwritten, and the plaintiff company commenced the present action.

At the trial before Bigham, J. the policy sued upon was tendered in evidence by the plaintiffs. Bigham, J., acting under sect. 14 of the Stamp Act 1891, then took the objection that the policy was invalid under sect. 93 of that Act, and, after hearing the arguments on both sides, held that the policy was invalid and inadmissible in evidence.

The learned judge thereupon gave judgment for the defendants.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The case is reported 85 L. T. Rep. 241; 9 Asp. Mar. Law Cas. 233; (1901) 2 K. B. 567.

The plaintiff company appealed.

The Stamp Act 1891 (54 & 55 Vict. c. 39) provides as follows:

Sect. 93 (1). A contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance. (2) No policy of sea insurance made for time shall be made for any time exceeding twelve months. (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months. (a)

J. A. Hamilton, K.C. and *A. H. Chaytor* for the plaintiff company.—This document is not invalidated by sect. 93. It is not a policy made for a period exceeding twelve months. The document sued upon really contains two separate policies. The first is clearly a time policy for twelve months, and the second, which is contained in the continuation clause is a separate and distinct policy. This second policy, if it be treated as a time policy, is valid, because it is not made for a period exceeding twelve months. But it is really a voyage policy, the voyage being clearly defined as commencing at the spot where the ship happens to be at the termination of the previous time policy, and ending at the port of her final destination in the United Kingdom or on the continent of Europe. That is the proper view to take of this agreement:

Way v. *Modigliani*, 2 T. R. 30; 1 R. R. 412.

There is no objection, so far as the Stamp Act is concerned, in holding that a document may contain two distinct contracts, as either contract may be stamped separately from the other. Where a contract is capable of two constructions, one making it valid and the other void, it is clear law the first ought to be adopted:

Mayor, Aldermen, and Citizens of Norwich v. *Norfolk Railway Company*, 4 E. & B. 397;
North-Eastern Railway Company v. *Lord Hastings*, 82 L. T. Rep. 429; (1900) A. C. 260.

The particular risk is sufficiently defined to satisfy the requirements of sect. 93, if the beginning and the end of the voyage can be ascertained with reference to events which have happened:

Folsom v. *Merchants' Mutual Marine Insurance Company*, 38 Maine, 414;
Cleveland v. *Union Insurance Company*, 8 Mass. 308.

This point was assumed, though not actually decided, in two English cases:

Crocker v. *Sturge*, 75 L. T. Rep. 549; (1897) 1 Q. B. 330;
Crocker v. *General Insurance Company Limited of Trieste*, 3 Com. Cas. 22.

But, further, the Stamp Act 1891 ought not to apply at all to this contract. The contract was executed in Sweden by a Swedish company and ought to be construed according to Swedish law. A contract valid according to foreign law may be sued upon in England, although, if it had been made in England, it would not have been enforceable by action:

Leroux v. *Brown*, 12 C. B. 801.

(a) This section has been amended by the Finance Act 1901 (1 Edw. 7, c. 7), s. 11.—REP.

Here the intention of the parties was to make a valid contract. There is nothing in the contract against public policy, or against morality, nor anything by which the public revenue is injured. There are many instances, such as under the Statute of Frauds or the Statutes of Limitations, in which, under such circumstances, parties can agree not to rely upon the provisions of a statute. The objection taken to this document by Bigham, J. is of that kind which the law leaves to the parties to rely upon or not, as they may desire. As the parties here intended to make a valid contract, the court should infer an agreement between them that the defendants should not rely upon this objection under sect. 93. It is, of course, the duty of the judge to look at a document to see if a sufficient stamp duty has been paid upon it, but here the question is not one affecting the revenue. The question is merely whether the plaintiffs have a cause of action.

Scrutton, K.C. and *T. Mathew* for the defendant company.—There is no evidence whatever of any agreement between the parties that the defendants should not rely upon sect. 93. Under sect. 14, it is the duty of the judge to look at a document offered in evidence to see whether it complies with the requirements of the Stamp Act. As to the law by which this contract is to be governed, the primary rule is to ascertain what was the intention of the parties:

Hamlyn and Co. v. *Talisker Distillery Company*, 71 L. T. Rep. 1; (1894) A. C. 202.

Here the contract is drawn up in a common English form, payment under it is to be made in England, and the defendants agreed to be bound by the jurisdiction and decision of the English law courts. Then, if English law is to be applied, the policy does not comply with the requirements of sect. 93 of the Stamp Act 1891. Whether it be treated as containing a time policy followed by a voyage policy, or a time policy followed by another time policy, the same objection applies to it, that there is no specific description such as sect. 93 requires. The risk must be definitely described in the policy:

Home Marine Insurance Company v. *Smith*, 78 L. T. Rep. 734; 8 Asp. Mar. Law Cas. 408; (1898) 2 Q. B. 351.

They referred also to

Allen v. *Morrison*, 8 B. & C. 565;
Great Britain Steamship Premium Association v. *Whyte*, 19 Rettie, 109.

Hamilton, K.C. in reply.—*Home Marine Insurance Company* v. *Smith* (*ubi sup.*) is distinguishable. The judgment in that case went upon the impossibility of defining the amount for which the ship was insured.

COLLINS, M.R.—Notwithstanding the able argument of counsel for the plaintiffs, I think that the judgment of Bigham, J. should be affirmed. The action is brought by an insurance company who had reinsured other persons in respect of certain risks, and had also reinsured themselves with the defendants. The plaintiffs have paid the sum due by them under the first policy, and now seek to recover their loss from the defendants. The action was tried before Bigham, J. without a jury. He looked at the instrument put in suit, as he was bound to do

under sect. 14 of the Stamp Act 1891, and he came to the conclusion that, having regard to other provisions of the Act, the instrument was invalid and could not be made the subject matter of an action. The question raised on this appeal is whether he was right in coming to that conclusion. This question turns mainly on sect. 93 of the Stamp Act 1891. [His Lordship read the section.] The last clause in that section must refer to time policies. Now, does the policy relied upon by the plaintiffs comply with the provisions of that section? The answer depends upon the continuation clause. The policy itself is for a period of twelve months, but then it contains the continuation clause which has caused the difficulty in the case. The clause is this: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the continent of Europe at a *pro rata* daily premium to the within." The question is whether the risk is sufficiently defined to bring the policy within the provisions of sect. 93. Now, the vessel was damaged on the voyage insured, but succeeded in putting into Quebec where temporary repairs were carried out in order to enable her to cross the Atlantic for the United Kingdom. She left Quebec after the expiration of the twelve months and was lost on her voyage home. Under those circumstances claims were made on the policies of insurance. Bigham, J. held the policy sued upon to be invalid under the Stamp Act 1891 as being a time policy for a period exceeding twelve months. The plaintiffs contend that the policy is not invalid under sect. 93 on two grounds, first, that it is really a policy for twelve months, followed by a voyage policy, and alternatively that it is really two time policies though contained in one document. As to the first contention, the difficulty arises as to the places where the supposed voyage is to begin and end. Mr. Hamilton said that the voyage should be considered to be from the place where the ship happened to be at the expiration of the time policy to the port in the United Kingdom or on the Continent, which the ship might finally arrive at. That, he says, is a sufficiently definite description of the risk to satisfy the provisions of sect. 93. In my opinion, however, his proposition seems to ignore the provisions of the section which require a specific definition of the voyage. That requisition is not satisfied by describing a voyage as beginning anywhere and ending at any port in the United Kingdom or on the continent of Europe, at no particular time. The learned counsel pressed upon us the interpretation put on some somewhat similar clauses in certain American cases; but, as Mathew, L.J. has pointed out, those cases had reference to a particular class of vessel engaged in a particular kind of trade. The question there depended upon the course of trade, and, whether or not those cases would in similar circumstances be followed in English courts, they seem to me to be so far apart from the present case as not to throw any light upon the question now before us. It was also sought to distinguish the case of *Home Marine Insurance Company* v. *Smith* (*ubi sup.*). There the indistinctness of the definition was in the amount insured for. The court held that as the amount was not defined except in so far as a limit was put to the sum to be paid by the underwriters as regards any one ship, there was no specific definition sufficient to satisfy the statute. I do not think that the learned counsel were able to distinguish that case satisfactorily. The case applies to the amount insured, not to the risk insured against, but the principle on which it was decided seems to me to apply to both matters. The termini of the alleged voyage in the present case are just as indistinct as was the sum named in the case referred to. Bigham, J. was of opinion that the plaintiffs had not succeeded in showing that sect. 93 did not apply to this policy. He dealt first with the hypothesis that the document sued upon was a time policy, followed by a voyage policy, and he pointed out the great inconvenience of including in it a policy to which no implied warranty of seaworthiness attached, and another policy to which such a warranty did attach. He also held that the voyage was not sufficiently defined, as no termini were specified. He then dealt with the other alternative suggested — viz., that the document contained two time policies. He found that a similar difficulty existed there, because the period of the second time policy is not defined. On these grounds therefore he held, and in my opinion rightly held, that the policy is too indefinite to satisfy the requirements of the Stamp Act, and is therefore invalid.

It was then contended on behalf of the plaintiffs that as the defendants did not themselves take any objection to the validity of the policy it ought to be inferred that the parties to the action had agreed that the point should not be taken. It was also argued that as the defendants are a Swedish Company and the policy was executed by them in Sweden, the question of the validity of the contract ought to be decided by Swedish law. I will deal with the latter point first. It seems to me to be perfectly clear that the parties intended their rights to be governed by English law. The policy is in a well-known English form, and it expressly provides that in case of any dispute under it the Vega Company agrees to be bound in all things by the jurisdiction and decision of the English law courts. The inference to be drawn from that is absolutely clear, and I will only refer to the principle laid down in *Hamlyn* v. *Talisker Distillery Company* (*ubi sup.*). As the question was one which had to be decided in an English court, it would be out of the power of the parties to come to any agreement as to the validity of the policy which would have the effect of fettering the power of the judge at the trial of the action to do that which the Stamp Act 1891 requires him to do. It was, however, urged that the Act only requires the judge to take objections in the case of the stamp on a document being inadequate, and that the Act does not apply to such an objection as was made by the learned judge in the present case, which goes to the validity of the document. But the difficulty in the plaintiffs' way here seems to me to be even greater than it would have been if the objection had been the ordinary one of insufficient stamping. The objection taken is one that actually annuls the document, so that the document cannot be put in suit. The plaintiffs have no cause of action at all. I agree entirely with the judgment of Bigham, J. and I think that the appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The first question is as to the construction of this policy. Is it a time policy throughout? The original policy contains a continuation clause which is incorporated in the reinsurance policy. That clause seems to me to be an extension of the period of time previously mentioned in the policy. The instrument is one time policy for the period of twelve months, and the additional time contemplated by the continuation clause. It was argued on behalf of the plaintiffs that the instrument ought to be construed as though it contained two separate policies, but I cannot believe that it was ever the intention of the parties that the document should be so considered. But even if we were to yield to that suggestion, the second of the supposed policies is not sufficiently specific. The risk is not defined. No one could possibly predict what voyage the vessel might be sent upon at the end of the twelve months named in the policy. Such a policy would be so indefinite that no action could be maintained upon it. I entirely agree with the judgment of Bigham, J. on that point. Then it was said that the court ought to infer an agreement between the parties to the action that no such point as that raised by the learned judge should be taken. There is no evidence of any such agreement, but even if any such arrangement had been made, it could have no effect upon the power of the judge to perform the duty imposed on him by the statute. As to the suggestion that the policy ought to be dealt with according to Swedish law, it is enough to refer to the express stipulation in it that in case of dispute the parties agree to be bound by the jurisdiction and decision of the English courts.

COZENS-HARDY, L.J.—I am of the same opinion, and have little to add. If the plaintiffs had made out that the law of Sweden is to be applied to this policy other considerations would have arisen, but it seems to me that they have failed to show that. The contract was made in Sweden, but that fact is not conclusive to show that the law of Sweden applies to it. The place of payment is to be England, but that fact again is not conclusive in any way. The intention of the parties is to be gathered from the terms of the instrument and the surrounding circumstances. It seems clear to me that in the present case the parties intended their contract to be governed by English law as administered in an English court. That being so, sect. 93 of the Stamp Act 1891 applies, and that section provides that a document of a certain kind which appears to be a contract is to be a nullity. No agreement between the parties could make such a document valid, or could relieve the judge from the obligation of treating it as a nullity. I agree that the judgment of Bigham, J. was right and should be affirmed.

Appeal dismissed.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawkesley*.

Solicitors for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

Tuesday, July 29, 1902.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.)

CARISBROOK STEAMSHIP COMPANY v. LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

General average — Contribution by chartered freight—Sacrifice on outward voyage by ship in ballast.

A ship was chartered to proceed from England to a foreign port and there load a return cargo for freight payable on delivery of the home cargo. The ship performed the outward voyage in ballast, and in the course of that voyage met with a misfortune which necessitated a general average sacrifice. She afterwards completed her voyage, and brought home the cargo for which her owners received the chartered freight.

Held (affirming the decision of Mathew, J.), that the chartered freight was liable to contribute to the general average sacrifice.

Williams v. London Assurance Company (1 *M. & S.* 318) *followed.*

APPEAL by the plaintiffs from a judgment of Mathew, J. at the trial of the action without a jury.

The action was brought by the owners of the steamship *Nestor* upon a policy of insurance underwritten by the defendants by which the hull and materials, engines and machinery, of the ship were insured from the 1st Feb. 1900 to the 31st Jan. 1901.

By a charter-party, dated the 11th Sept. 1900, it was agreed that the ship, which was described as "reported expected to leave Fleetwood about the 12th Sept in ballast, calling at a Bristol Channel port for coals," should proceed to Savannah, and there, having discharged her cargo (if any), load for the charterers a full and complete cargo of cotton, and being so loaded should proceed therewith to Liverpool, Manchester, or Bremen, one port only, as directed, and there deliver the cargo; the freight to be paid on delivery at specified rates per ton.

On the 13th Sept. the *Nestor* sailed from Fleetwood in ballast for Savannah.

The charterers did not exercise their option of calling at a Bristol Channel port.

On the 3rd Oct. she arrived at Savannah roads.

On the 4th Oct., on her way up the river she grounded. She was got off, but with some damage to her propeller and machinery; and repairs having been effected she proceeded to load a cargo of cotton, which she afterwards duly delivered, and the chartered freight was paid.

The plaintiffs brought this action to recover the cost of the repairs.

The defendants contended that the loss was a general average sacrifice, and that the plaintiffs were bound to contribute to the loss in respect of their chartered freight.

Mathew, J. held that the chartered freight ought to contribute to the general average sacrifice, and he gave judgment for the defendants.

The case is reported (1901) 2 K. B. 861.

The plaintiffs appealed.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

Carver, K.C. and *D. Stephens* for the plaintiffs.—The outward voyage in ballast was no part of the adventure in which the freight was to be earned. That was the opinion expressed by Willes, J. in

Potter v. *Rankin*, 18 L. T. Rep. 712; 3 Mar. Law Cas. O. S. 122; L. Rep. 3 C. P. 562.

And that opinion was approved of by Blackburn, J. in giving his opinion to the House of Lords in the same case:

Rankin v. *Potter*, 29 L. T. Rep. 142; 2 Asp. Mar. Law Cas. 65; L. Rep. 6 H. L. 83.

The freight, therefore, ought not to contribute to a general average sacrifice on that voyage. The moment when that average ought to have been adjusted was the date of the ship's arrival at Savannah at the end of her outward voyage. In the court below, Mathew, J. followed a decision of the Court of King's Bench in 1813:

Williams v. *London Assurance Company*, 1 M. & S. 318.

That case is distinguishable. There there was one entire voyage out and home, in respect of which freight was payable, so that the freight was being earned at the time when the loss happened to the ship. The case turned on the special terms of the charter-party. But if the court should be of opinion that that case is not distinguishable from the present, we submit that it was wrongly decided and should be overruled. Many writers have expressed disapproval of it:

Benecke's Principles of Indemnity, p. 315;
Arnould's Marine Insurance, p. 956, 2nd edit.;
Phillips on Insurance, s. 1387, 3rd edit.;
Abbott's Merchant Shipping, p. 357, 5th edit.

J. A. Hamilton, K.C. (*F. D. Mackinnon* with him) for the defendants.—The plaintiffs' arguments rest wholly on the assumption that there were here two voyages by the ship. There is no ground for that assumption. Every transit from one port to another does not of necessity constitute a voyage. The sole object with which the ship left Fleetwood was to earn freight by carrying cargo from Savannah to England. She began to earn the chartered freight the moment she left Fleetwood:

Barber v. *Fleming*, L. Rep. 5 Q. B. 59.

The moment the ship left England the plaintiffs had an insurable interest in the chartered freight. The charter was of a definite ship, so that no other vessel could have earned the freight from Savannah to England. The charter was the same as though the ship had been chartered to go to Savannah and back for a lump sum. The judgment of Lord Ellenborough, C.J. in *Williams* v. *London Assurance Company* (*ubi sup.*) is exactly in point. That case has been approved by the full Court of Queen's Bench in 1857:

Moran v. *Jones*, 7 E. & B. 523.

The evidence given by adjusters shows that their practice has always been to act in accordance with those two decisions, except for a short time when some doubt was felt in consequence of a decision of Barnes, J. in *The Brigella* (69 L. T. Rep. 834; 7 Asp. Mar. Law Cas. 403; (1893) P. 189). The dicta of text-book writers that have been referred to throw no real doubt on the decision in *Williams* v. *London Assurance Company* (*ubi sup.*). They merely point out the difficulty of apportioning the relative values of the outward and homeward freight. The case is quoted with approval by other writers:

Lowndes on General Average, p. 310, 4th edit.;
Baily on General Average, p. 152, 2nd edit.

The case has also been followed in America, in Massachusetts:

The Brig Mary, 1 Sprague, 17.

In 1810 Sir William Scott, in a question as to the salvage of some vessels recaptured from the French, said that where a ship goes out under a charter-party to proceed to her port of destination in ballast, and to receive her freight only upon her return, the court is not in the habit of dividing the salvage:

The Progress, 1 Edwards, 210.

As to *Potter* v. *Rankin* (*ubi sup.*) the dictum of Willes, J. which is relied upon ought to be read in connection with the facts of the case. There the ship was on a voyage and earning freight at the time of the charter. The freight in question was not being earned at all on that voyage. The two cases of *Williams* v. *London Assurance Company* (*ubi sup.*) and *Moran* v. *Jones* (*ubi sup.*) were not cited. No question of general average was there raised. The court will always be unwilling to upset the general practice of average adjusters:

Svensden v. *Wallace*, 52 L. T. Rep. 901; 5 Asp. Mar. Law Cas. 453; 10 App. Cas. 404, at p. 416;
Balmoral Steamship Company v. *Marten*, 85 L. T. Rep. 389; 9 Asp. Mar. Law Cas. 254; (1901) 2 K. B. 896.

D. Stephens in reply.

COLLINS, M.R.—This is an appeal from a decision of Mathew, J. in an action on a policy of marine insurance brought by the owners of the steamship *Nestor*, who were also owners of, and had received, the chartered freight. The insurance was on the hull and machinery of the ship. The defendants, the underwriters, wish to set off against the plaintiffs' claim a sum which they allege to be payable by the plaintiffs as a general average contribution. The question is, whether the chartered freight is the subject-matter of general average contribution or not. The ship was chartered from Fleetwood to Savannah, and was entitled to call for coals at a Bristol port, an option of which she did not avail herself. She proceeded without any cargo to Savannah, where she was to load a full and complete cargo of cotton, and she eventually arrived there, loaded her cargo and returned to England; and the plaintiffs duly received the chartered freight. But on her way out to Savannah she met with a misfortune which necessitated a general average sacrifice, by running on to a sandbank which caused damage to her propeller and machinery. The question is whether the plaintiffs, as owners of the chartered freight, are liable to contribute to the general average sacrifice. Mathew, J. held that the chartered freight had been at risk, and had been saved by the general average sacrifice, and it was therefore a contributory factor to the general average loss. On behalf of the plaintiffs it was contended that the freight could not be taken into consideration as a contributory factor to the general average loss, because it was on the outward voyage that the loss occurred. Against this contention we have

the case of *Williams* v. *London Assurance Company* (*ubi sup.*) decided in 1813. That case admittedly covers the point which is now raised. To my mind it is even a stronger case than the present. There the ship was chartered for a voyage from London to the East Indies and back, and it was agreed that the charterers should only pay freight for cargo brought home from the East Indies. She was only insured for the outward voyage, and in the course of that voyage she incurred an average loss, but was repaired, and afterwards performed her voyage and the freight was received. The Court of King's Bench, consisting of Lord Ellenborough, C.J., Le Blanc and Bayley, JJ., held that the freight was liable to contribute to the general average. That case is directly in point here, but the contention put forward on behalf of the plaintiffs is that it was wrongly decided, and should be overruled. In 1857 the same point came up before the Court of Queen's Bench in the case of *Moran* v. *Jones* (*ubi sup.*), and the court decided the point in the same way; or, at least, unanimously adopted as law the decision in *Williams* v. *London Assurance Company* (*ubi sup.*). The marginal note to that case contains the following words: "The ship was chartered to proceed from Liverpool to a foreign port, and there load a return cargo for freight payable on delivery of the home cargo. She took on board an outward cargo and sailed. She was driven on a bank by a storm near Liverpool; and the cargo was rescued from her and carried to Liverpool and there warehoused; the ship still remaining ashore in a situation of peril. Some days afterwards the ship was got off and taken to Liverpool, where she was repaired and again took the cargo on board, and proceeded on her voyage. It was agreed between the parties in the case that the freight was to be taken as liable to contribute to general average; and the question for the court was only whether the expenses, incurred after the goods were in Liverpool, in getting the ship off, without which she could not have proceeded on her voyage, or earned the chartered freight, were general average to which ship, freight, and cargo were to contribute; or were chargeable to ship alone; or were chargeable on any other principle. Held, that as the ship and freight were both in peril, and both saved, the freight must contribute as well as the ship, supposing the cargo not to contribute." That case is directly in point, though perhaps the headnote expresses rather more strongly than was necessary the relation which the case has to the question of the liability of the cargo to general average. It certainly seems from the argument that both the court and counsel dealt with the question of the liability of the freight as being left to the court to decide. Mr. Brown, in his argument for the plaintiff, said: "Then, next, it is clear that the chartered freight was in risk, and must contribute," and in support of that he cited *Williams* v. *London Assurance Company* (*ubi sup.*). Then he went on, "The freight is in fact part of the value saved. The expense of getting the ship off the shore is clearly matter of general average." Then at the end of the argument Lord Campbell, C.J. said: "So far as respects the liability of the freight to contribute to these expenses, we are prepared to give our opinion now; but as to the cargo, we wish to take time for consideration." Therefore he treated the first of those two matters as a question of law to be decided by the court. Lord Campbell, C.J. afterwards delivered the considered judgment of the court. He said: "In this case we never doubted that the defendant, as underwriter on the freight, was liable for a contribution to general average in respect of the sum of 643*l.* 11*s.* 1*d.*, the expenses incurred in order to get the ship off from the bank on which she was stranded, whether the goods were or were not liable to contribute to this portion of the loss. It is admitted that the ship could not have been got off and completed her voyage unless these various expenses had been incurred. Therefore, without these expenses there would have been a total loss of the freight amounting to the sum of 6750*l.* Even if the goods were not liable to contribute, on the ground that they were not exposed to any peril when these expenses were incurred, still, the freight which was then exposed to peril and has been saved ought to contribute as if there had never been any goods on board, and the ship had sailed from Liverpool to Callao in ballast." Those words seem to me to be directly in point here, and they seem to me to be the decision of the court. But whether they are so or not, they are at all events an expression of opinion of the full Court of Queen's Bench approving the principle of the earlier case. But, further than that, we have a case decided in 1810 which involved a similar principle, that was the case of *The Progress* (*ubi sup.*), decided by Sir William Scott (afterwards Lord Stowell) in the Admiralty Court. In that case, some ships which had been captured by the French were recaptured at Oporto by the allied British and Portuguese army. At page 218 of the report Sir William Scott says that he had to determine three points, and the third of these points was this: "Whether a salvage is due on the freight of ships taken up in this country and sent to Oporto to bring away these cargoes which they have been enabled to do by the act of recapture." Then at page 223 he says: "As to the freights of the vessels that were taken up at Oporto, no salvage is asked upon them, and certainly it could not have been contended that any would be due, as the voyage had not commenced. But those vessels which had gone to Oporto from this country under a charter-party for one entire voyage out and home, and had already performed the outward voyage, were in the course of earning their freights at the time of capture; they had actually broke ground, as the phrase is, and had entered upon that adventure out of which their profits were to arise. While lying in the harbour of Oporto they were in the course of earning their freights; they were *in itinere* and the salvage is as clearly due as if they had been captured at sea. If there had been two distinct voyages, as is sometimes the case in charter-parties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect; but where a ship goes out under a charter-party to proceed to her port of destination in ballast and to receive her freight only upon her return, the court is not in the habit of dividing the salvage. These, therefore, are the determinations I have come to; . . . and thirdly, that where a ship goes out under a charter-party for the voyage out and home, salvage is due upon the whole freight." It was contended on behalf of the appellants that there was no analogy between a salvage claim

and a general average loss. But it seems to me that there is a very clear analogy between them. In each case something has been saved at the expense of another person, and the question is what has been saved and as to the payment for the saving. In both cases that involves a consideration of what was at risk and what was saved by the sacrifice—viz., in the one case the average sacrifice, in the other the labour and expense of the person salving. Then in what proportion are the interests which were at risk and were saved to contribute? What is the factor which ought to come into consideration in respect of freight? It seems to me that in *The Progress* (*ubi sup.*) the court had practically the same question to decide as the average adjuster had in the present case. The judgment is therefore a clear authority in principle that in the case of a round voyage under such conditions as these, where the freight is only payable on the ultimate arrival of the ship with its cargo on board, that freight is a contributing factor.

But, besides the cases I have referred to, we have a decision of the Court of Admiralty in America—namely, the case of *The Brig Mary* (*ubi sup.*). As has been pointed out, the case cannot be considered as a binding authority in England, but having regard to the fact that opinions of text-writers, some American, have been cited to us, the case is a very valuable contribution to the discussion, because it is a clear opinion by Sprague, J. directly upon the point in question, in which, after considering the opinions of text-writers, and the decision in *Williams* v. *London Assurance Company* (*ubi sup.*), he came to the conclusion that the decision in that case was correct. That, then, is the state of the authorities. Considered as a question of principle, the matter seems to me to come within the general principles that freight should contribute to the loss. In a round voyage such as this, the ship is earning freight from the moment of breaking ground to the time when the cargo is ultimately delivered, and is in process of earning it just as much before the goods are put on board as afterwards. Just as the ability of the ship to earn freight would be defeated if the adventure were stopped short by some peril a fortnight after starting, so also it would be defeated if it met with a similar peril one day before reaching the port of destination. Where there is a general average sacrifice ten days after she has started, it seems to me that there can be no distinction in principle between that sacrifice and the sacrifice two days before she would have arrived. What is at risk in both cases is the same—namely, the ability of the ship to consummate the whole undertaking in safety. No doubt there are differences of convenience where a cargo is carried to the intermediate port as distinguished from the case where there is no cargo carried to that port; and if the cargo is carried under a charter which entitles the ship to a freight at the intermediate port, one can easily understand why average adjusters should make a difference and limit the contributors in respect of such an average sacrifice on what I may call the first part of the voyage by limiting the freight contribution to the freight which was to be earned at the first port where the cargo was to be discharged. I am not quite sure that that practice is entirely satisfactory in point of principle, but I do not think you can obtain rules laid down and acted upon which are absolutely perfect in point of principle. It is necessary to obtain rules which are good working rules in point of convenience, and that is the standard which has always been applied in this country. The law has to be administered as a practical thing, and cannot always be carried out with extreme nicety to all its logical results. The principle laid down in *Williams* v. *London Assurance Company* (*ubi sup.*) seems to me to be on the whole a sound working practical rule, and, speaking for myself, I am not able to find a better one. The difficulties which it is argued may arise in applying that principle seem to me to be less than the difficulties which may arise in applying the rules suggested by those who have questioned that case. But I think that the arguments put forward on behalf of the defendants show that the objections to the decision in *Williams* v. *London Assurance Company* (*ubi sup.*) are not really so formidable as at first sight they appear. They are objections pointing to the difficulty of estimating the proper value to be put upon the freight at risk, rather than difficulties arising from taking it into consideration at all. But in my opinion the law as laid down in *Williams* v. *London Assurance Company* (*ubi sup.*) is the law of the country at this moment. The case was decided in 1813 by a court presided over by Lord Ellenborough, C.J., a court of judges pre-eminently versed in the question in dispute. It was decided a year or two after the case of *The Progress* (*ubi sup.*), in which, in my opinion, the same principle was involved. It was approved and followed in 1850 by the Court of Queen's Bench, presided over by Lord Campbell, C.J., and also consisting of lawyers very familiar with this particular branch of the law. And further, it has never been questioned in any case in which it has been cited and discussed. The only and most formidable objection made to it is based upon some observations of Willes, J. in *Potter* v. *Rankin* (*ubi sup.*). I need not say that any observations falling from him with regard to the law of insurance, or the common law, I should treat with the most absolute and unfeigned respect; but it seems to me that, when the circumstances of the case are examined, the observations made by him which are here relied on merely amount to a dictum. The facts in the case did not raise the point which we now have to deal with, nor was the case of *Williams* v. *London Assurance Company* (*ubi sup.*) cited or in any way commented upon. The mind of Willes, J. was addressed to a different, not to the same set of circumstances as exist in the case now before us, and his observations ought therefore to be taken *secundum subjectam materiem*. It was not present to the mind of the learned judge that he was in any way impugning the decision in *Williams* v. *London Assurance Company* (*ubi sup.*). The same observation applies to the opinion of Blackburn, J. in the House of Lords when we remember that he himself was counsel in the case of *Moran* v. *Jones* (*ubi sup.*) when *Williams* v. *London Assurance Company* (*ubi sup.*) was cited and the matter discussed. Lord Blackburn could not have forgotten it, and it is impossible to conceive that he had in his mind any intention of impugning the authority in the observations that he made. It must have been

present to his mind, and, therefore, I am satisfied that neither Willes, J. nor Blackburn, J. had any intention of impugning the authority of that case in the observations that were made in *Potter* v. *Rankin* (*ubi sup.*). That is the state of the authorities. We have the two decisions of the full Court of Queen's Bench, never discussed or drawn in question in any court of law in this country till now. In that state of the law we are asked to overrule those authorities, which have been followed by average adjusters all this time, in order to give effect to some doubts of an ambiguous and difficult character suggested by text-writers more or less eminent. On these grounds I think I may adopt in terms the judgment of the learned judge in the court below. In my opinion this appeal should be dismissed.

STIRLING, L.J.—I am of the same opinion. A very elaborate and able argument upon behalf of the appellants has brought before us many considerations which would be well worthy of being weighed if the question were now brought before the courts of this country for the first time, or if we were engaged in framing a code of rules to be adopted with reference to matters of this description. But our duty is to administer the law as we find it, and it is admitted, in order that the appellants may succeed, that *Williams* v. *London Assurance Company* (*ubi sup.*), which was decided in 1813 by a court consisting of Lord Ellenborough, C.J., Le Blanc, and Bayley, JJ., must be overruled. Now, that case was not only decided a long time ago, but it has never been judicially dissented from. On the contrary, it has been followed, as it seems to me, by Lord Campbell, C.J. and the Court of Queen's Bench in *Moran* v. *Jones* (*ubi sup.*). Further, it has been acted upon, so far as appears, ever since down to the present time by average adjusters, and their practice, regard being had to the long time it has been established, in itself raises a strong presumption that the rule which is there laid down is not one which works injustice or is found in practice to be unreasonable. Now, what have we against this? No doubt the decision has been criticised by text-writers; but the only scrap of authority which can be adduced is a statement by Willes, J. in *Potter* v. *Rankin* (*ubi sup*), a statement which was accepted as accurate by Blackstone, J. in advising the House of Lords in the same case. Now, two observations may be made with reference to what was said by Willes, J. The facts of *Potter* v. *Rankin* (*ubi sup.*) were not the same as those in the present case and in the case of *Williams* v. *London Assurance Company* (*ubi sup.*). In *Potter* v. *Rankin* the outward and homeward voyages were not, as here, dealt with by one and the same charter; but the homeward voyage was the subject of a totally distinct and separate charter-party from that which dealt with the outward voyage. Further, *Williams* v. *London Assurance Company* (*ubi sup.*) was not cited in *Potter* v. *Rankin* either in the Court of Common Pleas or in the House of Lords. It is impossible for me to suppose that either of the learned judges whose opinions in *Potter* v. *Rankin* (*ubi sup.*) are relied upon meant, without citing or dealing with *Williams* v. *London Assurance Company* (*ubi sup.*), to overrule a decision which had been well established at the time when they spoke. For these reasons, which are substantially those of my Lord and Mathew, J., I think that the appeal ought to be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion, and have nothing to add. *Appeal dismissed.*

Solicitors for the plaintiffs, *Holman, Birdwood,* and *Co.*

Solicitors for the def-ndants, *Waltons, Johnson, Bubb,* and *Whatton.*

July 29, 30, *and Aug.* 7, 1902.

(Before COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.).

DUNN AND OTHERS *v.* BUCKNALL BROTHERS AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Delay in carriage of goods—Negligence—Liability of shipowner—Measure of damages—Loss of market.

The carriage by a shipowner of goods destined for an alien enemy, without the knowledge and consent of the shipper of other goods on the same vessel, is a breach of duty by the shipowner towards the shipper of the other goods, and he is liable for delay in the delivery of those other goods occasioned by the seizure and detention of the ship by reason of the fact that the enemy's goods were on board, and he is not excused by an exception in the bill of lading of loss or damage occasioned by restraint of princes.

There is no absolute rule of law that damages for loss of market cannot be recovered for delay in the carriage of goods by sea. Whenever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of carriage by sea as in the case of carriage by land, the damages for delay are to be calculated upon the same principles in both cases.

The Parana (36 *L. T. Rep.* 386; 3 *Asp. Mar. Law Cas.* 399; 2 *P. Div.* 118) *considered and explained.*

APPEAL by the defendants from the judgment of Mathew, J., at the trial of the action as a commercial cause, without a jury.

The plaintiffs brought this action to recover damages from the defendants for delay in the delivery of goods shipped at New York on the *Mashona* for carriage to Algoa Bay.

The goods were shipped by the plaintiffs under bills of lading, which contained an exception of liability for loss or damage occasioned by restraint of princes.

The *Mashona* sailed from New York on the 5th Nov. 1899, shortly after war had broken out between Great Britain and the South African Republic.

The vessel arrived at Algoa Bay on the 5th Dec. On her arrival at Algoa Bay she was arrested by H.M.S. *Partridge*, when it was found that she was carrying goods consigned to residents in the South African Republic. These goods consisted chiefly of breadstuffs, and were said to be intended for the enemy.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

The vessel was then taken to Table Bay by order of the naval authorities, and a suit was instituted in the Prize Court at Cape Town for the confiscation of the goods and the condemnation of the vessel, as aiding or attempting to aid trading operations with the enemy.

The vessel and cargo were detained at Table Bay, pending the proceedings in the Prize Court, from the 5th Dec. 1899 until the end of March 1900.

By the judgment of the Prize Court the goods consigned to the residents in the South African Republic were condemned, but the vessel was released.

The owners of the vessel were ordered to pay the costs of the captors, save those of bringing the vessel round from Algoa Bay.

The Prize Court held that "there was reasonable and probable cause for seizing the ship; that there was certainly carelessness in taking the cargo on board at New York; and that though the intention was perhaps not to have landed them without the consent of the proper authorities, still the ship had the goods on board."

In consequence of these proceedings there was a delay of several months in the delivery of the plaintiffs' goods, and the plaintiffs brought this action alleging that the delay was caused by the negligence of the defendants.

The action was tried before Mathew, J. without a jury as a commercial cause.

The learned judge found as a fact that the defendants' agents knew the true character of the goods which were subsequently condemned, and that they were guilty of negligence and breach of duty to the plaintiffs in permitting them to be shipped on the same vessel as the plaintiffs' goods, and he accordingly gave judgment for the plaintiffs.

The learned judge further held that the plaintiffs were entitled to damages based on the difference between the market value at the time when the goods ought to have been delivered in due course and their market value at the time when they were in fact delivered. He found as a fact that it was known to the defendants what the object of the plaintiffs' shipment was—namely, the supply of the British troops—and that the goods would sell at a much higher price if delivered in due course than at a later time when a large importation of similar goods would force prices down.

The defendants appealed.

Carver, K.C. and *Lewis Noad* for the appellants Bucknall Brothers, and Sir *E. Clarke*, K.C., *Scrutton*, K.C., and *F. D. Mackinnon* for the appellants Donald Currie and Co.—The judgment of the learned judge at the trial was wrong upon both parts of the case. First, there is no liability at all upon the defendants, for they are protected by the exception, in the bill of lading, against loss or damage occasioned by restraint of princes. There was no negligence or breach of duty on the part of the defendants towards the plaintiffs in carrying goods for other shippers which were destined for the South African Republic. There is no obligation upon the shipowner not to carry any other cargo which may possibly in the result cause delay. These other goods were not dangerous goods within the authorities which show that a shipowner may be liable if he takes goods on board which cause actual physical damage to other goods on the same ship:

Hayn v. *Culliford*, 40 L. T. Rep. 536; 4 Asp. Mar. Law Cas. 128; 4 C. P. Div. 182.

Even if the defendants knew the destination of these goods, yet they did not intend to land them without the leave of the proper authorities, and therefore they were not guilty of any breach of duty towards the plaintiffs in carrying these goods, the carriage of them not being an illegal act:

The Mercurius, Edwards's Adm. Rep. 53;
The Minna, *Id.* 55, n.

There was not any breach of duty or any negligence, on the part of the defendants, arising from the carriage of these other goods, for which the defendants can be made liable for the delay of the plaintiffs' goods:

The Xantho, 57 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503;
Steinman v. *Angier Line*, 64 L. T. Rep. 613; 7 Asp. Mar. Law Cas. 46; (1891) 1 Q. B. 619.

If the defendants are liable for the delay, the judgment of Mathew, J. as to the measure of damages was wrong. Damages for loss of market are not recoverable in the case of delay in the carriage of goods by sea. The judgment of the learned judge upon this question is contrary to the decision in *The Parana* (36 L. T. Rep. 388; 3 Asp. Mar. Law Cas. 399; 2 P. Div. 118). In that case Mellish, L.J. said: "It was said that there can be no difference between the carriage of goods by railway and the carriage of goods by sea; but it appears to me there may be a very material difference between the two cases. . . . The difference between cases of that kind and cases of the carriage of goods for a long distance by sea seems to me to be very obvious. In order that damages may be recovered, we must come to two conclusions—first, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed"; and the Court of Appeal held that damages for loss of market could not be recovered. The distinction between cases of carriage by land and by sea is based upon the uncertainty of the length of a voyage by sea, and upon the uncertainty as to the time of sale, which may be before, during, or after the voyage. Damages for loss of market have never been allowed in cases of carriage by sea:

British Columbia Saw Mill Company v. *Nettleship*, 18 L. T. Rep. 604; 3 Mar. Law Cas. O. S. 65; L. Rep. 3 C. P. 499;
The Notting Hill, 51 L. T. Rep. 66; 5 Asp. Mar. Law Cas. 241; 9 P. Div. 105;
Victorian Railways Commissioners v. *Coultas*, 58 L. T. Rep. 390; 13 App. Cas. 222.

There was no evidence that the defendants knew anything at all about the object and purpose of the shipment of the plaintiffs' goods. Further, mere knowledge is not sufficient; it must be knowledge under such circumstances that the contract is made with reference to the object and purpose of the shipment. It was not a natural and probable consequence of the alleged breach of duty by the defendants that the vessel should have been unnecessarily taken to Cape Town, and the defendants cannot be liable for the delay thereby caused.

Asquith, K.C, *Bray*, K.C., and *F. W. Hollams* for the respondents.—The judgment of the learned judge was right both upon the question of liability and as to the measure of damages. The case is quite clear as to the liability of the defendants, and there is no ground for questioning the finding of fact of the learned judge that the facts concerning these goods were known to the agents of the defendants. There was a clear breach by the defendants of their duty towards the plaintiffs, and that breach was committed as soon as the vessel sailed from New York with the contraband goods on board. The carriage of those goods made the vessel dangerous to the goods of the plaintiffs:

Hayn v. *Culliford*, 40 L. T. Rep. 536; 4 Asp. Mar. Law Cas. 128; 4 C. P. Div. 182.

What, then, is the proper measure of damages? If the goods of the plaintiffs had been lost by the negligence of the defendants and they were liable to pay damages for the loss, the measure of damages would clearly be the market value of the goods at the port of destination. It is admitted that the price which the Government would pay for the goods was as high as the market value. The plaintiffs are not claiming damages in respect of any exceptional contract, but only ordinary damages. The facts of the present case entirely distinguish it from the case of *British Columbia Saw Mill Company* v. *Nettleship* (18 L. T. Rep. 604; 3 Mar. Law Cas. O. S. 65; L. Rep. 3 C. P. 499). The loss of the difference between the market value of the goods at the time when they ought to arrive at their destination and at the time when they do in fact arrive is an ordinary and natural consequence of the breach of the contract to carry when the delivery of the goods is delayed just as much as the loss of the market value when the goods are lost. In the present case it was in the contemplation of both parties that the goods were to be carried to a special market. The case of *The Parana* (36 L. T. Rep. 388; 3 Asp. Mar. Law Cas. 399; 2 P. Div. 118) is, therefore, an authority in favour of the plaintiffs upon that state of facts. That part of the judgment in that case which deals with the special character of the contract for carriage by sea does not affect the present case, and it is unnecessary to argue that it is not now good law. The case of *Rodocanachi, Sons, and Co.* v. *Milburn Brothers* (56 L. T. Rep. 594; 6 Asp. Mar. Law Cas. 100; 18 Q. B. Div. 67) shows that the market value of the goods at the time when they ought to have been delivered is the measure of damages, and that, if damages are claimed in respect of an exceptional contract of sale at a price higher than the market price, that contract must have been brought to the notice of the carriers. The case comes absolutely within the rule laid down in *Hadley* v. *Baxendale* (9 Exch. 341), which is equally applicable to cases of carriage of goods and of sale of goods. That rule was stated, in the Court of Appeal, to be now the law upon the subject, in *Hammond* v. *Bussey* (20 Q. B. Div. 79).

Carver, K.C. in reply.—This seizure could not reasonably have been expected, and the delay thereby caused was not a natural and probable consequence which could have been within the contemplation of the parties. The case of *Hayn* v. *Culliford* (*ubi sup.*) was an entirely different case, where the other goods actually injured the plaintiff's goods. The defendants had reasonable grounds to believe that arrangements could be made for landing the goods which were subsequently seized, and therefore there was no negligence on their part:

The Mercurius, Edwards's Adm. Rep. 53.

As to the damages, the judgment of Mellish, L.J. in *The Parana* (*ubi sup.*) was based upon the character of the commerce and not upon the uncertainty of carriage by sea, and that judgment is good law.

Cur. adv. vult.

Aug. 7.—The judgment of the court was read by

COLLINS, M.R. [stated the facts and proceeded:]—The defendants deny liability altogether and dispute the measure of damages. Their contention on the first point is that at the time of shipment they had reasonable grounds for supposing that by arrangements existing at South African ports ships containing cargo consigned to the enemy would be allowed to proceed on giving a bond in 10,000*l.* for the discharge of such goods into the hands of the British authorities at their ultimate port of destination within British territory, and that their intention in proceeding to Algoa Bay was to report the facts to the British authorities there and act as directed by them—an intention which was defeated by the intervention of the *Partridge* before they had time to carry it out; and they relied on the case of *The Mercurius* (Edwards's Adm. Rep. 53) in support of this contention. We are of opinion that, if such was their real intention (and the court use the word "perhaps" in referring to it in the passage above cited), it affords no defence to this action. The court have found, in the passage above cited, that there was carelessness at New York, and that there was reasonable and probable cause for seizing the ship. Even if the finding of the court were not conclusive on this point, in our opinion the course they took in carrying enemies' goods without the knowledge and consent of the other shippers was a breach of duty towards them, and was in effect to court detention even if they had a well-founded hope of being able to give such explanations to the authorities as would avoid the condemnation of the ship. They took the risk of escaping detention without consulting the plaintiffs on the matter. They are *primâ facie* liable to the plaintiffs for late delivery, and can only excuse themselves by the exception. But it is quite clear that they cannot rely upon an exception to excuse themselves from the consequences of a peril which their own negligence contributed to bring about. The principle is thus stated by Mr. Carver in his valuable work on Carriage by Sea, 3rd edit., sect. 16: "A shipowner will not be exonerated from losses arising from any of these excepted causes when there has been any neglect on his part to take all reasonable steps to avoid them." See also sect. 77 of the same work, citing *The Xantho* (57 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503, 510, 515), and Bowen, L.J. in *Steinman* v. *Angier Line Limited* (64 L. T. Rep. 613; 7 Asp. Mar. Law Cas. 46; (1891) 1 Q. B. 619). The converse case of the owner's right against the shipper is given by Lord Tenterden in his treatise on Shipping, chap. 7, as an instance of an unques-

tionable liability—and is quoted by Lord Campbell, C.J. in *Brass* v. *Maitland* (6 E. & B. 470, at p. 484): "The merchant must lade no prohibited or uncustomed goods by which the ship may be subjected to detention or forfeiture"; and the liability of the shipowner under the express contract of the bill of lading is at least as clear as that implied as resting on the merchant. Here, as pointed out by Mathew, J., there can be no doubt as to the conduct of the shipowners. They had taken advice and caused a clause to be introduced into the bills of lading delivered to the shippers of goods for the Transvaal, pointing to the possibility of detention and excusing themselves from liability. Indeed, Mr. Carver contended that, inasmuch as their conduct was deliberate, and with a view to carry such cargo to its destination only if the British authorities sanctioned it, the case came within *The Mercurius*, and the shipowners were excused. It certainly seems a startling contention that a liability for the consequences of an act done negligently would be excused if it were shown that the act was done deliberately. The question whether the conduct of the owners has been such as to justify the condemnation of the ship is quite independent of their responsibility to the shipper for detention brought about by their act, negligent or deliberate. If negligence in not taking all proper precautions to avoid the excepted perils debars them from relying on the exception, how can they better their position by showing that they deliberately encountered it, even though they had hopes more or less sanguine of avoiding serious detention? They clearly had no right to speculate on possible immunity at the risk of the plaintiffs without consulting them. In our opinion, therefore, on the undisputed facts in this case their liability is clearly established, and the only remaining question is whether the learned judge was wrong in his direction to the referee as to the measure of damages.

On this part of the case *The Parana* (36 L. T. Rep. 388; 3 Asp. Mar. Law Cas. 399; 2 P. Div. 118) was strongly relied upon by the appellants as establishing that the plaintiffs could be entitled to nothing more than interest on the value of the goods when they ought in ordinary course to have been landed down to the date of actual delivery, and they contended broadly that damages could not be recovered for loss of market on a voyage by sea. But we do not understand *The Parana* as establishing any such general proposition. There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages and the consequent uncertainty as to the times of arrival may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that, as a general rule, damages for loss of market by late delivery are not recoverable from the carrier by sea. It is certainly not a rule of law; it is only an inference of fact that from the circumstances of the case no reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties. But, as the means of sea transit improve, voyages of three and four weeks' duration may be, and are now, accomplished with almost absolute certainty, and the state of the market at the reasonably calculated date of arrival may well be a vital factor present to the minds of both parties at the time of making the contract. Wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea, as of a land, transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases. This, indeed, if it were not self-evident, would seem to follow from the illustrations given by Mellish, L.J. himself in delivering the judgment of the Court of Appeal in *The Parana* (*ubi sup.*). After giving other instances, he says, at p. 121: "Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum." And he adds: "But there is in this case no evidence of anything of that kind." Here the learned judge has found as a fact "that it was known to the defendants what the object of the plaintiffs' shipment was—namely, the supply of the British troops—and that the goods would sell at a much higher price if delivered in due course than at a later time when a large importation of similar goods would force prices down." The appellants, indeed, suggested that evidence was wanting to support these findings, but on the admitted facts it seems to us a case of *res ipsa loquitur* as to the inference which both parties must have drawn as to the purpose of the shipment and the probable effect of delay in delivery. And, as is well known to practitioners in the Commercial Court, cases are there conducted on the basis of mutual admissions which do not always appear in the formal record. We are of opinion, therefore, that the judgment of the learned judge was right on all points, and that, consequently, this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants Donald Currie and Co., *Parker, Garrett*, and *Holman*.

Solicitors for the appellants Bucknall Brothers, *W. A. Crump* and *Son*.

Solicitors for the respondents, *Hollams, Son, Coward*, and *Hawksley*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 25, 28, *and May* 15, 1902.

(Before BIGHAM, J. in the Commercial Court.)

MARTEN AND OTHERS *v.* STEAMSHIP OWNERS' UNDERWRITING ASSOCIATION LIMITED. (*a*)

Marine insurance—Partial or total loss—Insured value to be repaired for constructive total loss—Reinsurance against total loss—Construction.

A ship was insured against all risks in a valued policy of 16,000*l*. *The policy contained the Institute Time Clauses, one of which is "The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss." The underwriter reinsured,*

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

but only against a total loss, and in the policy of reinsurance this clause was struck out. The ship was stranded, and the owners abandoned her as a constructive total loss, selling her for 6000l. to a buyer who raised and repaired her. On the evidence it appeared that, while she was an ordinary constructive total loss, yet she might have been repaired at less cost than her assured value.

Held, that under these circumstances the underwriter was not entitled to recover on the policy of reinsurance as for a total loss.

THIS case was heard before Bigham, J. sitting in the Commercial Court on the 25th and 28th April.

J. A. Hamilton, K.C. and *Lochnis* for the plaintiffs.

Scrutton, K.C. and *Hurst* for the defendants.

In the arguments of counsel the following cases were cited:

Chippendale v. *Holt*, 73 L. T. Rep. 472;
Franco-Hungarian Insurance Company v. *Merchants' Marine Insurance Company*, Shipping Gazette, June 7, 1888;
Charlesworth v. *Faber*, 5 Com. Cas. 408;
Sailing Ship Blairmore Company v. *Macredie*, 79 L. T. Rep. 217; 8 Asp. Mar. Law Cas. 429; (1898) A. C. 593.

The facts and arguments are fully stated in the judgment.

Cur. adv. vult.

May 15.—BIGHAM, J.—By a policy of the 29th May 1899 the plaintiffs underwrote a vessel called the *William Symington* against all risks for twelve months. The vessel was valued in the policy at 16,000*l*. Attached to the policy was a printed memorandum containing what are called the Institute Time Clauses, one of which is as follows: "The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss." The effect of this clause is that, if the vessel becomes damaged by the perils insured against, the owner, before he can recover for a constructive total loss, must show that the cost of repairing her will exceed 16,000*l*. The plaintiffs had taken risks on many other vessels, in respect of which they had issued other policies. At the end of the year they were desirous of reinsuring all these risks, and accordingly they effected a policy of reinsurance with the defendants, which is the policy sued on. It is dated the 3rd Jan. 1900, and it covers a sum of 42,884*l*. "upon the vessels as per schedule annexed." The schedule contains the names of about 100 vessels, one of them being the *William Symington*. In the body of the policy there is a valuation clause in the following words: "The said steamships, by agreement between the assured and assurers in this policy, being valued at as per schedule annexed or as per original policy or policies." On turning to the schedule it is found that the *William Symington* is valued at 16,000*l*. and is covered to the amount of 650*l*. The risk is described in the policy as "against the risk of total and (or) constructive total loss only warranted free of all average and (or) salvage charges, being a reinsurance applying to policy or policies, and to pay as may be paid thereon." Thus it will be seen that, whereas the original policy was against total or partial loss (all risks), the reinsurance was only against total or constructive total loss. The Institute Time Clauses were printed on the reinsurance policy, but many of them were struck out by an ink line being drawn diagonally through them; the clauses so struck out were such as applied more particularly to cases of partial loss, and were inapplicable to a policy against total loss. They included, however, the clause by which it is stipulated that the insured value is to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss. This clause is numbered 14, and the diagonal line went down from No. 5 to No. 15 inclusive, thus traversing No. 14. During the period covered by the two policies—namely, on the 9th Dec. 1899—the *William Symington* ran ashore at Chioggia, in the Adriatic, and on the 20th Dec. the owner served the plaintiffs with notice of abandonment. The vessel was floated on the 23rd Feb. 1900, and was towed into Venice. There some temporary repairs were done to her, and she was then taken to Fiume, where she was sold to a Mr. Fragala for a sum of 5200*l*. Mr. Fragala repaired her, and she is now trading on his account. Having heard the evidence as to the cost of proper repairs to restore the vessel to her original class, I am satisfied of two things—first, that if the ordinary rules are applied to ascertaining the fact, the vessel was a constructive total loss at the date of the notice of abandonment. I mean that a prudent uninsured owner would not have repaired her; he would have made the best of a bad job by selling the wreck as it lay at Chioggia; but I am also well satisfied of a further fact—namely, that if the repaired value is to be taken at 16,000*l*., and not at its true figure, then the vessel was not a constructive total loss. She could have been repaired at a cost which, after taking everything into account, would have been much less (less by some thousands of pounds) than 16,000*l*.

The question I have to consider is whether the plaintiffs ever became liable to pay a constructive total loss to the shipowners within the meaning of the reinsurance policy. If they did become liable to pay such a loss and have compromised with the shipowners for a payment of some less sum, the defendants will get the benefit of the abatement. The whole question of the defendants' liability of course turns upon the true construction to be placed upon the reinsurance policy. The defendants say that the only risk they undertook was the risk of the plaintiffs having to pay as for a total or a constructive total loss on their policy with the shipowners—that is to say, on the basis of a repaired value of 16,000*l*.; and that as the plaintiffs never became liable to pay such a loss, no cause of action has arisen on the reinsurance policy. On the other hand, the plaintiffs say that the defendants are not entitled to inquire whether the plaintiffs had become liable for a constructive total loss on the original policy; and that it is sufficient for the plaintiffs to show a constructive total loss on the basis of the actual repaired value of the ship. Thus the question is reduced to this—Is the clause that the insured value shall be taken as the repaired value to be read into the reinsurance policy? I will first examine this policy as though it contained no express reference of any kind to this clause—that is to say, as though the clause had never appeared in print in the margin and had never been struck through in ink, as already described. What then would have been the meaning of the policy? Now, I think the meaning quite plain, it is a

"reinsurance"; that expression connotes the idea of something already insured. Then what was already insured? The answer is two things—namely, the risk of total loss and the risk of partial loss; but the defendants only reinsured one of these two risks—that is to say, the risk of total loss. But, again, what risk of total loss? The answer is only the risk which arises when the repaired value is taken at 16,000*l*. The plaintiffs are not liable for any other kind of total loss, and therefore cannot reinsure any other kind. The fact is that the sole object of the reinsurance policy was to indemnify the plaintiffs against the risk of total loss covered by the policy which they themselves had issued. Then does it make any difference that the clause can be seen in the print, and has been struck through by the ink line? It is said that this shows an intention to let the question of constructive total loss, if it arises, be determined without reference to the agreed value; in other words, that it shows an intention to reinsure a kind of constructive total loss which does not form the subject of the already existing policy. But, even if any significance at all ought to be attached to the striking out of the clause, there are two answers to this contention: first, that the body of the policy is so worded as to make the clause quite unnecessary—the body of the policy, as I have already said, indemnifies against the risk in the original policy, and against that risk only; and, secondly, that it may well be that, among the many original policies issued in respect of the other 100 ships, there are some which do not contain the repaired value clause; in which case it would be right to strike the clause out of the reinsurance policy. In the way in which the body of the policy is worded it covers all the original risks against total loss or constructive total loss whether the original policies contain the clause or do not contain it, and this is exactly what the parties intended. In truth the plaintiffs have sustained a very large partial loss on the original policy, and they want to recover it back under the reinsurance policy against constructive total loss only. This they cannot be allowed to do. The plaintiffs further say that, having paid as for a constructive total loss on the basis of a repaired value of 16,000*l*., they ought to be allowed to recover against the defendants, as the reinsurance policy contains the words "to pay as may be paid on the original policy." But the answer is, first, that they have not paid as for a constructive total loss. They may so describe the payment which they have made, but it was, in fact, only a payment for a large partial loss; and, secondly, even if they have paid as for a constructive total loss inasmuch as, in my opinion, they were not liable to pay they cannot recover. The words "to pay as may be paid" mean only to pay as the reassured may have been compellable to pay.

Judgment for defendants.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for the defendants, *Pritchard* and *Sons.*

Tuesday, June 24, 1902.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

EDGILL (app.) *v.* J. AND G. ALWARD LIMITED (resps.). (*a*)

Seaman—Disobeying lawful command—Order to join boat—Desertion—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 376.

A seaman can be convicted under sect. 376 (1) (*d*) *of the Merchant Shipping Act* 1894 *for disobeying a lawful command, even although such disobedience amounts to desertion or absence without leave within sect.* 376 (1) (*a*) *or* (*b*).

CASE stated on an information preferred by the respondents against the appellant, under sect. 376 (1) (*d*) of the Merchant Shipping Act 1894, charging him that he, being a seaman and having been lawfully engaged to serve on a British fishing boat, unlawfully and wilfully disobeyed on the 25th Jan. 1902 a lawful command of the master thereof.

The appellant was engaged by the respondents to serve them as second engineer of the *Andes* under an agreement for the half year beginning on the 1st Jan. 1902.

On the 22nd Jan. the *Andes* arrived at Grimsby fish dock from a fishing voyage. The appellant had acted as second engineer during that voyage.

On the 24th Jan. the appellant, being at his work on the *Andes*, was ordered by the foreman manager of the respondents, acting for them and the master of the *Andes*, to be on board at 6 a.m. on the 25th Jan., when the *Andes* was to start to the knowledge of the appellant on another voyage. The appellant assented to such orders, and asked and was informed where the boat would be lying at the time when he was to join.

The appellant did not go aboard the *Andes* at all on the 25th Jan. Search was made for him, and the vessel was detained until another second engineer could be engaged.

The justices found that the appellant wilfully disobeyed the command, without any excuse or reason for so doing.

It was contended on behalf of the appellant that he was wrongly charged, as it was not proved that any order had been given him by the master on board the vessel; that he could not be convicted of wilfully disobeying a lawful command as the facts showed that if he had committed any offence it was that of desertion, or of absence without leave, under sect. 376 (1) (*a*) and (*b*), and that in such a case sect. 376 (1) (*d*) was not applicable. For the respondent it was contended that the appellant had committed the offence under sect. (1) (*d*), and that a seaman was not relieved for wilful disobedience under sect. (1) (*d*) because that act of disobedience was desertion under (*a*) or absence without leave under (*b*).

The justices were of opinion that the appellant had disobeyed a lawful order, and had committed an offence under sect. 376 (1) (*d*), and that it was immaterial whether he had or had not committed either the offence of desertion or absence without leave, and they convicted the appellant.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 376:

(1) If a seaman lawfully engaged to serve in any fishing boat or an apprentice in any sea fishing service

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

commits any of the following offences, that seaman or apprentice shall be punished summarily as follows: (a) For the offence of desertion he shall be liable to forfeit all or any part of the effects he leaves on board and all or any part of the wages which he has earned, and to satisfy any excess of wages paid by the skipper or owner of the fishing boats from which he deserts to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him. (b) For the offence of absence without leave—that is to say, for neglecting or refusing without reasonable cause to join or to proceed to sea in his fishing boat, or for being absent without leave at any time within twenty-four hours of his boat's sailing from any port, either at the commencement or during the progress of the engagement, or for being absent at any time without leave and without sufficient reason from his boat—if the offence does not amount to desertion, or is not treated as such by the skipper, he shall be liable to forfeit a sum not exceeding two days' wages, and in addition for every twenty-four hours of absence either a sum not exceeding four days' wages or any expenses properly incurred in respect of a substitute. . . . (d) For the offence of wilful disobedience—that is to say, for disobeying any lawful command during the engagement—he shall be liable to imprisonment for any period not exceeding four weeks, and also to forfeit a sum not exceeding two days' wages. . . .

(5) A seaman or apprentice shall not be relieved by his refusal or neglect to go to sea or by his desertion from being liable to punishment under this section for an offence of wilful disobedience, continued breach of duty, or unlawful combination, and, in addition to any such punishment, shall also be liable to be punished for the offence of desertion or absence without leave.

Hugo Young, K.C. and *Balloch* for the appellant.

Avory, K.C., *Bodkin*, and *Bruce Williamson* for the respondents.

Lord ALVERSTONE, C.J.—We have to construe sect. 376 of the Merchant Shipping Act 1894. It is perfectly true that that was a consolidation Act; but it was more, and, although in some cases I agree some light can be gained by seeing the course of legislation, I doubt very much whether that applies to this class of legislation, which is obviously part of a code. I think there were two classes of offences contemplated by sub-sects. (a), (b), and (c), as contrasted with subsequent sub-sections. There may be many absences without leave or acts of neglect to join without reasonable cause which would not be wilful disobedience. One would be that a man was not there because he had a reasonable excuse, or that he was not there for some cause which would not be wilful on his part, and he would be liable then to the lesser penalty. But wilful disobedience is made the subject of express enactment, and by that I understand it is meant that the man meant intentionally to disobey something that he was told to do. Speaking for myself, I think it is clear that that construction is very much assisted by sub-sect. 5, which shows that the Legislature was dealing with the same subject-matter in one sense, because they have spoken of punishment for the offence of wilful disobedience, and the punishment for the offence of disobedience or absence without leave is not to relieve him from being liable to punishment for the offence of wilful disobedience. Then, with regard to sub-sect. 4, I think that in all probability it was inserted in order to deal with the cases of apprentices, who are under stricter discipline all the time. Certainly I do not think it was intended to apply to the case where a seaman has had an order with regard to his duty given to him on board the ship. Now, here the evidence before the magistrate was that the man was told to be on board by six o'clock on the following morning. He was the engineer, and it was not to be supposed that he could safely go away and that the ship could sail without someone else being supplied to take his place, and they have found as a fact that he wilfully disobeyed an order. I am quite clear that there was sufficient evidence to come to the conclusion that the offence of wilful disobedience of a lawful command during the engagement had been committed, and therefore we ought not to interfere. I think the words "during the engagement" would seem to show that you must look at what the contract between the employer and employed is for this purpose, and if there is a wilful disobedience of an order given to him during the engagement, and he was bound to obey it, it may well be that sub-sect. (d) deals with a different subject-matter than that which was contemplated by sub-sects. (a), (b), and (c).

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

Solicitors: *Protheroe* and *Price*, for *Reed* and *Bloomer*, Grimsby; *Williamson, Hill*, and *Co.*, for *Bates* and *Mountain*, Grimsby.

July 11, 12, *and Aug.* 11, 1902.

(Before WALTON, J.)

CUNARD STEAMSHIP COMPANY LIMITED v. MARTEN. (a)

Marine insurance — Policy — Construction of— Suing and labouring clause in printed form— Insurance against shipowners' liability owing to omission of negligence clause in contract of affreightment — Applicability of suing and labouring clause to such insurance.

Shipowners, who had entered into a contract of affreightment which contained no negligence clause exempting them from liability for loss arising through the negligence of their servants, effected with an underwriter a policy of insurance on their ship, to cover their liability of any kind to the owners of the cargo up to a certain specified amount owing to the omission of the negligence clause in the contract. The policy was an ordinary printed form of Lloyd's policy, and contained a suing and labouring clause entitling the assured to sue and labour for the defence and recovery of the goods and ship. During the insured voyage the vessel stranded owing to the negligence of the shipowners' servants and part of the cargo was lost, and the shipowners became liable in respect thereof. The shipowners incurred expenses in saving the cargo which was saved and in trying to save the cargo which was lost, and in attempting to tow the vessel off the rocks; and they sought to recover these expenses from the underwriter, not as a direct loss under the policy, but under the suing and labouring clause in the policy as being suing and labouring expenses.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Held, that the suing and labouring clause in the policy had no application to the subject-matter of the insurance, and did not form any part of the insurance, and that the shipowners could not recover under that clause the expenses so incurred by them.

COMMERCIAL CAUSE tried before Walton, J. without a jury.

The action was brought by the Cunard Steamship Company Limited, as the owners of the steamship *Carinthia*, against the defendant, who was one of the subscribers to a policy of marine insurance effected on behalf of the plaintiffs.

By the policy, which was dated the 9th May 1900, the plaintiffs were insured against perils of the seas from New Orleans to ports in South Africa on the plaintiffs' steamship *Carinthia*

To cover shipowners' liability of any kind to owners of mules and (or) cargo up to 20,000*l*., owing to the omission of the negligence clause in contract and (or) charter party and (or) bill of lading.

The policy was an ordinary Lloyd's printed form of policy with special clauses added, and it contained a suing and labouring clause in the following form:

In case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof without prejudice to this insurance.

In a special clause on a slip gummed to the policy the plaintiffs were given "all liberties as per contract of affreightment and (or) charter-party and (or) bill or bills of lading new or old including negligence clause."

The defendant subscribed this policy for 1000*l*.

The *Carinthia* had been chartered by the Government in April 1900 for the purpose of carrying mules from New Orleans to South Africa. The terms of the contract of affreightment were contained in a letter of the 5th April 1900 from the Admiralty Director of Transports to the plaintiffs, and by the terms of the contract the *Carinthia* was to carry some 1500 mules in consideration of the freight and on the terms therein specified.

The contract of carriage contained no negligence clause exempting the plaintiffs from liability for loss arising from the negligence of their servants, the shipowners' liability to the Admiralty being that of common carriers.

In these circumstances the plaintiffs insured themselves by the policy against all liability which might result to them by reason of the omission of the negligence clause in the contract of affreightment.

The *Carinthia* sailed from New Orleans for Cape Town on the 11th May 1900 with the mules on board.

On the 15th May, owing to the negligence of the master, she stranded at Cape Gravois, in the island of Hayti, and was wrecked, and a large number of the mules were lost, and considerable expenses incurred in saving those which were saved and in trying to save those which were lost, and in attempting to tow the vessel off the rocks.

The plaintiffs thereby incurred a liability to the Admiralty.

The plaintiffs in their points of claim alleged that by reason of the stranding of the vessel many mules were totally lost, and the plaintiffs were under liability in respect of the same and in respect of increased freight paid on the mules saved, which were sent on in another vessel, but that the extent of the liability had not yet been ascertained, and that, to reduce or avert a loss which would be recoverable under the policy, the plaintiffs incurred expenses under the suing and labouring clause in the policy to the amount of 7744*l*.; and the plaintiffs claimed in this action only in respect of those suing and labouring expenses. The defendant's proportion of these expenses on his insurance of 1000*l*. was 387*l*. 4*s*. 2*d*., and that was the sum which the plaintiffs now claimed.

The defendant in his defence admitted that the vessel was stranded during the insured voyage owing to the negligent navigation of the plaintiffs' servants, and he alleged that

The policy sued on is expressed to be upon shipowners' liability to owners of mules owing to the omission of the negligence clause in the contract of carriage. The sue and labour clause in the printed form of policy has no application to such a subject-matter of insurance, and is not part of the contract. Alternatively, if the sue and labour clause applies, none of the expenses claimed have been incurred within the meaning of the clause by the plaintiffs, their factors and assigns, in averting from the subject-matter insured loss by perils insured against as alleged or at all. In the further alternative, if the defendant under the policy sued on is liable for sue and labour expenses, the expenses claimed herein were incurred by the plaintiffs to avert the whole of their possible liabilities to the owners of the mules and (or) cargo which far exceeded the liability covered by the policy.

Pickford, K.C. and *Loehnis* for the plaintiffs — It is admitted that the loss was caused by the negligence of the plaintiffs' servants, and that the plaintiffs came under a liability to the Admiralty in respect of the loss. The plaintiffs' claim in this action is confined to a claim under the suing and labouring clause in the policy in respect of expenses incurred by them to avert or reduce the amount of the loss. The first question is whether the plaintiffs are entitled to recover under the suing and labouring clause in the printed form of the policy in respect of the losses incurred. They are entitled to recover under the clause. The policy ought to be construed as a contract on the part of the underwriters by which they agreed to indemnify the shipowners against any liability up to 20,000*l*. which the shipowners might incur to the owners of the mules owing to the omission of the negligence clause in the contract of affreightment; so that, if the loss does not exceed 20,000*l*., they are entitled to recover the whole loss, but if it exceeds 20,000*l*., then they are entitled to recover 20,000*l*. Here the liability of the shipowners to the Admiralty arose owing to the omission of the negligence clause in their contract with the Admiralty, and upon the construction of the policy the suing and labouring clause is applicable, and the underwriters are bound to indemnify the plaintiffs. They referred to

Strang, Steel, and Co. v. *A. Scott and Co.*, 61 L. T. Rep. 597; 6 Asp. Mar Law Cas. 419; 14 App. Cas. 601;

Xenos v. *Fox*, 19 L. T. Rep. 84; 3 Mar. Law Cas. O. S. 146; L. Rep. 3 C. P. 630; affirmed by Ex. Ch. L. Rep. 4 C. P. 665;

The Mary Thomas, 71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108.

Carver, K.C. and *F. D. Mackinnon* for the defendant.—The whole point really is whether the plaintiffs can recover these expenses under the suing and labouring clause in the printed form of the policy. They are not claiming these expenses as a direct loss under the policy, but are claiming them under the suing and labouring clause in the printed form of the policy. The claim should have been a direct claim under the policy. The object of bringing their claim under the suing and labouring clause, instead of bringing it as a direct loss under the policy, is to make the defendant pay more than 100 per cent. of the loss, and to make him pay more than he ought to pay. There is a valid objection to the whole claim. The suing and labouring clause in this policy has no application at all to the subject-matter of the insurance in this case. It is common form in the printed policy, and what the parties have written in the policy is inappropriate to the printed matter. That clause in the printed form is concerned with an insurance on ship and goods; and if the policy were to be read as an insurance on goods, then it might be right to say that the suing and labouring clause applied. But if we are right in saying that this is not an insurance on ship and goods, then the clause does not apply, because there is no subject-matter of the insurance to which it could apply. The insurance was against liability of any kind, and was not confined to the safety of the mules, but covers all liability which the plaintiffs would have incurred owing to the omission of a negligence clause in the contract. *Xenos* v. *Fox* (*ubi sup.*) is a clear authority to show that the suing and labouring clause has no application to this policy. Even if the clause applies, these were not suing and labouring expenses. They also referred to

Crowley v. *Cohen*, 3 B. & Ad. 478;
Joyce v. *Kennard*, 25 L. T. Rep. 932; 1 Asp. Mar. Law Cas. 194; L. Rep. 7 Q. B. 78;
Schloss v. *Heriot*, 8 L. T. Rep. 246; 1 Mar. Law Cas. O. S. 335; 14 C. B. N. S. 59;
Notara v. *Henderson*, 26 L. T. Rep. 442; 1 Asp. Mar. Law Cas. 278; L. Rep. 7 Q. B. 225;
Hingston v. *Wendt*, 34 L. T. Rep. 181; 3 Asp. Mar. Law Cas. 126; 1 Q. B. Div. 367;
Kemp v. *Halliday*, 14 L. T. Rep. 762; L. Rep. 1 Q. B. 520;
Royal Mail Steam Packet Company v. *English Bank of Rio de Janeiro*, 19 Q. B Div. 362;
Aitchison v. *Lohre*, 41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755.

Pickford, K.C. in reply.

Cur. adv. vult.

Aug. 11.—Walton, J. delivered the following written judgment, commencing with a statement of the facts as above set out:—There is no doubt that the plaintiffs are liable to the contractor of the Admiralty for the mules which were lost, and this liability is within the meaning of the policy "owing to the omission of the negligence clause in the contract of affreightment." The difficulty of determining whether the suing and labouring clause forms part of the contract of insurance in this case arises (as so frequently happens in questions of marine insurance) from the very peculiar way in which contracts of marine insurance are expressed. A printed form which dates back to the eighteenth century is used as the basis of the contract. In this form there are certain blank spaces, in which it is usual to insert a description of the subject-matter of the insurance or of the special line of indemnity intended to be given by the policy. It not uncommonly happens that the words written into the blank spaces of the form have no connection with the printed words which precede or with those which follow them. In almost all cases certain parts of the printed form have no application to the risk described by the written words. Sometimes it will be found that many even of the special clauses contained in printed slips gummed on to the policy have no possible application to the actual insurance. Cases are not uncommon in which the whole contract is contained in the written definition of the termini of the voyage and a few written words inserted below in some blank space in the form, none of the printed clauses of the form being applicable at all. Such being the well-known course of business in formulating contracts of marine insurance, it is obviously necessary in every case to consider carefully the description of the risk or special kind of indemnity expressed in the written words of the policy in order to ascertain whether any particular clause of the printed form applies to the insurance effected by the policy. It is most unusual to find that the superfluous or inapplicable words have been struck out of the printed form. Applying this to the present case, it is necessary to look at the description of the risk undertaken by the underwriters in order to determine whether that part of the printed form which is called the suing and labouring clause has any application or forms part of the contract. A somewhat similar question had to be decided in *Xenos* v. *Fox* (19 L. T. Rep. 84; 3 Mar. Law Cas. O. S. 146; L. Rep. 3 C. P. 630; L. Rep. 4 C. P. 665). The question which arose in that case was whether the suing and labouring clause applied to that part of the policy called "the running down clause," by which the underwriters undertake to indemnify the owner of the vessel insured from liability which he may incur to the owners of other vessels with which the vessel insured may be negligently brought into collision. It was held that the suing and labouring clause had no application to such a contract of indemnity contained in a policy on ship. The decision would have been the same if the policy had covered nothing but the risk of liability for collision. I refer to that case only as an illustration, and not as an authority upon which the present case can be decided. The construction of the policy now in question must depend upon its own language and cannot be determined by the interpretation of different language in another policy. It is necessary to consider what was the precise character of the risk covered by the policy now sued upon. It was, as I have said, "to cover shipowners' liability of any kind to owners of mules and (or) cargo up to 20,000*l.*, owing to the omission of the negligence clause in the contract." I may in passing point out that in a special clause which is, I think, contained in a slip gummed on to the policy, the assured is given "all liberties as per contract of affreightment and (or) charter-party and (or) bill or bills of lading new or old including negligence clause." The assured is somewhat specially given liberty to make contracts, including a negligence clause, in a policy which covers nothing but his liability, owing to the omission of the negligence clause. Proceeding,

however, with the consideration of the words which I have quoted, describing the risk covered, there appear to me to be two possible views of the nature of the insurance. It may be an insurance for 20,000*l.* on the mules applying to the plaintiffs' interest as carriers responsible for the safe delivery of the mules. A shipowner who is responsible for the safe delivery of goods carried in his ship has an insurable interest in the goods which he can insure by a policy on goods. *Crowley* v. *Cohen* (3 B. & Ad. 478) affords an example of such a policy. If the policy in the present case were to be interpreted as a policy on mules or cargo applying to the shipowners' liability as carriers, one result of such a construction would be that, if the mules or cargo were worth more than 20,000*l.*, the shipowners were not fully covered. The mules were in fact worth considerably more than 20,000*l.*, and the shipowners' total responsibility, therefore, was for a sum considerably in excess of 20,000*l.* Assuming, merely for the purposes of argument, that the total value of the mules and possible liability was 40,000*l.*, the effect of the policy, treating it as a policy on the mules, would be that the shipowners' interest was insured to the extent of one-half only, and, in the case of a loss, whether total or partial, they would be entitled to recover one-half of such loss and no more. If this is the true nature of the insurance, I see no difficulty in applying the suing and labouring clause. It would not be distinguishable for the purposes of this case from an ordinary policy on goods.

The plaintiffs, however, do not contend that the policy should be construed in this way as an insurance on goods. They contend that the policy must be read as a contract by which the underwriters agreed to indemnify the plaintiffs against liability of any kind up to 20,000*l.*, which they might incur to the owners of the mules owing to the omission of the negligence clause. The plaintiffs contend that for any loss not exceeding 20,000*l.* they were entitled to recover in full, and for any loss exceeding 20,000*l.* they were entitled to recover 20,000*l.* I think that this is the true construction of the policy, and that to treat it as a policy on goods would not give effect to the plain intention of the parties as expressed in the policy. The present policy is, in my opinion, similar to the policy in the case of *Joyce* v. *Kennard* (25 L. T. Rep. 932; 1 Asp. Mar. Law Cas. 194; L. Rep. 7 Q. B. 78), and, as was there said, not an ordinary marine policy. If, however, the policy is not to be treated as a policy "on goods," but as a contract of indemnity against a certain kind of liability up to a certain limited amount, it is very difficult to apply the suing and labouring clause to such a contract. That clause applies when there is a suing or labouring for the safeguard and recovery of "the said goods"—that is to say, the goods insured. As I have said, this is not an insurance on goods. Again, the suing and labouring clause indubitably contemplates and implies that, whilst the underwriters are to bear their share of any suing and labouring expenses, they are to bear such share only in the proportion of the amount underwritten to the whole value of the property or interest insured. If the assured has insured himself or goods to the extent of one-half only of the value of his property or interest in the goods insured, he, in respect of each and every item of suing and labouring expense, recovers one-half and bears one-half himself. This is the perfectly well-established basis of every adjustment of suing and labouring expenses. But how can this be applied in the case of a contract of indemnity against liability to a limited amount such as is here sued upon? There might be liabilities covered by the present policy which did not depend upon the safety of the goods. But assuming that the liability can be measured by the value of the goods—that is to say, the mules—and depends upon their safety, how is the proportion of suing and labouring expenses to be borne by underwriters to be arrived at? In the one case, where all the mules are on board the ship and are all in equal danger of total loss, and an expense is incurred to avert such loss—as, for instance, by towing the ship when sinking, and placing her in safety on the beach—there would be no difficulty. But, assuming again that the total value of the mules is 40,000*l.*, and the liability covered is up to 20,000*l.*, as in the present case, and expense is incurred in saving the mules by getting them ashore one by one, and mules to the value of 20,000*l.* are thus saved and the rest lost, how is the expense to be apportioned? In such a case it might very well be said that the whole expense was for the benefit of the assured, and not for the benefit of the underwriters at all. Intermediate cases would present even greater difficulties. I fully recognise that a suing and labouring clause might be framed which would be appropriate to such an insurance as was effected in the present case. But, in my judgment, any attempt to apply to the insurance in question a clause which was framed and intended to apply to an insurance of a different kind would work injustice, unless in order to make the clause applicable to the insurance in question it was so modified as to make it in fact a different clause altogether. I think that the suing and labouring clause in this policy, like many other parts of the policy, is inapplicable to the insurance actually effected, and was no part of the contract. I may add that, if I thought the suing and labouring clause must be held to apply, I should regard this as a strong reason for treating the policy as an open policy for 20,000*l.* on goods, with the usual consequences. *Judgment for the defendant with costs.*

Solicitors for the plaintiffs, *Rowcliffes, Rawle,* and *Co.*, for *Hill, Dickinson, Dickinson, Hill,* and *Roberts*, Liverpool.

Solicitors for the defendant, *Parker, Garrett, Holman,* and *Howden.*

Friday, Oct. 31, 1902.

(Before Kennedy, J.)

De Hart v. Compania Anonima de Seguros Aurora. (a)

Insurance—Marine—General average—Jettison of deck cargo—Foreign law—Special contract.

By a policy of insurance effected by the plaintiff on his ship with the defendants it was provided: "General average payable according to foreign statement if so made up."

(a) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

The ship being chartered, it was provided by the charter-party: "In case of average, jettison of deck cargo and the freight thereon for the common safety shall be allowable as general average."

In the course of a voyage to Antwerp it became necessary for the common safety to jettison part of the deck cargo, and, upon the average statement being made up there, this was included in general average.

Apart from any special provision in the charter-party, the jettison of deck cargo and the freight thereon would not by Belgian law be the subject of general average.

Held, that the statement was in accordance with the Belgian law, as that law recognises the special terms of the contract between the parties, and so the plaintiff could recover from the defendants the contribution that had to be made by the ship in general average relating to the jettison of the deck cargo.

Commercial cause.

The plaintiff effected with the defendants, who were underwriters, two policies of insurance on his steamship *Henriette H.* for twelve months.

Each of the policies contained the clause,

General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with the contract of affreightment,

and attached to the policy were the Institute Time Clauses 1900, which include the following clause:

General average and salvage charges payable according to foreign statement or per York-Antwerp Rules if in accordance with the contract of affreightment.

By a charter-party dated the 11th Oct. 1900, made between the plaintiff and Messrs. Baars, Dunwody, and Co., it was agreed that the *Henriette H.* should carry a cargo of pinewood, including a deck load (if required by the master), from Pensacola to Antwerp.

It is the regular and usual course of trading for vessels from Gulf timber ports to carry deck loads of timber to Continental ports.

Clause 11 of the charter-party was as follows:

In case of average the same to be settled according to York-Antwerp Rules 1890, excepting that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average.

The *Henriette H.* sailed during the continuance of the policies from Pensacola on the 29th Nov. 1900, carrying a deck load, and on the voyage she suffered damage, and it became necessary for the safety of the ship and her cargo, in consequence of perils insured against, to jettison part of the deck load.

The remainder of the cargo was delivered at Antwerp.

An average statement was prepared at Antwerp and the deck cargo jettisoned and its freight was included as general average.

By Belgian law, apart from any special provision in the charter-party, the jettison of the deck cargo and the freight thereon would not be the subject of general average.

Carver, K.C. and *De Hart* for the plaintiff.

J. A. Hamilton, K.C. and *J. R. Atkin* for the defendants.

Kennedy, J.—In this case a point has been raised which is obviously thought of importance from a business point of view, but which I confess, although having had the great advantage of hearing both the arguments of Mr. Hamilton and Mr. Atkin, as a matter of construction I should have thought there was no doubt about. But one may be too easily led wrong in construing business documents as business men intended them to be appreciated. All I have to say is what is the right construction taking the document in its ordinary sense, giving to the words what appears to me to be the fair business meaning in a transaction of marine insurance. The question arises as to the liability of the defendants in respect of what is claimed by the plaintiff by way of indemnity for a contribution that has had to be made in general average, and the particular question turns upon the construction of a clause in the policy: "General average and salvage charges payable according to foreign statement or per York-Antwerp Rules if in accordance with the contract of affreightment." That is in the clause attached to the policy in the Institute Time Clauses 1900, and in the body of the policy itself appears—"General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with the contract of affreightment." Now, I could quite well conceive the parties coming to such an arrangement as the counsel for defendants argued the arrangement is if this clause be properly construed. They might arrange that the assurers will be liable for general average if the average is assessed or adjusted according to any one of three modes—first, according to the law of England; secondly, according to the express law of a foreign country where there was no express agreement between the parties to the contract of affreightment; and, thirdly, that they would be liable to an assessment or adjustment of the general average and be ready to pay in the case of one specific convention only between the parties—namely, on the York-Antwerp Rules being included. But I cannot so read the provision, which appears to me, I confess, susceptible of a natural meaning which is also a sufficiently good business meaning This was a time policy. The vessel might be sailing to various foreign ports governed by various foreign laws. As a matter of fact, there had to be an adjustment made at Antwerp and a general average statement prepared, and a general average statement was there prepared and made up. It is not contended here that that statement was made up in a way contrary to the law of the country. I need not decide whether or not when you use the words "general average charges payable according to foreign statement" that does or does not mean according to foreign statement if that foreign statement is correct according to foreign law, or as it is put in the sixth edition of Arnould, from which I quote: "The underwriter renders himself liable to pay according to the foreign average adjustment if made at the foreign port in accordance with the law in force at that port"; or whether, as stated by Bovill, C.J. in *Harris* v. *Scaramanga* (26 L. T. Rep. 797; L. Rep. 7 C. P. 481; 1 Asp. M. C. 339), delivering the judgment of himself and Keating, J., "that if a question arises as to whether or not there was a claim for general average for which the underwriter was liable, it was by express agreement of the parties a question to be determined by the

foreign adjustment." It is said that there is language taking a different view and justifying the expression in Arnould in *Hendricks* v. *Australasian Insurance Company* (30 L. T. Rep. 419; 2 Asp. M. C. 44; L. Rep. 9 C. P. 460) and also in *Mavro* v. *Ocean Marine Insurance* (32 L. T. Rep. 743; 2 Asp. M. C. 500; L. Rep. 10 C. P. 414). I have not got, as it appears to me, to decide that point. By agreement here between the parties the average statement has to be made in accordance with the law of Belgium. The objection by the defendants to the terms of that adjustment being valid and effective against them is that that adjustment admits as general average what would not be admitted by the law of Belgium apart from special contract between the parties. But what is in fact in the average statement is so stated in accordance with the law of Belgium, because the law of Belgium does recognise as a basis for adjustment express terms if it is proved that express terms have been made between the parties to the contract of affreightment. It seems to me the only fair construction of this clause is that the underwriter undertakes to pay according to a foreign statement—I will assume a foreign statement made in accordance with the law of the foreign country. The law of the foreign country in this case Belgium, recognises as one of the constituents of the average adjustments the special terms of the contract between the parties Therefore the foreign statement is correctly made up having regard to those special terms, and it seems to me, therefore, that the underwriters are bound to recognise that foreign statement, assuming that the foreign statement includes a statement made according to foreign law. Now, one of the arguments is, Why make a special exception with regard to the contract of affreightment in respect of the York-Antwerp Rules? That, I presume, was to cover this, that the York-Antwerp Rules are very commonly adopted, and if the adjustment is not made in that foreign country, but, we will say, is an English adjustment, they are willing, so far as the York-Antwerp Rules apply, to adopt the liability which they may create if the parties have so chosen to stipulate in their contract of affreightment as between themselves. Otherwise they would not be so bound. It seems to me that there is no inconsistency or improbability from a business point of view in saying, we will take the foreign statement and be bound by that, although it may in the result conflict with our law, and, amongst other things, embody and recognise the special contracts between the parties. It is fair and just to the owner of the ship travelling to various ports of the world, having himself to incur various liabilities under various laws, which of course in fact he does not know beforehand, that his insurers should indemnify him against the risk of having to pay sums which he would not have to pay under the English law. So far as knowledge of the law is concerned, of course he does not know it, but if he does study the law I daresay he will find others like the Belgian law, which embodies in the terms of adjustment the terms of a special contract made between the parties; whereas when you come to English law the assurer says: "I am quite willing to adopt the York-Antwerp Rules if the parties agree to them and adopt them *inter se* and stand upon them, but otherwise I stand upon the law of England, which says under the terms of the agreement the underwriters are not responsible." I must therefore give judgment for the plaintiff.

Judgment accordingly.

Solicitors: *Stibbard, Gibson,* and *Co.,* for *Gibson, Pybus,* and *Pybus,* Newcastle-upon-Tyne; *Waltons, Johnson, Bubb,* and *Whatton.*

Aug. 2 *and Nov.* 19, 1902.

(Before KENNEDY, J.)

ROWSON *v.* ATLANTIC TRANSPORT COMPANY LIMITED. (*a*)

Damage to cargo—Exceptions in bill of lading—Faults or errors in the management of vessel—Harter Act (U.S.A.) 1893.

By the Harter Act, which was incorporated in certain bills of lading under which butter was shipped, if the owner of a vessel transporting merchandise exercises due diligence to make the vessel seaworthy and properly manned and equipped, then the owner is not to be responsible for damage "resulting from faults or errors in navigation, or in the management of the said vessel."

Owing to the negligence of the persons in charge of the refrigerating apparatus with which the ship was fitted, the butter was damaged.

Held, that this was a fault or error in the management of the vessel, and that the owners of the vessel were not liable.

COMMERCIAL CAUSE.

This was an action brought by the plaintiff against the defendants for damages for breach of contract and duty in the carriage of goods by water.

By the points of claim it was alleged that the plaintiff had suffered damage by breach of contract by two bills of lading, each signed by the defendants and dated the 29th June 1900, of several parcels of butter, amounting in all to 206 tubs and 170 boxes, received in apparent good order and condition by the defendants from Abraham Hodgson and Sons, to be transported by the steamer *Minneapolis* from New York to London, to be delivered in the like good order and condition at London unto order or assigns.

All the bills of lading were indorsed to the plaintiff, to whom the property in the goods passed by such indorsement.

All the butter was delivered in a damaged condition, the depreciation on the same amounting to 250*l.*

By their defence the defendants relied on the exceptions contained in the bills of lading and the terms and provisions of the Harter Act therein incorporated, that neither the vessel, her owner or owners should become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel, nor from inherent defect, quality, or vice of the thing carried.

The faults or errors upon which the defendants relied were the failure on the part of those in charge of the refrigerating machinery to properly work the same and to keep the refrigerating chambers at a proper and sufficiently low temperature.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

All the other material facts appear in his Lordship's judgment.

J. A. Hamilton, K.C. and *Loehnis* for the plaintiff.

Robson K.C. and *D. Stephens* for the defendants.

Nov. 19.—Kennedy, J.—In this case the action has been brought by Arthur Jopson Rowson against the Atlantic Transport Company Limited to recover damages in respect of injury to a quantity of butter carried by the defendants' vessel at the end of June and beginning of July 1900, from New York to London, under two bills of lading, of which I have had the originals produced before me; one bill of lading being for 206 tubs of butter, and the other one for 170 boxes of butter. There is no question that the butter when received in London in July was damaged, and there is no suggestion that the butter when received by the defendants for carriage on board the *Minneapolis*, the steamer in question, at New York was in good condition. The butter in these tubs, or boxes, was carried on board the *Minneapolis* in certain chambers, which are also in the evidence called boxes by some of the witnesses—rooms in the ship in which there is insulation for the purpose of the application of the refrigerating apparatus with which the *Minneapolis* is equipped for the purpose of carrying in summer goods such as butter, and also for the purpose of carrying, as she did in two other chambers on this voyage, dressed meat safely and in good condition to the port of discharge. There are, as it appears to me, two questions substantially which arise for decision in the case; one a question of fact, the other a question of law. The question of fact is (the burden resting unquestionably, in my view, upon the defendants) whether or not they have proved that the cause of the damage to this butter during this summer voyage of the *Minneapolis* was negligence in respect of the management and application of the refrigerating apparatus to the four chambers, or boxes, which carried the butter. The question of law is whether or not if the defendants have shown that that was the cause of the damage, they are entitled to rely upon the protection contained in the Act of Congress of the United States of 1893, commonly known as the Harter Act. The same questions, to the extent to which I will mention in a moment, came before my brother Walton, in November of last year, in an action brought by Mills and Sparrow against the defendants, and Walton, J., in the judgment which I have had before me, came to the conclusion upon the question of fact that the defendants had not satisfied him by the evidence which they then adduced that the damage to similar butter on the same voyage was caused by the negligent management of the refrigerating apparatus on board the ship, and therefore it became unnecessary for him to decide the question of law, which could only arise, as I have said, in a case of this kind if the defendants have shown affirmatively that the mischief did arise from negligence in the management of the refrigerating apparatus. I have to consider therefore, and I have carefully considered here, first, whether or not the burthen of proof has in the case before me been satisfied. In the action of Mills and Sparrow against the Atlantic Transport Company, my brother Walton, after carefully reviewing what evidence was before him, pointed out that he could not be asked to make a guess as to the cause of the loss. He said: "I might perhaps guess as a mere matter of guessing that very likely there was some negligence on the part of the engineers during the voyage, but I cannot dispose of this case in that way. It may be that there is a case of suspicion—that may be—but if I ask myself was there negligence on the part of the engineers during the voyage in the use of this machinery, and was this damage the result of that, the only answer I can give, after very carefully considering the evidence, is that I do not know; I cannot find it as a fact; I simply have not the materials before me which satisfy me one way or the other that there was. Of course, if the plaintiffs here have to prove that there was no negligence the case would be very different, but the defendants have to satisfy me reasonably and fairly that there was negligence." In that case there was, as I understand the evidence, no proof from New York, the port of lading, as to the condition of the refrigerating apparatus when this butter was loaded on board, when, of course, the chambers should be cool, or as to the condition of the apparatus when, the butter being received there, the refrigerating apparatus was being run for the purpose of maintaining the proper degree of coolness. The evidence was entirely wanting. There was also no evidence then called from the engine-room, so far as regards the person who was primarily responsible, because actually in supreme command—namely, Mr. Edwards. Edwards was not called then, because, as appears from Walton, J.'s judgment, as well as from the statements before me on the hearing of this case, in fact his address was not known; he left the ship soon after her arrival, and had gone, as I understand, to Folkestone, and although in fact, if a certain line of inquiry had been adopted—namely, inquiry from other persons on board the ship — his address might have been known, it was not in fact known, and his evidence therefore was not procured by the defendants for the trial. To that Walton, J. calls express attention. Now, I have had before me, in addition to evidence of a very full kind as to the state of things on the shipment at New York with regard to what was done to make the chambers properly cool for the reception of the butter—with regard to the taking of temperatures both before and during the actual shipment, and with regard to the good working of the refrigerating apparatus when this vessel was loaded—very full evidence, both documentary, and in the case of Mr. Nobbitt oral, from New York. I have had also the evidence of Mr. Edwards, and as a result of that evidence — to which I will refer somewhat more in detail in a moment—coupled with the fact that, as really is undisputed, there were no material or serious repairs which were done to the machinery at the termination of the voyage in England by the firm of Messrs. Hall, whose machinery it was, and the fact that no complaint had been made on the previous two voyages, or either of them, on one of which, at all events, the refrigerating apparatus was used. Coupled with that fact the evidence, I feel bound to say, has satisfied me that there was negligence upon this voyage which was the cause, and that negligence is the cause, to which the

mischief here ought to be attributed. There is no doubt of the mischief; there is no imputation upon the character and condition of the butter when shipped; and, further, as my brother Walton pointed out in that case, even if it had been at all moist, or sloppy, as it must be called, when shipped, if the refrigerating apparatus was in good order, and was properly worked, the butter ought to have been hardened before its arrival in this country; there is no doubt of the damage when the cargo arrived, and, in addition to the evidence before him, there is proved to me satisfactorily that great care was exercised in my view as regards the shipment. It is proved to me that the refrigerating apparatus in cooling the chambers was found to run perfectly. [His Lordship, after dealing with the evidence, continued:] Now I come to that which required me to reserve my judgment, because I formed a clear and definite conclusion upon the evidence at the time, and a minute and careful examination of the evidence since has only gone to confirm me in that conclusion. Then the question is, Is that a defence? And I have felt considerable difficulty in coming to a conclusion.

The matter turns upon the proper construction of the Harter Act with regard to this state of facts. The two bills of lading, as I have said, embodied as a term this: "It is mutually agreed that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the thirteenth day of February 1893 and entitled 'An Act Relating to the Navigation of Vessels,' &c." It is agreed in this case that the question stands thus. It turns upon sect. 3 of the Act in question: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned and equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." Now, I am satisfied that in this case not only due diligence was exercised, but in fact the vessel was in all respects seaworthy and properly manned, equipped, and supplied. There is abundant affirmative evidence and nothing to the contrary of that. Then arises this question: Assuming that to be so, is the damage by reason of negligence with regard to the refrigerating apparatus and the temperature of these chambers resulting from it, a fault or error in the management of the said vessel? That question is one with which my brother Walton dealt to some extent in the judgment to which I have referred, and he, with his very great experience of this class of question, felt exactly as I feel, that it is very difficult to determine precisely whether mismanagement of refrigerating machinery during the voyage is mismanagement of the ship as a ship affecting the safety of the cargo, or merely mismanagement of the cargo, affecting the safety of the cargo. "It seems to me," he said, "to be very close to the line, and it would be very difficult to determine on which side of the line the present case falls. If it is merely mismanagement of the cargo, then I think it is not a fault or error in navigation or in the management of the vessel within the meaning of sect. 3 of the Harter Act. If it is mismanagement of the ship as a ship, then, according to the decision in *The Rodney* (82 L. T. Rep. 27; 9 Asp. M. C. 39; (1900) P. 112), it would be an error or fault in the navigation or management of the vessel within the meaning of sect. 3 of the Harter Act." He, however, found it unnecessary for him in that case, owing to the state of the facts, to give a solution of the difficulty. I need not say that even merely from what he said I think there was a difficulty, but I think it is obvious to anybody that it is a very difficult question, and I propose very shortly to give my reasons for the view which on the whole I have come to with regard to it. It seems to me to be clear, to start with, that the protection is given, as far as it is given by the Act, upon the condition of the vessel being one in respect of which the owners have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied. Now, a vessel which has to carry cargo which can only be safely carried if the refrigerating machinery is in proper order is a vessel to which, according to a series of decisions both in this country and America, the term "seaworthiness" would be properly applied. It is a term which originally no doubt was used in days when refrigerating apparatus of course was unknown—like many other parts of modern appliances and equipments for the safe carriage of cargo. In a sense of course it is obviously not a happy term to use, except with regard to that condition of the vessel which enables the owner in respect of her cargo to keep it free from perils of the sea; but it is a well-known term, a well-recognised term, and to my mind the proper view to take of this section is that "in all respects seaworthy and properly manned, equipped, and supplied" means in all respects fit to carry the particular cargo safely in respect of the dangers which but for proper fittings and equipment might damage it during carriage. There is a case which is referred to in Mr. Carver's well-known book, in the portion which deals with this class of case which I have referred to, and it is the only American case which I think I need refer to—namely, the case of *The Thames* (61 Fed. Rep. 1014). The District Judge in that case said in the course of the judgment: "The term 'seaworthy' is relative. A ship leaking in her deck may be seaworthy for carrying stone, iron, coal, and for many other things even more valuable in respect to avoirdupois. But it cannot legitimately be contended that a ship is seaworthy as to perishable articles when it leaks in such a manner and degree as to cause damage to a very large proportion of such articles by a process plain to all on board and obvious throughout the voyage." Then he refers to the particular cargo there, which was flour, and proceeds: "A ship may be seaworthy as to one sort of cargo and unseaworthy as to another. Where a customary and well-known article of commerce is received on board ship and carried on a voyage the master guarantees the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. The ship is impliedly warranted to be seaworthy *quoad* that article, and if damage occurs in consequence of the unfitness of the ship for carry-

ing that article, the ship is liable and cannot exonerate itself by proving the *non sequitur* that it is capable of carrying safely and without damage some other article of a different character."

The same view as to unseaworthiness was taken in the case I am about to refer to. I need only refer to that case because it is closer in subject-matter to the present case. That was a decision of the Court of Appeal, affirming a judgment, I think of my brother Mathew, in the case of *Owners of Cargo on Ship Maori King* v. *Hughes* (73 L. T. Rep. 141; 8 Asp. M. C. 65; (1895) 2 Q. B. 550). There the preliminary question had to be decided as to whether, according to the terms of the bill of lading, there was an implied warranty that the refrigerating machinery was at the time of shipment fit to carry the frozen meat in good condition to Europe, and in the course of those judgments of the late Master of the Rolls and the Lords Justices the matter is fully dealt with, but the principal parts to which I think it necessary to refer here are passages in the judgment of Kay, L.J. at pages 558 and 559. The Lord Justice says, quoting Lord Blackburn's judgment in *Steel* v. *State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. M. C. 516; 3 App. Cas. 72): "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." And he deals with the question of seaworthiness at the earlier page, 557, in this way: "Supposing, however, that it should be necessary to make such an inquiry, the real inquiry, as it seems to me, would be, not as to the 'unseaworthiness' of the ship properly so called, but whether the ship was, at the time when the goods were shipped, provided with proper appliances to enable her to carry these goods in their hard frozen condition, and deliver them in that condition at the end of the voyage." Now, in this case the ship held herself out as a carrier in these rooms of cargo which could only safely be carried if the rooms were refrigerated. It differs so far from *Owners of Cargo on Ship Maori King* v. *Hughes* (*sup.*) that in that case I think, if I recollect rightly, the bill of lading was headed "Refrigerator Bill." There is no question in this case—indeed it is common ground—that the butter could not be safely carried except in the refrigerating chamber, which was kept refrigerated, and that the shippers of the cargo would, of course, have said, as it seems to me correctly, that if that ship had taken that butter, and delivered it damaged without refrigerating apparatus in that chamber, the ship was not seaworthy in respect of the butter. That was the business of the transaction; they were seeking to get this butter trade; they held themselves out and undertook to load it in such a chamber as was fit for the carriage of the goods. Perhaps the strongest case of inferring a duty of this kind is something which is not exactly this, but it is a case which is comparatively recent, and is one which we know of as the Bullion case—*Queensland National Bank* v. *Peninsular and Oriental Steamship Company Limited* (78 L. T. Rep. 67; 8 Asp. M. C. 338; (1898) 1 Q. B. 567; 3 Com. Cas. 51)—in which it was held that if you hold yourself out to carry bullion, not only do you undertake to find room for it in the ship, but such a place as will make it reasonably safe by being sufficiently strong for the carriage of an article of that kind, which is exposed to theft. If that is so that is the reason which brings me, rightly or wrongly, to the conclusion that if the proviso would not be rightly fulfilled unless there was proper refrigerating machinery to keep the butter cool, if the ship would be unseaworthy in that state of facts, then if she is rendered unseaworthy during the voyage by the negligence in the use of that room, that is mismanagement of the vessel with regard to the cargo, and it cannot be said not to be mismanagement of the vessel. If she would be as a vessel unseaworthy in respect of the carriage of those goods if she had not got that refrigerating machinery in good order to work—if the room was not fitted—I cannot escape, as it seems to me, from the logical conclusion that if she is so fitted, and by negligence during the voyage that part of her is made dangerous and unseaworthy in respect of that which is carried in it, it must be a fault or error in the management of the vessel. She would not have been a seaworthy vessel had she not got the appliances. If she is made unseaworthy during the voyage by negligence, it is an error, or fault, in the management of the vessel of which this equipment of this chamber is part. The refrigerating apparatus is in fact, of course in a sense, a thing that could be taken out; so might the insulating chambers as far as that goes; the steam, I understand, is supplied from the main boilers, but otherwise there is no immediate connection with the rest of the engine. But if you undertake to carry cargo safely you must have your appliances and your refrigerating machinery, just as in the case of a vessel carrying wet sugar (*Stanton* v. *Richardson*, 33 L. T. Rep. 193; 3 Asp. M. C. 23; L. Rep. 7 C. P. 421) you must have your pumps. You must have in such a case as this that refrigerating apparatus fit at the start, or you will not comply with the condition of the Harter Act; and if there is an error or fault which causes damage or loss from your mismanagement of that part of your ship, which is your refrigerating apparatus, without which, unless it was in good condition at the start, the ship would have been unseaworthy, it is a fault or error in management, and not in navigation. I adopt (and I think I am following it in this respect, although it does not decide this case) a decision of the Divisional Court in the Admiralty Division, which, of course, I should be bound by, whatever it decided, and whatever my view might be if it absolutely governed this case. I believe I am deciding entirely in accordance with the view of the learned judges, Jeune, P. and Barnes, J. That is the case of *The Rodney* (*sup.*) (which followed the earlier case of *The Glenochil* (73 L. T. Rep. 416; 8 Asp. M. C. 218; (1896) P. 10).

That was a case in which—"During the voyage the vessel met with heavy weather, and the forecastle becoming flooded, the boatswain, while endeavouring, with the aid of a poker, to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold, and damaging a portion of the cargo. The owner of the cargo sought to render the shipowner liable. Held, by the Divisional Court (Jeune, P. and Barnes, J.), reversing the decision of a County Court judge, that the shipowner was exempt from liability, as the damage resulted from a fault in the 'management' of the vessel, the act having been done for the purpose of rendering the forecastle habitable—that is, with the object of rendering the ship proper for the purpose for which she was intended." As I say, I think that does not exactly cover this case, but what I especially quoted it for was for the same reason that the learned counsel cited it to me in this case when they brought that case under my notice—namely, the language used by Barnes, J., which is also referred to by Walton, J. in his judgment to which I have referred more than once. The last words in the judgment of Barnes, J. are: "I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship as a ship, which affects the safety of the cargo." Well, is the refrigerating apparatus the ship or part of the ship? Clearly it is with regard to the warranty of seaworthiness, on the decisions. Why is it not a part of the ship when we come to deal with that second part of the Harter clause, which refers to the errors which may arise from mismanagement? It is, as it appears to me, the only logical solution of the question which I have to solve here and to decide, to say that the mismanagement of this machinery—for that is what it is—the mismanagement of that part of the ship which is the machinery and the chambers—is a mismanagement which is a mismanagement of the ship, or, as the clause expresses it, "the damage or loss resulting as a damage or loss which results from the faults or errors in the management of the said vessel." I therefore in this case, on the evidence before me, must give judgment for the defendants, who have satisfied the first half of the clause, and have become, therefore, entitled to the protection of the second half.

Judgment for the defendants.

Solicitors: *Waltons, Johnson, Bubb,* and *Whatton; Holman, Birdwood,* and *Co.*

Monday, Dec. 15, 1902.

(Before BIGHAM, J.)

Re AN ARBITRATION BETWEEN NEWMAN AND DALE STEAMSHIP COMPANY LIMITED AND THE BRITISH AND SOUTH AMERICAN STEAMSHIP COMPANY. (*a*)

Charter-party — Demurrage — Exception clause — Exception of fire — Whether for benefit of charterer as well as shipowner.

A charter-party made between the owners of a ship and the charterers provided that a certain number of days should be allowed for loading and unloading the cargo, after which demurrage was to be paid at a specified rate, and it also contained the usual exception clause, with, among others, the exception of fire.

Held, on the authority of Barrie *v.* Peruvian Corporation (2 *Com. Cas.* 50), *that the exceptions applied for the benefit of the charterers as well as for the benefit of the shipowners, and that the charterers were by the exception of fire excused from paying demurrage in respect of a necessary delay occasioned by a fire breaking out in the cargo while the cargo was being discharged, but were not excused in respect of a further delay which was not occasioned in consequence of the fire.*

AWARD stated by an umpire in the form of a special case.

1. By a charter-party dated the 16th July 1901, made between the Newman and Dale Steamship Company Limited, owners of the steamship *Aqua,* of London (hereinafter called the owners), of the one part and the British and South American Steamship Company (hereinafter called the charterers) of the other part, it was provided that the steamship *Aqua* should

Proceed to New York and there load as required by charterers (after having bunkered and being in every respect ready for the voyage) a full and complete cargo of hay, alfalfa, and (or) bran which freighters may send alongside for shipment . . . and being so loaded shall proceed to Table Bay for orders which are to be given within twenty-four hours of the captain's application to charterers' agents for same on arrival to discharge (always afloat) at one or two ports between Cape Town and Delagoa Bay (both ports included) as ordered and there deliver the same, in consideration whereof the freighters shall pay for the full reach and hire of said ship as above with exceptions as stipulated for the said voyage a lump sum of 6750*l.*, payable one-third in London in cash, on sailing if required less 3 per cent., or one-half advance at owners' option less 5 per cent. and the balance in London in cash, seven days after receipt of consignees' certificate of the right and true delivery of the cargo in full of all port charges, pilotages, &c.

2. By the charter-party it was also provided in clause 8 thereof:

Twenty-four weather working days, Sundays and holidays excepted, to be allowed for loading and discharging the cargo, after which demurrage to be paid at the rate of 45*l.* per running day to be settled in London. Time in shifting ports not to count as lay days.

It was also therein provided that, should any dispute arise between the owners and the charterers, the matter in dispute should be referred to the arbitration of two persons at London, one to be appointed by each of the parties thereto, or the umpire of the two so chosen, and the decision of the arbitrators or umpire should be final, and that, for the purpose of enforcing any award, that agreement might be made a rule of court.

3. The charter-party contained the following clause (clause 10) as to strikes:

If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading and discharging of the cargo, the days for loading and discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage for which he may be liable under this charter, if by the use of reasonable diligence he could have obtained other suitable labour, and, in case of any delay by reason of the before-mentioned causes, no claim for

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter.

Then immediately after, in clause 11, the charter-party also contained the following exceptions:

The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager.

4. The cargo was shipped under a bill of lading dated the 12th Aug. 1901, and was delivered, as hereinafter mentioned, at East London to the British Government, who were the consignees of the cargo. Copies of the charter-party and of the bill of lading were annexed to and formed part of this case.

5. The vessel sailed from New York on the 13th Aug. 1901, and arrived in Table Bay on the 22nd Sept. 1901, when she received orders to proceed to East London and discharge. Five lay days were occupied in loading at New York.

6. The *Aqua* arrived at East London on the 26th Sept., and notice was at once given to the representative of the British Government at the port, but she did not begin to discharge until the 13th Oct. On the 16th Oct. fire broke out in the cargo, and the vessel was ordered away from the discharging berth by the consignees and removed to an anchorage in the river. She continued at her anchorage discharging damaged hay and coals into lighters until the 3rd Nov. 1901, when, notice having been given to the consignees that all damaged cargo had been discharged, she was again ordered to her discharging berth, and continued discharging undamaged cargo until the 7th Nov., when the whole of such cargo was discharged. Some further amount of damaged hay was then found in the vessel, and she was again moved from the discharging berth to an anchorage in the river, when she proceeded to discharge the damaged cargo, and completed such discharge at 5 p.m. on the 11th Nov. 1901.

7. During discharge the owners demanded demurrage from the charterers, and the charterers paid certain sums in respect of such demurrage under protest, and claimed to recover the same or a portion thereof, or to deduct the same from the balance of freight as improperly demanded.

8. The owners brought an action against the charterers to recover the balance of freight and demurrage owing upon the charter-party and the same was by order of the High Court stayed, and it was ordered that all matters in dispute should be referred to arbitrators to be nominated by each party and their umpire. Two arbitrators were appointed, and Mr. Pickford, K.C. was appointed as umpire. The arbitrators were unable to agree, and thereupon the matters in difference were referred to Mr. Pickford for his award and determination as umpire.

9. The facts above stated were proved or admitted before the umpire, and the only question between the parties was as to the amount of demurrage payable to the owners by the charterers. The owners claimed twenty-eight days at 45*l.* a day, and the charterers admitted two days and sixteen hours. If the owners' claim were correct there remained a balance due to them in respect of freight and demurrage of 1091*l.* 13*s.* 11*d.*, and if the charterers' allowance were correct no sum remained due to the owners. The amount of demurrage payable depended partly upon the question of law hereinafter stated, and partly upon questions of fact not material to this case.

10. It was contended on behalf of the charterers that the exception "fire" in the charter-party applied to the obligation of the charterers to discharge, and that they were excused by the occurrence of the fire above mentioned from all demurrage caused by the fire. It was contended on behalf of the owners that the exception did not apply to the charterers' obligation to discharge, and that the charterers were not thereby excused from liability for demurrage occasioned by the fire. The umpire consented to state his award in the form of a special case raising the question which of those contentions was right in law.

11. The umpire found that it was necessary to remove the vessel from her discharging berth in consequence of the fire, and that the damaged hay required a longer time to discharge than if it had been sound, and that there was a necessary delay of seven days in consequence of the fire.

12. The umpire also found that there was a further delay by reason of the following circumstances: After the fire had been extinguished and the vessel could have been safely brought back to a discharging berth, the consignees continued to discharge the damaged hay into lighters in the river instead of so bringing her back and continuing the discharge at the berth. This course was adopted because the hay was damaged and worthless to the consignees, and was under the circumstances a reasonable course for them to pursue, but it was not necessary in consequence of the fire. He found that the delay so caused amounted to ten days.

13. It was contended that the charterers were freed from any liability for demurrage in respect of both those periods of seven and ten days by reason of the above exception of fire.

14. If the charterers' contention were right as to both of the periods of seven and ten days, the umpire awarded that there was due from the charterers to the owners in respect of the matters so referred to him the sum of 56*l.* 13*s.* 11*d.*

If the charterers' contention were right as to the period of seven days, and wrong as to the period of ten days, the umpire awarded that there was due in respect of these matters the sum of 459*l.* 1*s.* 11*d.*

If the charterers' contention were wrong as to both those periods, the umpire awarded that there was due in respect of those matters the sum of 791*l.* 1*s.* 11*d.*

He awarded that the charterers should pay the costs of the arbitration and of his award.

The question for the opinion of the court was whether the contention of the charterers was correct as to one or both of the above periods of seven and ten days.

J. A. Hamilton, K.C. (*L. Noad* with him) for the shipowners.—Clause 8 of the charter-party provides as to the number of the days allowed for loading and unloading after which demurrage

was to be paid; and clause 11 set out the exceptions, of which the material one in this case is "fire." In no view of the case are the charterers right in saying that they are excused from payment as to the ten days, as to which there is an express finding that that delay was not caused by the fire. Then as to the delay of seven days, the charterers are not excused. The exception applies only for the benefit of the shipowners, and does not apply for the benefit of the charterers. The express words in the exception clause do not seem to refer to any liability of the charterers so as to create an exception in their favour; on the other hand, clause 8 creates an express obligation on the part of the charterers to load and unload within a certain time, and after that time to pay demurrage, and it is submitted that the charterers cannot be allowed to cut down that express obligation under clause 8 by any inference arising from clause 11 as to the exceptions. The charter-party in clause 10 deals with one circumstance and one only—namely, strikes—which is expressly put in for the benefit of the charterers; and, that being so, the charterers cannot afterwards say that clause 11 is for their benefit. The current of authority is principally applicable to the shipowner's obligation for the safe delivery of the cargo, and shows that these exceptions are inserted for the benefit of the shipowner only, and not for that of the charterer. The matter was considered in *Blight* v. *Page* (3 B. & P. 295, n.), and Lord Kenyon there held in an action by the shipowners against the shippers that the exception "restraint of princes and rulers" was only applicable to the shipowners. In *Touteng* v. *Hubbard* (3 B. & P. 291), which was also an action on a charter-party by the shipowners against the charterers, Lord Alvanley, C.J. said (at p. 298): "I will first consider for what purpose and for whose benefit the words "restraint of princes and rulers during the said voyage always excepted" were inserted in the charter-party. It appears to me that they were introduced for the benefit of the master, not of the merchant. . . . Lord Kenyon in the case of *Blight* v. *Page* (*ubi sup.*) put this construction on an instrument nearly similar with the present." Those cases show that this exception is for the benefit of the shipowners only; and the only case against that proposition is the case decided by Mathew, J. in 1896 of *Barrie* v. *Peruvian Corporation* (2 Com. Cas. 50), which really does not affect this case. The clause in this case is different from the clause in that case, and the difference shows that the reason why the charterers got the benefit of the exceptions in that case was that clauses were inserted in the charter-party in that case which were considered by Mathew, J. to show an intention that the charterers should get the benefit of the exception clause. That is not so in the present case, and *Barrie* v. *Peruvian Corporation* (*ubi sup.*) is therefore distinguishable upon that ground. [BIGHAM, J.—I have always understood that this clause as it stands here applies to the shipowner only?] Yes; the clause must be read as a clause only in favour of the shipowner. He also referred to

Hulthen v. *Stewart*, 6 Com. Cas. 65.

Carver, K.C. (*F. E. Smith* with him) for the charterers.—This exception clause enures for the benefit of the charterers as well as of the shipowners, and, although the word "mutually" is frequently introduced in the form that the ordinary risks are "mutually excepted," the word "mutually" is quite unnecessary to give the charterers the benefit of the exceptions. In *Touteng* v. *Hubbard* (*ubi sup.*) the exception clause was a portion only of a larger clause, whereas here it forms the whole clause. In that case (see 3 B. & P., at p. 292), as well as in the case of *Blight* v. *Page* (3 B. & P. 295, n.), the shipowners were bound to "deliver the same"—that is, the cargo —"on being paid freight by the merchant," and the exception "restraint of princes" comes immediately after, so that the words of that exception came in as a qualification of the obligation to deliver, and were therefore held to be for the benefit of the shipowners only. The exception clause in this charter-party comes after the several clauses that relate to the voyage to the port of loading, the loading, and the voyage to and delivery at the port of discharge, and the exceptions are therefore as applicable to the charterers' part of loading and unloading as they are to the shipowners' part of bringing the ship to the ports of loading and discharge and safely delivering: (see *Ford* v. *Cotesworth*, 19 L. T. Rep. 634; 3 Mar. Law Cas. O. S. 190, 468; L. Rep. 4 Q. B. 127, at p. 137; and in Ex. Ch., per Martin, B., 23 L. T. Rep., at p. 166; L. Rep. 5 Q. B. 544, at p. 548). Martin, B. there says: "For my own part, I do not see why the clause, 'restraints of princes and rulers, &c., throughout this charter-party always excepted,' should not apply to the present circumstances" —that was, to the excuse of the charterers. The view taken in the text-books is that the exception clause in the charter-party applies to exonerate both shipowner and charterer (see Scrutton on Charter-parties, pp. 168, 169, and p. 174, where it is said: "The exceptions in the bill of lading only apply to exonerate the shipowner or carrier; exceptions in the charter apply to exonerate both shipowner and charterer"; and see Carver's Carriage by Sea, sect. 150, p. 175, which is to the same effect). The case is really concluded by the case of *Barrie* v. *Peruvian Corporation* (*ubi sup.*), which decides the exact point. There the exception clause was the same as this, and Mathew, J. held that the exception enured for the benefit of the charterer as well as of the shipowner. We must look at this charter-party as a whole; all the clauses at the end are general clauses of general application, and why should not this exception clause be of general application? Unless there is some indication to the contrary in the charter-party itself, the right construction is to apply the clause to both parties. So far as to the question whether the exceptions apply to both parties. The next question is, assuming that they apply to the charterers, how far they apply. As to the delay of the seven days, there is the express finding that that was caused necessarily by the fire. As to that the charterers are clearly excused. As to the ten days, there is the finding that, although the delay was not necessarily caused by the fire, the consignees pursued a reasonable course in so discharging the cargo, and once it is found that a party to the contract when placed in a difficult position acts reasonably, that is sufficient to entitle him to the benefit of the clause. The charterers are therefore excused as to both periods.

Noad, in reply, referred to

Carver, sect. 611;

Thiis (or *Tiis*) v. *Byers*, 34 L. T. Rep. 526; 3 Asp. Mar. Law Cas. 147; 1 Q. B. Div. 244;

and to the judgments of Mathew and Smith, JJ. in

Smith v. *Dart and Son*, 52 L. T. Rep. 218; 5 Asp. Mar. Law Cas. 360; 14 Q. B. Div. 105.

BIGHAM, J.—The question in this case is whether the exception in the charter-party with reference to fire enures to the benefit of the charterer as well as to the benefit of the shipowner. For my own part, if I had to decide this case without reference to authority, I should be of opinion that all the exceptions in the 11th clause of this charter-party were intended to apply exclusively for the protection of the shipowner and to nothing else. I have always understood these clauses to be introduced by the shipowner for his own benefit. and for his own benefit only. But the case is not devoid of authority. I have the decision of Mathew, J. in the case of *Barrie* v. *Peruvian Corporation* (*ubi sup*), and I do not think I can decide this case according to my own view of the intention of the parties, having that case before me, for I am not able to distinguish satisfactorily the present case from the case of *Barrie* v. *Peruvian Corporation* (*ubi sup*). It seems to me to follow that if the decision in *Barrie* v. *Peruvian Corporation* (*ubi sup.*) is right, then the exceptions in clause 11 of this charter-party must be applied for the mutual benefit of both shipowner and charterer. It is quite a common thing, known to us all, that the charterer not infrequently introduces into a clause of this kind the word "mutually" for the purpose of acquiring the benefit of the clause, and probably under the impression that if he did not do so he would not get the benefit of it; and it is the recollection of that fact, amongst others, that makes me disposed to say that the clause without the word "mutually" in it is intended only for the benefit of the shipowner. But, I repeat, there is the authority of the judgment of Mathew, J., and I am not able to distinguish in principle the present case from that case. Mathew, J. in dealing with the case of *Barrie* v. *Peruvian Corporation* (*ubi sup.*) relies upon certain clauses in the charter-party which point to mutuality; and he says that he sees no reason why mutuality should not be applied to the clause as to the excepted perils, and he gives an illustration which, to my mind, applies to this case just as much as it did to the case with which he was then dealing. He says: "During the argument the question was put: If the cargo had been provided, and the lighters had all been sunk"—which, of course, would have been a peril of the sea—"would the exceptions have applied to protect the charterers? To my mind they would if it were not for clause 3"—a particular clause which he mentions and to which he refers. He must have thought that the exception of perils of the sea in the exception clause was intended for the protection of both shipowner and charterer. I think I am bound by that authority to say that the exception of fire in this charter-party applies both to the charterers and the shipowners, and that therefore the charterers are entitled in this case to the benefit of the protection that it gives.

Now, the next question in the case is, What protection does it give? On the facts as found by Mr. Pickford, I am of opinion that the charterers are excused from payment for the seven days mentioned in par. 11 of the case. Mr. Pickford there finds that it was necessary to remove the vessel from her discharging berth in consequence of the fire, and that the damaged hay required a longer time to discharge than if it had been sound, and that there was a necessary delay of seven days in consequence of the fire. The facts as found there, I think, bring that part of the case within the exception. Then, as to the other part of the case, Mr. Pickford finds that after the fire had been extinguished, and the said vessel could have been safely brought back to a discharging berth, the consignees continued to discharge the damaged hay into lighters in the river instead of so bringing her back and continuing the discharge at the said berth. The said course was adopted because the hay was damaged and worthless to the consignees, and was, under the circumstances, a reasonable course for them to pursue, but it was not necessary in consequence of the said fire. Then he says that the delay there amounted to ten days. I am of opinion that in respect of those ten days the charterers are not excused. The fire had ceased to be the operating cause and was not the operating cause during these days at all—that is to say, the exception ceased to exist, and is therefore no longer available to excuse the charterers. The fact appears to have been that the hay had been rendered worthless and the charterers chose to throw it away, to throw it overboard, and they could do it much more cheaply and easily, though at considerable delay to the vessel herself, if they threw it overboard where the vessel then lay. As to those ten days, I think the charterers are not entitled to rely upon the exception as excusing them from performing a positive contract to discharge the vessel within a certain number of days.

Judgment for the shipowners against the charterers for 459l. 1s. 11d. for demurrage in respect of the seven days' delay.

Solicitors for the shipowners, *William A. Crump* and *Son*.

Solicitors for the charterers, *Edwards* and *Cohen*, for *Simpson, North, Harley*, and *Birkett*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 3 and 7, 1902.

(Before BARNES, J.)

THE HARMONIDES. (a)

Collision — Passenger ship — Damages — Proper method of assessing value of vessel sunk by collision.

In assessing the value of a large passenger steamship running in a regular line, the test in a collision action is, not what she would fetch if sold in the market, but what was her value to the owners as a going concern at the time she was sunk.

MOTION by the owners of the steamship *Waesland* in objection to the report of the Liverpool District Registrar.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law

On the 5th March 1902 a collision occurred in a dense fog in the river Mersey between the steamship *Waesland*, belonging to the Red Star Line, and the steamship *Harmonides*, of the Houston Line, in consequence of which the *Waesland* sank and was totally lost.

The *Waesland* at the time was on a voyage from Liverpool to Philadelphia with a general cargo and passengers.

At the trial of the action the *Harmonides* was found solely in fault for the collision, and her owners subsequently obtained a decree limiting their liability, under the provisions of the Merchant Shipping Act 1894, to 8*l.* per ton, and paid the sum of 27,128*l.* into court with interest from the date of the collision.

At the reference before the district registrar and merchants at Liverpool, claims amounting in all to 80,477*l.* were put forward by the owners of the *Waesland*, owners of cargo on board, and others. Of this sum, the owners of the *Waesland* claimed 29,777*l.* as the value of their vessel at the time of the collision, and in support of their claim affidavits were filed by the senior partner in the firm of managing owners, and by a former general manager of the Cunard Steamship Company. As against these an affidavit of Mr. Lachlan, a partner in the firm of Lachlan and Co., official valuers to the Court of Admiralty, was filed, in which he gave it as his opinion that the market value of the *Waesland* was 16,500*l.*, exclusive of the equipment for passengers.

No witnesses were called in support of either of these allegations, and the registrar came to the conclusion that 18,000*l.* was a proper value to put on the vessel, and allowed this sum accordingly.

The owners of the *Waesland* appealed.

At the hearing of the motion in objection to the registrar's report, a further affidavit was filed by the owners of the *Waesland* claiming a further sum of 1426*l.*, the value of the refrigerating machinery on board of her. The learned judge, being of opinion that further evidence ought to have been given before the registrar, adjourned the case in order that witnesses might be called.

At the adjourned hearing on the 7th Nov. a statement was put in of the yearly earnings of the *Waesland*, and evidence was called by her owners from which it appeared that the *Waesland* was a steamship of 4752 tons gross, built originally in the year 1867 for the Cunard Steamship Company and named the *Russia*. She was purchased in 1880 by the Red Star Line for 18,000*l.* and renamed by them, and at the same time she was lengthened and refitted for passenger accommodation, about 50,000*l.* in all being spent upon her. In 1889 her engines were tripled at an expense of 23,000*l.*, and it was estimated that her cabin accommodation had cost 18,000*l.* The value set upon her by her owners had been arrived at by adding together the sums expended in 1880 and 1889 and deducting 6 per cent. per annum for depreciation.

It was contended that it was impossible to say what was the exact market value of an Atlantic liner, because they never came into the market unless they were unprofitable or worn out.

Evidence was called by the respondents to prove that the *Waesland* was virtually an obsolete vessel, and that her market value was in the circumstances a fair test of her value to her owners.

Pickford, K.C. and *Noad* for the owners of the *Waesland*.

Aspinall, K.C. and Dr. *Stubbs* for the respondents, owners of cargo.

During the course of the argument the following case was referred to:

The Iron-Master, Swa. 441.

BARNES, J. (after dealing with the facts and the evidence).—I think the litigation in this court has been brought about by the case being treated too scantily before the district registrar, because the moment the case was presented to me on these affidavits it became obvious that one would desire to see the witnesses and hear them cross-examined, and have them point out by what reasons they were able to support their affidavits. I think it is to be regretted that the matter was not more fully dealt with before the district registrar. It has been fully considered before me and I have seen the witnesses, and I think I am in a much better position for dealing with this case than the registrar was when he had it before him. There is no real dispute between the parties as to the principle upon which the matter should be dealt with. I fully agree with the observations quoted from the case of *The Iron-Master* (*ubi sup.*). There is no doubt that in this class of case the best evidence is that of those who know the ship, and the next best evidence that of those who have experience of the market, but who do not know the vessel except from the shipping records. There are other criterions, such as the amount of capital invested, the amount of depreciation, the amount of profits, and so forth. All these matters have to be considered, to my mind, where it is impossible to say that there is a real market test of the value of such a vessel as this. If one goes to the root of the matter, it is clearly obvious that what the owners lose if a vessel like this is run into and sunk is really what it would cost to replace them in the position they were in before the accident. But where a ship like this has gone to the bottom you cannot, speaking from a business point of view, replace them in the position they were in before, because you cannot replace the vessel which is at the bottom of the sea; you cannot buy another like her in the market; you cannot get another made immediately, and if you bought another ship she would be new and consequently more valuable, because she would start as a new ship from that day. You would have to start on the basis of her being a new ship and then discount her value down. So that the real test, where there is no market, is, as Mr. Aspinall has said, and Mr. Pickford agrees, what is the value to the owners, as a going concern, at the time the vessel was sunk? There is no dispute between counsel as to that. You cannot get at it with any great certainty. Certainly, to my mind, you cannot get at it from the market value. Possibly, for such a ship at such a time there would be no market, and she would have to be sold for old iron. You cannot deal with it like an ordinary commodity being sold every day. You must look at it and see what is the loss to the owners. It has been pointed out that you may look at the original cost, plus the money expended on her, and so forth. That is of assistance, but it is not complete assistance, because it is a rough and ready method. You may look and see also how the ship is paying. But that is not a complete

test because you cannot be sure that the way she has been paying will continue. But one thing is absolutely certain, you cannot say the test is her market value I think the registrar has come to an erroneous view about this case because he has not had it sufficiently threshed out before him. I have considered it with great care, and by the light of the class of ship, and of the considerations which ought to be taken into account, in arriving at what the ship was really worth to her owners, and my opinion is that the appellants have not overstated their case. I think the vessel was worth 31,000*l.*, and I therefore propose to vary the report by increasing the sum of 18,000*l.* to 31,000*l.* The appellants must have the costs of the appeal.

Solicitors for the owners of the *Waesland*, *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the respondents, owners of cargo, *Stokes* and *Stokes*.

Monday, Nov. 17, 1902.

(Before PHILLIMORE, J.)

THE TERGESTE. (*a*)

Wages—Victualling allowance—Maritime lien—Shipwrights—Possessory lien—Priorities.

An allowance of money made to the crew of a vessel in consideration of their finding their own provisions is part of their wages, and they have a maritime lien in respect of it.

The maritime lien of the crew for their wages takes priority of the possessory lien of shipwrights up to the time when the vessel is put into the hands of the shipwrights for repairs, and the fact of the master and crew being on board the vessel while repairs are being done does not oust the possessory lien of the shipwrights.

Where a contract has been entered into to do certain repairs to a ship, the repairers have a possessory lien for the work they have done, although they have not completed all the repairs they contracted to do.

ACTION by the master and crew against the owners of the Italian steamship *Tergeste* claiming wages and disbursements, and also a declaration that the crew were entitled to a possessory lien for work done to the vessel while in dry dock.

The owners entered no defence to the action, but shipwrights, who claimed to have a possessory lien on the ship for repairs, intervened.

The *Tergeste* arrived in London on the 9th March 1902. As she had suffered some damage on the voyage, and it was also necessary for her to undergo her No. 2 survey in order to keep her class, a contract was entered into with Messrs. Rait and Gardiner to do the necessary work.

On the 8th April the vessel was put into Messrs. Rait and Gardiner's dry dock, and work was begun. The crew at the same time were also employed doing repairs.

In June the contractors, having failed to obtain any money on account, stopped work, and on the 29th July, as they still remained unpaid, they commenced an action against the ship. She was thereupon arrested by the master and crew in the present action, and, as the owners did not appear, she was sold by order of the court, and the proceeds, which amounted to 3440*l.*, less 250*l.*, paid by order of the Vacation judge to the crew, were brought into court.

Evidence was called by the plaintiffs from which it appeared that the master was engaged at 18*l.* a month, including food, and the crew were shipped under Italian articles, and received forty lire per month as wages, and a further forty lire as a victualling allowance.

They claimed that they had a maritime lien for both the wages and the victualling allowance, that they were entitled to a further sum by way of viaticum, and they also claimed that they were entitled to a possessory lien for the work done by them to the vessel while in dry dock.

The interveners admitted that wages were due up to the time the vessel was put into dry dock, but not beyond that date.

Laing, K.C. and *Denis O'Conor* for the plaintiffs.—The interveners have no possessory lien, as they have not completed their contract. They can only have a possessory lien if a common law action would lie, and here it will not, as they have stopped work of their own accord. Moreover, the master and crew were on board the whole time the repairs were being done, and therefore Messrs. Rait and Gardiner never had complete possession of the vessel. They referred to:

The Gustaf, 6 L. T. Rep. 660; 1 Mar. Law. Cas. O. S 230; Lush. 506;

The Immacolata Concezione, 50 L. T. Rep. 539; 5 Asp. Mar. Law. Cas. 208; 9 P. Div. 37;

Fisher on Mortgage, sect. 623.

Aspinall, K.C. and *Darby* for the interveners.—The shipwrights have a promissory lien. In *The Gustaf* (*ubi sup.*) the crew remained on board during the operations, and in *The Immacolata Concezione* (*ubi sup.*) the shipwrights stopped work on account of the insolvency of the shipowners. There was no specific contract, and a repairer is entitled to be paid on account, and retains his possessory lien throughout:

Roberts v. *Havelock*, 3 B. & A. 404.

The following cases were also referred to:

Ex parte Willoughby, 44 L. T. Rep. 111; 16 Ch. Div. 604;

The Carolina, 34 L. T. Rep. 399; 3 Asp. Mar. Law Cas. 141.

PHILLIMORE, J.—The Italian steamship *Tergeste* was arrested by the marshal of the court in an action for wages and disbursements, brought by the master on behalf of himself and the crew. At the time she was arrested the firm of Rait and Gardiner, ship-repairers, claimed to have a common law possessory lien on the ship for work which they had done. The ship sold for 3440*l.*, of which 250*l.* has already been paid, under the order of the Vacation judge, by or on behalf of the plaintiffs, leaving 3190*l.* to be dealt with now. The claim of the plaintiffs, if it is to be supported in its entirety, amounts to a large sum—I think about 1400*l.* As against that Messrs. Rait and Gardiner say they have spent 4161*l.* in repairs to the ship, in respect of which they claim a possessory lien, and though that bill has not been taxed and might of course be taxed, I understand that the counsel for the master and crew do not say that if that bill was to be allowed in its proper shape it would not exhaust the fund in court—at any rate, that the uncontested part of this claim would not exhaust the fund in court. Therefore

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

it becomes a question of dispute between the master and crew on the one side and Rait and Gardiner on the other as to which should have priority for their claims. It is not disputed, and there is no doubt that the master and crew are entitled to priority for their wages up to the date the ship was put into the dry dock of Rait and Gardiner, which was on the 8th April. I have to decide what is meant by their wages. I come to the conclusion that what is called the victualling money or allowance of forty lire per man per month in respect of victualling is part of his wages, and that therefore the master and crew may not only have the sum given them for their wages, but also the sum given to the crew in consideration of their finding their own provisions, and I do not think, that being allowed, there is any serious dispute as to the amount due for wages to the master and crew. The crew are also entitled to their viaticum home, and I understand that counsel for the material man are ready to accept the figures in the captain's account, as to the way in which he spent the 250*l.* which was advanced by the marshal to him, as correct. To that must be added, I think it was said to be 8*l.*, for the captain's journey home. I do not think that the crew are entitled, at any rate, in priority to the material man if the material man has a lien, to any allowance for subsistence money, from the time when they issued their writ to the time when they were provided for by the marshal. It may be that the registrar will allow some sum in respect of costs according to whatever is the usual rule in those matters. That I leave entirely to him. The captain's disbursements previous to the time when the ship was put into dry dock are claimed at the sum of 87*l.*, and I understand there is no serious conflict about that. Those items, therefore, are in the first instance to be paid out of the fund in court.

The view which the Admiralty Court has taken with regard to conflicting claims by shipwrights having a possessory common law lien and the claims which have been sustained by process in the Admiralty Court has been well established and been accepted by the Admiralty Division of the High Court of Justice since. It is that it is the duty of the material man not to fight with the Admiralty marshal; to surrender the ship to the officer of the court and let the officer of the court, under the order of the court, remove and sell her; but having done that, the court undertakes that he shall be protected, and that he shall be put exactly in the same position as if he had not surrendered the ship to the marshal; and the court has further decided in the case of *The Gustaf* (*ubi sup.*) that the possessory lien is subject to maritime liens attaching to the ship when taken into the shipwright's yard, and the only doubt that Butt, J. had in the case of *The Immacolata Concezione* (*ubi sup.*) was whether *The Gustaf* was not too favourable to the claimants under a maritime lien. I have some recollection of that case, which may assist the court, besides the report of it. The court has decided that maritime liens which accrue before the ship is put into the possession of the shipwright are to be paid in preference to the shipwright's possessory lien—probably on the ground put by Dr. Lushington, that the shipwright is entitled to retain the ship, but that if there is a possessory lien, that possessory lien is to take precedence of all maritime liens for claims which accrue after the date when the possessory lien begins. There is no doubt here when the possessory lien began; it began when the ship was put into dry dock. It is perfectly true that for some days there was no amount due in respect of which the lien would operate; that becomes material, because the date I have to look to is the date when the ship was taken from the shipwrights by the marshal, and the shipwrights should be in the same position as they were at the time when the ship was taken from their possession. If Messrs. Rait and Gardiner had such possession as to give them a possessory lien at the date when the ship was taken by the Admiralty marshal they had it for the price of the whole of the work which they had done up to that time. It is said they had no possessory lien, because the master and crew were on board; if that were the rule a great number of shipwrights' liens would be disturbed. That man has a lien who has such control of the chattel as prevents it being taken away from his possession. He may admit other persons or workmen to access to the chattel; other tradesmen may claim a possessory lien of the chattel or part of it, but if it cannot be got out of the dock or yard without the consent of the owner of the dock or yard the owner of the dock will have a possessory lien, though perhaps not the only one, on the chattel, which he can enforce, and which the court has taken upon itself to enforce for him as against subsequent claims. I have no doubt in this case that Rait and Gardiner had an ample possessory lien. Then comes the next point, had any money accrued to them? It is said, no, because they had not completed any one of the five orders which they had received. There the law follows good sense and business principles, and it was said by the court in *Roberts* v. *Havelock* (*ubi sup.*) that a man who contracts to do a long costly piece of work does not contract, unless he expressly says so, that he will do all the work, standing out of pocket until he is paid at the end. He is entitled to say, "That is not my contract; it is quite true that I had contracted to do the work and I am bound to do it, but there is an understanding all along that you are to give me from time to time, at reasonable intervals, payments for work done." The shipwrights contend that if the contract here was to do certain work, it always included the term, to do it if they were paid reasonable sums in part payment as they went along, not an advance, but in part payment for work already done before they proceeded to the next thing; and if that payment was not made then the shipwright, or any other artificer, is entitled to review his work, and say, "I have done work worth so much; true I have contracted to do other work, but it is not reasonable I should do it as I have not been paid, and in respect of work I have done I claim payment." In my judgment Messrs. Rait and Gardiner had here a possessory lien for the work which they had done, though they had not finished all the work. If they had asked for payment on account, as they were entitled to do. They have a possessory lien on all the work they have done, and that lien takes precedence of any claim, even a maritime lien, which has accrued since the ship first came into their possession. The result, therefore, is that the plaintiffs master and crew will be entitled to their

wages to the 8th April, to the money in the form of wages which takes the form of compensation for provisions up to the same date, their viaticum home, including the viaticum to the captain, to the captain's disbursements up to that date. After that must come the claim of Messrs. Rait and Gardiner, and as that will unquestionably swallow up almost all that is left, it is unnecessary to discuss anything further, and I think that is the proper order to be made. The costs will come out of the fund, and there will be no reference unless some ground is given for one, and if any of the parties make an unnecessary application for a reference they will have to pay the costs.

Solicitors for the plaintiffs, *Ince, Colt,* and *Ince.*

Solicitors for the interveners, *Simpson, Cullingford,* and *Co.*

Dec. 3 *and* 8, 1902.

(Before PHILLIMORE, J.)

THE TORBRYAN. (*a*)

Charter-party—Damage to cargo—Negligence of stevedores—Exception clause—Proper interpretation of words.

Goods were shipped under a charter-party, a clause of which protected the shipowners from liability for "the act of God . . . and all other accidents excepted, even though caused by negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owners in the management or navigation of the vessel, or otherwise."

Held, that the shipowners were not liable for damage done to the goods, as the word "otherwise" referred, not to the "management or navigation of the vessel," but to the receiving and delivery of the cargo, and that although the damage was due to the negligence of the stevedores in the discharge of the cargo, it was an "accident" within the meaning of the clause, as the negligence was not wilful.

ACTION by owners of cargo to recover damages in respect of damage done to cargo and short delivery. By a charter-party, dated the 30th Jan. 1902, the plaintiffs shipped 8000 bags of sugar at Dunkirk for London by the defendants' steamship *Torbryan.* The sugar was shipped in bags, and after the cargo had been discharged it was found that seven of the bags were missing, seven others had been damaged by coal dust, and several of the other bags had been torn and a portion of the contents lost, partly owing to their striking the deck or hatch-coamings as they were being discharged, and partly owing to the stevedores having used hooks. The plaintiffs claimed 178*l.* 14*s.* 4*d.* in all for the damage done and loss of the contents of the bags.

The defendants admitted that the bags were shipped apparently in good order and condition, and that the number and weights were correct, and paid into court 12*l.* 12*s.* 4*d.* in respect of the bags lost and those damaged by coal dust. They contended, however, that the damage to the remainder was caused by the bags being too thin and weak, and also by the negligent stowage of them by the defendants' agents or servants at Dunkirk, in consequence of which the various marks got mixed up together and rendered the discharge very difficult. They also contended that they were protected by the exceptions in the charter-party, which were as follows:

The act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates, or robbers, strikes, arrests or restraint of princes, rulers, and people, collisions, strandings, and all other accidents excepted, even though caused by negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owners in the management of the vessel, or otherwise.

Scrutton, K.C. and *Balloch* for the plaintiffs.

Carver, K.C. and *Nelson* for the defendants.

At the conclusion of the evidence, Phillimore, J. stated that, in his opinion, the damage to the bags and the consequent loss was due to negligence of the stevedores in the handling and discharge of the cargo.

The arguments of counsel on the question of law sufficiently appear in the judgment.

The following cases were referred to in the course of the argument:

The Cressington, 64 L. T. Rep. 329; 7 Asp. Mar. Law Cas. 27; (1891) P. 152;
Norman v. *Binnington,* 63 L. T. Rep. 108; 6 Asp. Mar. Law Cas. 528; 25 Q. B. Div. 475;
Baerselman v. *Bailey,* 72 L. T. Rep. 677; 8 Asp. Mar. Law Cas. 4; (1895) 2 Q. B. 301;
Blackburn v. *Liverpool, Brazil, and River Plate Steamship Company,* 85 L. T. Rep. 783; 9 Asp. Mar. Law Cas. 263; (1902) 1 K. B. 290;
Pandorf v. *Hamilton,* 57 L. T. Rep. 726; 6 Asp. Mar. Law Cas. 212; 12 App. Cas. 518;
Re Richardsons and Samuel, 77 L. T. Rep. 479; 8 Asp. Mar. Law Cas. 330; (1898) 1 Q. B. 266;
Owners of Cargo on board the Steamship Waikato v. *New Zealand Shipping Company,* 79 L. T. Rep. 326; 8 Asp. Mar. Law Cas. 442; (1899) 1 Q. B. 56;
Notara v. *Henderson,* 26 L. T. Rep. 442; 1 Asp. Mar. Law Cas. 278; L. Rep. 7 Q. B. 225;
The Xantho, 57 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503.

Cur. adv. vult.

Dec. 8.—PHILLIMORE, J.—The plaintiffs are the owners of 8000 bags of sugar shipped on the steamship *Torbryan* at Dunkirk for delivery in London upon the terms of a charter-party in the French language, of which I have an agreed translation. They sue in respect of four heads of damage—seven bags short delivery, 9*l.* 6*s.* 2*d.*; seven bags damaged by coal dust, 3*l.* 6*s.* 2*d.* (which two sums have been paid since writ); loss by spilling from bags, 158*l.* 2*s.* 8*d.*; cost of repairing bags, 7*l.* 19*s.* 5*d.* These two latter claims are in question. I have no doubt as to the facts. The cargo was brought over in sufficient bags. Some were torn in the sides by hooks which the stevedores improperly and recklessly used in the course of discharge. Some were cut through from below by the slings owing to the sets being violently knocked from underneath against the deck or the coamings of the hatch in the course of their being carelessly lifted out of the hold. It is possible that in a few cases the bags burst at the seams through the same violent contact. From the holes and at the burst seams fine crystallised sugar spilt in the process of moving. Some was saved clean and put back into the bags, some was saved in a damaged condition and sold for an

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

inferior price as sweepings, and a good deal was lost. The net loss was properly put by the plaintiffs at 158*l.* 2*s.* 8*d.*, and they properly spent 7*l.* 19*s.* 5*d.* in repairing the bags, and thus saving further loss. The acts and omissions of the stevedores which caused these losses were negligent and improper, the stevedores were the servants of the shipowner, and he is responsible to the plaintiffs unless he is protected by the charter-party. There is one other fact which might on a possible construction of the charter-party be material—viz., the proportion of loss due to either of the two causes, tearing by the hooks or violent contact. I have no means of apportioning between these two causes, and it was agreed at the trial that if such apportionment should ever become necessary it should be ascertained in some subsequent proceeding, either by a reference to the registrar or otherwise. The material clause of the charter-party is as follows: [His Lordship then read the clause set out above.] Protective clauses of this kind are now well established in commerce, and business is conducted on the footing of their existence, and courts of justice must, and do give full effect to them. But the position is artificial, the steps by which the court reaches the construction are made up of arguments finely drawn, and the conclusion is of necessity strange to the plain man, who is neither lawyer nor merchant. The defendants contend that the loss sued for is upon the facts which I have found to be considered to be due to an "accident caused by negligence of servants of the owners" "otherwise" than "in the management or navigation of the vessel." I propose first to deal with the word "otherwise." The plaintiffs say that this word means something very like management or navigation, and they rely upon the cases of *Re Richardsons and Samuel* (*ubi sup.*) and *Owners of Cargo on board the Steamship Waikato* v. *New Zealand Shipping Company* (*ubi sup.*). The defendants say that this word introduces, at any rate, something in addition to management and navigation, and they rely upon the case of *Baerselman* v. *Bailey* (*ubi sup.*). I think both contentions are of force, but the result of the two is in favour of the defendants. "Navigation" is the bringing of the ship with the cargo on board from port to port. "Management" covers such matters as opening and closing the hatches to secure ventilation or protection from weather, and such exceptional duties with regard to the cargo as may be imposed upon the master of the ship in certain events upon the authority of the case of *Notara* v. *Henderson* (*ubi sup.*). What is naturally left for the word "otherwise" except the receiving and delivery of the cargo?

Then comes the question—Is this loss due to an accident caused by negligence?—a question to my mind far more difficult. I have considered the cases of *Pandorf* v. *Hamilton* (*ubi sup.*), *The Xantho* (*ubi sup.*), *The Cressington* (*ubi sup.*), and *Blackburn* v. *Liverpool, Brazil, and River Plate Steam Navigation Company* (*ubi sup.*), which, apparently, contain the law upon this subject. On the whole, I think that the loss here should be deemed for the purposes of the charter-party to be caused by the spilling of the sugar, and that this spilling was an accident. The other view would be that the loss was caused by damage to the bags, and that it would be necessary for the defendants to prove that the damage to the bags was accidental. Even taking the case at this stage, I think the defendants should succeed. I have not much doubt that they should succeed as to those bags which were damaged by the striking against the deck or hatch coamings. That striking, though due to careless working, was clearly accidental. The loss from these bags was, in my view, due to an accident, the spilling, caused by an accident, the striking, which was brought about by negligence. As regards the damage caused by the hooks, I have had more doubt. All use of such hooks as were used was wrongful, and was likely to be injurious; but it did not follow that the hooks each time they were used tore one of the bags. Here, again, I think upon the whole that there was a loss by accident, the spilling, caused by another accident, the tearing, due to negligence in shifting the bags with hooks. In this way I arrive at a double accident in the chain of consequences in each case; but a single accident is sufficient for the defendants. It was urged upon me that very early in the course of delivery and repeatedly afterwards complaint was made of and to the stevedores of their improper working in both respects, and it was contended that their persistence after warning removed the subsequent mischief from the category of accidents. The fact is true, but I cannot accept the inference sought to be drawn from it. The stevedores were reckless, and it may be said wanton, but they were not wilful. They did not intend to damage or destroy; they intended to hurry over the discharge, and to take their chance of doing or not doing damage. They handled many bags without damaging them. The balance were damaged, and as each bag was damaged it was an accident, though no doubt not an unlikely one. There must be judgment for the defendants except as to the two small claims which have been paid since the writ was issued.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Dec. 1, 1902.

(Before COLLINS, M.R. and MATHEW, L.J.)

THE DUC D'AUMALE. (*a*)

Practice—Collision—Action in personam—*Concurrent writ—Service out of jurisdiction—"Necessary or proper party" — Rules of Supreme Court* 1883, *Order XI., r.* 1 (*g*).

A collision occurred outside territorial waters between a British steamship and a French barque, which at the time was in tow of a British tug.

An action was commenced in personam *by the owners of the steamship against the owners of the tug and the owners of the barque in tow of her.*

Held, that the owners of the French vessel were "proper parties" within the meaning of Order XI., r. 1 (*g*), *and that leave was properly*

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

given to issue a concurrent writ and to serve notice of it out of the jurisdiction.

The judgment of Barnes, J. affirmed.

THIS was an appeal from a decision of Barnes, J. refusing to set aside an order of the President (Sir F. Jeune) granting leave to issue a concurrent writ in an action for damage by collision, and allowing notice of the same to be served out of the jurisdiction.

The appellants were the Compagnie Maritime Française, the owners of the French barque *Duc d'Aumale*, and the respondents were the Marychurch Steamship Company, the owners of the British steamship *Camrose*.

On the 22nd June 1902 a collision occurred between the steamship *Camrose* and the *Duc d'Aumale* in the English Channel, but outside British territorial waters. The *Duc d'Aumale* at the time was in tow of the British steam-tug *Challenge*, and after the collision she put into Calais, while the *Camrose* proceeded on her voyage to Antwerp. Subsequently the *Duc d'Aumale* was towed to Dunkirk and there repaired. There was no collision between the *Camrose* and the tug *Challenge*.

On the 2nd July proceedings were instituted by the owners of the *Duc d'Aumale* in the Tribunal of Commerce at Nantes against the owners of the *Camrose*, and, as no appearance was entered to the action, judgment was given against them by default on the 20th Aug., and they were pronounced solely in fault for the collision, and condemned in damages and costs. By the convention of the 8th July 1899, a judgment of a French court can be enforced in Belgium, and the owners of the *Duc d'Aumale* threatened to seize the *Camrose* in Antwerp, whereupon the owners of the *Camrose* agreed to give bail, without prejudice, for 250,000 francs, to prevent their vessel being arrested as soon as the proceedings by default became final. On the 11th July the owners of the *Camrose* issued a writ *in personam* against the owners of the *Duc d'Aumale* and the owners of the tug *Challenge*, claiming compensation for the damage their vessel had suffered by the collision. The writ was duly served on the owners of the *Challenge*, and on the 8th Aug. the plaintiffs obtained leave from the President (Sir F. Jeune) to issue a concurrent writ, and to serve notice of it on the owners of the *Duc d'Aumale* at Nantes. This notice was duly served on the 14th Aug., and on the 25th Aug. the owners of the *Duc d'Aumale* entered a conditional appearance under protest, and on the 23rd Oct. they took out a summons in chambers praying that the order might be discharged and the writ set aside. This summons was adjourned into court, and on the 10th Nov. came on by way of motion before Barnes, J.

It was contended by the owners of the *Duc d'Aumale* that the action was not properly brought against the owners of the *Challenge* within the meaning of the rule, as the tug *Challenge* had never been in collision with the plaintiffs' steamship *Camrose*, and that the real purpose of the action was to bring the *Duc d'Aumale* before the court, although the collision occurred outside the jurisdiction.

Order XI., r. 1 (*g*) is as follows:

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge wherever—(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Scrutton, K.C. in support of the motion.

Pickford, K.C. and *Balloch*, *contra*.

The following cases were referred to in the course of the argument:

Massey v. *Heynes*, 59 L. T. Rep. 470; 21 Q. B. Div. 330;
Flower v. *Rose*, 7 Times L. Rep. 280;
Witted v. *Galbraith*, 68 L. T. Rep. 354; (1893) 1 Q. B. 577;
Williams v. *Cartwright*, 71 L. T. Rep. 834; (1895) 1 Q. B. 142;
The Elton, 65 L. T. Rep. 232; 7 Asp. Mar. Law Cas. 66; (1891) P. 265;
The Englishman v. *The Australia*, 70 L. T. Rep. 846; 7 Asp. Mar. Law Cas. 603; (1894) P. 239;
The Avon and Thomas Joliffe, 63 L. T. Rep. 712; 6 Asp. Mar. Law Cas. 605; (1891) P. 7.

BARNES, J.—The first point taken on behalf of the owners of the *Duc d'Aumale* is that the writ is issued against persons who are not "necessary or proper" parties to an action "properly brought" within the jurisdiction, for it is argued that the action is really and substantially brought against the French owners, and that the tugowners are only put on the record for the purpose of bringing in the French shipowners under Order XI., r. 1 (*g*). That argument is supported by the cases of *Flower* v. *Rose* (*ubi sup.*), *Witted* v. *Galbraith* (*ubi sup.*), and *Williams* v. *Cartwright* (*ubi sup.*). The view presented on the other side in substance is that there is an actual *bonâ fide* cause of action alleged against the tugowners as well as against the French shipowners, and that, if the owners of both these vessels, the tug and tow, had been within the jurisdiction, they would both have been proper parties in a suit to recover for the damage done to the plaintiffs' ship, and that the tugowners in this case are not merely brought into the suit for the purpose of founding a right to proceed under the sub-section to which I have referred. I am of opinion that in this matter the plaintiffs are in the right. I think that the action is properly founded against both defendants, if there is a *bonâ fide* charge of negligence against both sets of defendants, which is the case presented on the part of the plaintiffs, and therefore I do not think it can be said that the other defendants, the French owners, are either improper or unreasonable or unnecessary parties. Of course, they are not strictly necessary parties—the words in the rule are "necessary or proper"—but they are "proper" parties to the suit brought in this court against both, and I think, after listening to the cases cited by counsel for the owners of the French ship, that the reasoning of those cases is that the attempt was there made to bring into play the sub-section of the rule when there was no real cause of action against the persons who were within the jurisdiction, and it was only sought to bring the rule into play, if it could by possibility be done, in order to enforce a remedy against the persons who were not within the jurisdiction. I do not think that I can usefully add anything to what I have said except by referring to Lord Esher's judgment in *Massey* v. *Heynes* (21 Q. B. Div. 330, at p. 338), where he says: "The question

whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction must depend on this—supposing both parties had been within the jurisdiction, would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction. This is the legislation on the subject, and we are bound by it." There is this further point to make in a case of this kind, apart from what may happen in the future, if the plaintiffs succeed against the French shipowners in enforcing their rights. There can be no doubt that, if this is a *bonâ fide* allegation of negligence against both sets of defendants, it is quite the proper and right thing that the whole matter should be fought out once for all with everybody present who was concerned with the accident. Therefore, unless this is a mere attempt to bring in the outside person not subject to the jurisdiction, without a shadow of a right against the person who is within the jurisdiction, I think that it is quite a proper case in which the process should be allowed to go against both. There may be the ultimate difficulty in enforcing the judgment if recovered, and at the present moment there is the difficulty on the part of the present appellants in setting aside this writ and enforcing what I understand is a judgment recovered by them in default of appearance in France against the present plaintiffs. It appears by affidavit that some proceedings in France were instituted by the French company against the present plaintiffs, and an attempt is now being made to enforce that judgment in Belgium. I have not thought it necessary to adjourn this case in order to inquire what the rights of the parties are in Belgium, or to see what would be the result of the French suit; but it is a strong thing to say that the rights of the parties are to be precluded by default proceedings, and my decision, in the exercise of the discretion vested in me, is that the application on the part of the defendants, the French company, must be refused. The costs will be costs in the cause.

The defendants appealed.

Dec. 1.—*Scrutton*, K.C. and *Noad* for the appellants.—There must be a *bonâ fide* cause of action against the person served within the jurisdiction before leave should be given to serve notice out of the jurisdiction. The words of Order XI., r. 1 (*g*), are "a necessary or proper party to an action properly brought against some other person duly served," &c. The test is whether the defendant within the jurisdiction could have been properly made a party to the action if there had been no question of jurisdiction:

Witted v. *Galbraith* (*ubi sup.*).

In that case the Court of Appeal refused to allow shipowners residing in Scotland to be served, on the ground that the action against the brokers residing in London was not a *bonâ fide* one. See also the judgment of Lord Esher, M.R. in *Williams* v. *Cartwright* (*ubi sup.*). The tug is the servant of the tow, so that there is no cause of action against the tug. It cannot be said the tug is independently liable, because there never was a collision between the *Camrose* and the tug. The owners of the tug are simply made defendants so as to take advantage of Order XI., r. 1 (*g*), and bring in the owners of the French ship. Secondly, the appellants have obtained judgment by default in the court at Nantes, and that decision is now final. If the proceedings in this country go on, there will be two conflicting decisions. Thirdly, the action is one *in personam* in respect of a collision on the high seas. The cause of action did not arise within the jurisdiction of the English courts, and, as Lord Coleridge pointed out in *Harris* v. *Owners of the Franconia* (2 C. P. Div. 173, at p. 177), Order XI., r. 1, does not enable a judge to order service of a writ out of the jurisdiction in such cases. If service of notice of writ is allowed, there will be an assumption of jurisdiction over a foreigner *in personam* in respect of a tort committed on the high seas, in spite of the fact that the vessel has never come within the jurisdiction. See

Re Smith, 35 L. T. Rep. 380; 1 P. Div. 300.

This would amount to an alteration of the rights of the parties by means of rules of practice, and the rules are rules of procedure only, and were never intended to affect the rights of the parties:

British South Africa Company v. *Companhia de Moçambique*, 75 L. T. Rep. 604; (1893) A. C. 602.

Pickford, K.C. and *Balloch*, for the respondents, the owners of the *Camrose*, were not called upon.

COLLINS, M.R.—It seems to me that the rule was framed with a view of excluding the cases put by the learned counsel who has just addressed us, because you could not have it more clearly expressed in language than it is in this sub-sect. (*g*) of Order XI., r. 1. [His Lordship then read the rule.] So that the framers of the rule make the criterion due service within the jurisdiction; not that the cause of action itself has arisen within the jurisdiction. If you get the "other person" duly served within the jurisdiction, then you have to show that the person not within the jurisdiction is a necessary or proper party. The service, and not the cause of action, is made the criterion in this sub-section. With regard to the legal merits of the case, I have nothing to add to the judgment of Barnes, J., which appears to me to cover the whole ground, and with which I entirely agree.

MATHEW, L.J.—I agree. The question here is whether one of the parties is a necessary or proper person within the meaning of the rule. There is no doubt that if these two persons were British subjects within the jurisdiction they could be sued together. One happens to be out of the jurisdiction, which is the case referred to in the rule. There is the service of the writ upon one within the jurisdiction, and this enables leave to be given to serve another person out of the jurisdiction who is a proper party to the litigation.

Solicitors for the appellants, *William A. Crump* and *Son*.

Solicitors for the respondents, *Thomas Cooper* and *Co.*

Wednesday, Feb. 4, 1903.

(Before WILLIAMS, STIRLING, and MATHEW, L.JJ.)

MACIVER AND CO. LIMITED *v.* TATE STEAMERS LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Seaworthiness — Charter-party — Charterers to provide and pay for coal — Captain to be under orders of charterers—Liability of owners to see that ship was seaworthy as regards amount of coal on board at commencement of voyage.

A charter-party for a voyage from the United Kingdom to the River Plate and back provided that the charterers should provide and pay for all the coal, and the captain was to be under the orders and direction of the charterers as regards employment, agency, and other arrangements.

Held, affirming the decision of Kennedy, J., that there was nothing in the charter-party to relieve the shipowners from their duty of seeing that the steamer was seaworthy as regards her supply of coals on board at the time of leaving the River Plate on her return voyage.

APPEAL by the defendants from the judgment of Kennedy, J. at the trial of the action without a jury.

The plaintiffs were the charterers, and the defendants were the owners of the steamship *Patapsco.*

The action was brought to recover damages for breach of the terms of a charter-party that the ship should be seaworthy for a voyage from the River Plate and St. Vincent.

By the charter-party, dated the 14th Feb. 1901, the defendants agreed to let and the plaintiffs agreed to hire the steamship *Patapsco* for one round voyage from Liverpool to the River Plate and back to the United Kingdom, the ship to be placed at the disposal of the charterers at Liverpool in such dock, or at such wharf or place (where she might always safely lie afloat) as they might direct, and

Being on her delivery ready to receive cargo, and tight, staunch, and strong, and in every way fitted for the service . . . having steam winches and donkey boiler with capacity to move all the steam winches at once and at the same time, or main boiler to be used, (and with full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage) and to be so maintained during the continuance of the charter-party, to be employed in carrying lawful merchandise . . . as the charterers or their agents shall direct on the following conditions:

The material conditions were as follows:

(1). That the owners shall provide and pay for all provisions, wages, and consular, shipping, and discharging fees of the captain, officers, engineers, firemen, and crew, and shall pay for the insurance of the vessel, and also for all the cabin, deck, engine room, and other necessary stores and maintain her in a thoroughly efficient state in hull and machinery for and during the service; (2) that the charterers shall provide and pay for all the coal, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers, or crew), and all other charges whatsoever except those before stated: (3) that the charterers shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall, on the expiration of the charter-party, pay for all coal left in the bunkers, each at the current market prices of the respective ports where she is delivered to them; . . . (8) that the whole reach of the vessel's holds, decks, and usual places of loading and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel, including cattle and (or) coal and (or) cargo on deck at shipper's risk; (9) that the captain shall prosecute his voyage with the utmost despatch, and shall render all customary assistance with the ship's crew, tackle, and boats, and that, though appointed by the owners, he shall be under the orders and directions of the charterers as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain's signing bills of lading or otherwise complying with the same; (10) that if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same and, if necessary, make a change in the appointments; . . . (12) that the master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which are to be patent to the charterers or their agents, and furnish to the charterers their agent, or super-cargo, when required, a true daily copy of the log, showing the course of the steamer and distance run, and the consumption of coal; . . . (17) the act of God, enemies, fire, restraint of princes, rulers, and people, and all dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation, and errors of navigation, throughout this charter-pary, always mutually excepted.

There was a conflict of evidence as to the amount of coal on board the ship when she left the River Plate for St. Vincent, but at the trial of the action Kennedy, J. found as a fact that the ship left with an insufficient quantity of coal, so that she was unseaworthy for the voyage. He also found that the weather experienced on the voyage was such as ought to have been expected at that season of the year, and there was nothing beyond the ordinary perils which ought to have been guarded against by the captain.

After leaving the River Plate the master found it necessary to put into Pernambuco in order to take in some more coals, and in fact took on board seventy tons.

In consequence of this the voyage was delayed, and a higher price was paid for the coals than would have been given if they had been bought in the River Plate.

Kennedy, J. under these circumstances gave judgment for the plaintiffs, holding that neither the captain nor the owners were released by the provisions of the charter-party from the responsibility of seeing that the ship was in a seaworthy condition at the commencement of the voyage from the River Plate.

The defendants appealed.

J. A. Hamilton, K.C. and *Bailhache* for the defendants.—Under the terms of the charter-party the charterers are to provide and pay for all coal. If the captain was negligent in not seeing that he had enough coal on board, he was acting in that manner not as agents of the owners, but of the charterers. The duty of the owners was to provide an efficient captain, and having done that, they would not be responsible

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

for an error of judgment in such a matter as that. They referred to

The Vortigern, 80 L. T. Rep. 382; 8 Asp. Mar. Law Cas. 523; (1899) P. 140.

Pickford, K.C. and *Bateson*, for the plaintiffs, were not called upon.

WILLIAMS, L.J.—In my opinion the judgment of Kennedy, J. was right. The argument on behalf of the owners really comes to this: That the provisions of the charter-party relieved the shipowners from the obligation of seeing that the ship was seaworthy in respect of the amount of coal on board on starting on each successive stage of the round voyage. Clause 2 was chiefly relied upon. That clause says that the charterers shall provide and pay for all the coal. It was argued that the words "provide and pay for" show that the intention of the parties was that the question of the amount of coal required to be on board before starting on each stage of the voyage was one to be determined by the charterers, so that the shipowners were to be relieved of their obligation to see that the ship was seaworthy in respect of the coal on board. I cannot see anything in the provisions of the charter-party to relieve the shipowners from that obligation. It was said that as the charterers had agreed that they themselves would provide the necessary coal, they could not sue the shipowners. I see no evidence that the charterers exercised any discretion in this matter; but, even if they had done so, it seems that they were put in a position in which it was impossible for them to form a correct judgment through the default of the defendants' servants. I see no reason for thinking that the judgment of Kennedy, J. was wrong, and, in my opinion, the appeal must be dismissed.

STIRLING, L.J.—I agree.

MATHEW, L.J.—I agree. It is not disputed that the shipowners were under an obligation to see that the ship was seaworthy in other respects than as regards coals, but as to that matter it is said that the duty was cast upon the charterers. I think that it is only necessary to read the charter-party to see that this could not have been the intention of the parties. Having regard to the obligation which, in my opinion, remained imposed on the shipowners of having the ship in a seaworthy condition in respect of her supply of coal at the commencement of the different stages of the voyage, it was the duty of the captain to give the charterers correct information so as to enable them to provide the requisite quantity of coal. That duty was not performed, and therefore enough coal was not provided before the ship left the River Plate. The vessel was in consequence unseaworthy for the voyage to St. Vincent, and the loss was thereby occasioned to the plaintiffs for which the learned judge has given them damages. I think that his judgment was correct.

Appeal dismissed.

Solicitors for the plaintiffs, *Charles Russell* and *Co.*, for *Lightbound, Owen*, and *Co.*, Liverpool.

Solicitors for the defendant, *Downing* and *Bolam*, for *Bolam* and *Co.*, Sunderland.

Wednesday, Feb. 11, 1903.

(Before Lord HALSBURY, L.C., Lord ALVERSTONE, C.J., and Sir F. JEUNE, P.)

ESSARTS v. WHINNEY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Mortgage—Shares in ship—Agent receiving profits—Notice by mortgagee—Periodical distributions of profits by agent.

E. was the mortgagee of certain shares in two ships. The profits were received by Messrs. B., A., and Co., who made periodical distributions, once a year in March, amongst the persons entitled. E. gave notice in November of the mortgage.

Held (affirming the decision of Wright, J.), that E. was only entitled to the freight earned and received by Messrs. B., A., and Co. after the notice, and that before that date the mortgagor was entitled, as the fact that the agents only accounted to the persons entitled at stated periods made no difference.

APPEAL from Wright, J. on an interpleader issue.

The plaintiff was the mortgagee of sixteen sixty-fourth shares of two ships which were mortgaged to her by one Cartmell Harrison.

The defendant was the trustee in bankruptcy of the mortgagor.

Messrs. Brown, Atkinson, and Co. were the managing owners of the two ships in question, and they made periodical distributions of the profits earned, once a year in March, to the persons entitled.

The two mortgages were dated the 11th Aug. 1899, and on the 24th Nov. 1899 notice of the mortgages was given by the mortgagee to Messrs. Brown, Atkinson, and Co., who received it on the 25th Nov. 1899, and they paid into court the sum of 649*l.* 12*s.* 6*d.*, being the portion of the profits of the ships attributable to the sixteen sixty-fourth shares.

The plaintiff claimed the whole of this money, but the learned judge held that she was only entitled to the freight earned and received by Messrs. Brown, Atkinson, and Co. after the notice was received on the 25th Nov. 1899, and he ordered 262*l.* 7*s.*, part of the sum of 649*l.* 12*s.* 6*d.*, to be paid to the defendant as trustee in bankruptcy of the mortgagor.

The plaintiff appealed.

Spencer Bower for the plaintiff.—Wright, J. thought that the plaintiff was not entitled to any freight earned before the notice, but she is entitled to all the money that was in the hands of the agents at the time the notice was given, and all that comes into their hands afterwards irrespective of when it was earned. It can be stopped before it actually arrives in the mortgagor's hands. In *Rusden* v. *Pope* (18 L. T. Rep. 651; 3 Mar. Law Cas. O. S. 91; L. Rep. 3 Ex. 269) it was held that a mortgage of a vessel carries with it freight, and the mortgagee intervening by taking possession or by an act equivalent to taking possession before the freight becomes payable is entitled as against the mortgagor or his assignees in bankruptcy to receive it. Actual possession being impossible, notice to the mortgagors and charterers was an act

(a) Reported by W. DE B HERBERT, Esq., Barrister-at-Law.

equivalent to taking possession, and, that being done, the mortgagee was entitled to the freight. Here the freight had not been paid over, and was still in the hands of the agents. It would not have been paid over till March, and, as it did not become payable till then, the present plaintiff was entitled as against the mortgagor or his trustee in bankruptcy, the present defendant, to all this money. In *Keith* v. *Burrows* (37 L. T. Rep. 291; 3 Asp. M. C. 481; 2 App. Cas. 636) Lord Cairns said: "In point of fact, when a mortgagee takes possession he becomes the master or owner of the ship, and his position is simply this: from that time everything which represents the earnings of the ship which had not been paid before must be paid to the person who then is the owner, who is in possession." He referred to

Gumm v. *Tyrie*, 6 B. & S. 299;
The Heather Bell, 84 L. T. Rep. 794; 9 Asp. M. C. 206; (1901) P. 272.

[Lord ALVERSTONE, C.J.—I think *The Heather Bell* is against you.] In *Black* v. *Homersham* (39 L. T. Rep. 671; 4 Ex. Div. 24) shares were sold at auction. The conditions of sale were silent as to dividends, and between the time of sale and the date of completion of the purchase as fixed by the conditions a dividend on the shares was declared in respect of a period antecedent to the sale, and it was held it belonged to the purchaser. [Lord ALVERSTONE, C.J. referred to *Willis* v. *Palmer* (2 L. T. Rep. 626; 7 C. B. N. S. 340).] That case might be against me if the agent received the money merely on behalf of the mortgagor. But here the agents received it on behalf of all the holders of the shares in the ship, and they only divide it periodically amongst the various persons entitled.

Carver, K.C. and *H. G. Farrant*, for the defendant, were not called upon to argue.

Lord HALSBURY, L.C.—I entirely concur with the judgment of the learned judge below. The law is well settled, and I can draw no distinction between the case of money received on behalf of one person entitled or on behalf of three persons entitled, although it has been suggested that there is a distinction. The mere fact that at stated periods the agents accounted to the persons entitled to the money does not affect the question. The time of distribution of the aliquot share makes no difference. The agents of the mortgagor had received the money before notice of the mortgage; the appeal must therefore be dismissed.

Lord ALVERSTONE, C.J. and Sir F. JEUNE, P. concurred.

Solicitors: *Crosse* and *Sons*; *Black* and *Moss*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 1 *and* 10, 1902.

(Before BIGHAM, J. without a Jury.)

GREENOCK STEAMSHIP COMPANY *v.* MARITIME INSURANCE COMPANY. (*a*)

Insurance (marine) — Voyage policy — Unseaworthiness arising during voyage—Insufficient coal taken at coaling port—Consequent loss—Liability of underwriters.

A steamship on commencing a voyage is primâ facie *unseaworthy if she has not sufficient coal on board then to complete the voyage, but where the voyage is made in stages she is seaworthy if she has sufficient coal on board on commencing each stage to enable her to complete that stage.*

Where a steamship commences a stage of the voyage with a deficiency of coal owing to the negligence of the master, any loss to the insured resulting from such deficiency is not covered by a clause in the policy that the insurance is "to cover loss through the negligence of master, mariners, engineers, or pilots."

Such loss is covered by a clause, "Held covered in case of any breach of warranty . . . at a premium to be hereafter arranged," but where the loss has occurred before the breach of warranty is discovered the premium to be arranged will be at least as great as the loss and so the insured can recover nothing under the clause.

ACTION tried before Bigham, J. sitting in the Commercial Court.

This action was tried upon the following agreed statement of facts: The plaintiffs were the owners of the steamship *Gulf of Florida*, and the defendants were a marine insurance company who had insured the steamship by a policy dated the 19th July 1897. The more important terms of the policy were as follows:

For 3000*l.* on the *Gulf of Florida* valued at 30,000*l.* At and from . . . to port or ports in any order in the United Kingdom and (or) Continent between Bordeaux and Hamburg, both inclusive, and while there and thence to port or ports place or places, on west coast of South America backwards or forwards and forwards and backwards, in any order or rotation, while there and thence to port or ports of call and (or) discharge in any order in the United Kingdom and (or) Continent between Bordeaux and Hamburg both inclusive, and while there however employed, until expiry of thirty days after arrival or until sailing on next voyage, whichever may first occur. With leave to call at any ports and places for all purposes, and any ports and places on the east coast of South America, and (or) Falkland Islands, both outwards and homewards. The risk not to commence before the expiration of previous policies. Against the risk of total loss only, but including collision clause, general average and salvage charges. Perils insured against of the seas, &c. Subject to and including Gulf Line voyage clauses as annexed.

Such clauses were shortly as follows:

This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. Including all risks incidental to steam navigation. General average salvage and special charges payable as per official foreign adjustment, if so made up, or per York-Antwerp Rules 1890 if in accordance with the contract of affreightment. Held covered in case of any breach of

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

warranty, deviation, and (or) any unprovided incidental risk or change of voyage at a premium to be hereaf er arranged. It shall be lawful to the assured, their factors, servants, and assigns, to sue, labour and travel for, in, and about the defence, safeguard, and recovery of the said ship, &c., and any part thereof without prejudice to this insurance, to the charges whereof we the assurers, will contribute each according to the rate or quantity of this sum herein insured. In the event of any inaccuracy in the description of voyage, interests, name of vessel, clauses, or conditions, it is agreed to hold the assured covered at a premium to be arranged.

The previous policies, before the expiration of which the risk was not to commence, were all in similar terms. One of them was dated the 1st Jan. 1897, and was subscribed by the defendants.

The events giving rise to disputes between the the parties took place after the *Gulf of Florida* left Monte Video on the 18th Dec. 1897.

Stated shortly they were as follows: On arrival at Monte Video the *Gulf of Florida* had on board 232 tons of bunker coals. She took on board a further 330 tons, and sailed on the 18th Dec. with 562 tons in the bunkers, the bunkers being full and the quantity apparently more than sufficient for the passage to St. Vincent, where in the ordinary course she would coal again. On the same day that she left Monte Video she put back in consequence of an accident to the condenser door. This was renewed, and the voyage resumed on the 23rd Dec. By this time about twenty tons of the bunker coals had been used, but those on board considered she had still sufficient for the passage to St. Vincent. After leaving Monte Video the *Gulf of Florida* experienced strong head winds and seas. On the 7th Jan. 1898 the coal was found to be burning very quickly, at a rate equal to thirty-six tons per day. As the rate of consumption continued very high, the speed was reduced on the 9th Jan. and to save steam the steam steering gear and electric light were shut off. On the 10th Jan. some of the ship's fittings were used for fuel, and on subsequent days further fittings and spars, and portions of the cargo were burnt to assist in keeping up steam. If this had not been done the *Gulf of Florida* would have been unable to reach port without assistance, and without such assistance would have been helpless and in danger of being totally lost.

The quantity of coal with which the *Gulf of Florida* left Monte Video, both on the 10th and 23rd Dec. was, in fact, insufficient for the passage to St. Vincent. This insufficiency happened owing to the negligence of the master and engineers.

The value of the ship's fittings and spars burnt was 312*l.* 4*s.* The plaintiffs had paid the consignees of cargo for the cargo used as fuel 662*l.* 1*s.* 11*d.*

The plaintiffs claimed that they were entitled to the defendant company's proportion of the value of the ship's fittings and spars burnt, and of the sums paid for cargo burnt. Alternatively they claimed the defendant company's proportion of the value of the fittings and spars burnt, and of the ship's contribution in general average of the value of the cargo burnt. In the further alternative, the plaintiff claimed to be entitled as above on payment of an additional premium to be fixed by the court, or as the court might direct.

The defendants denied that the plaintiffs were entitled to any of the said sums, or any part thereof, even on payment of an additional premium.

Carver, K.C. and *Leck* for the plaintiff.—There was here no warranty of seaworthiness, at any rate at the time this loss occurred. The warranty of seaworthiness, if any such existed, was of seaworthiness at the commencement of the voyage. Even saying that this warranty reattached at every port of call, and that the departure of the vessel from Monte Video with an insufficient supply of coal was a breach of such warranty, such breach and therefore the consequent loss arose through the negligence of the master and engineers, and was, therefore, covered by the policy. In any case we are entitled to recover on payment of a premium to be fixed by the court under the clause, "Held covered in case of any breach of warranty . . . at a premium to be hereafter arranged." Lastly, the whole value of the goods burnt is recoverable under the sue and labour clause. Counsel cited the following cases:

Gibson v. *Smale*, 4 H. L. Cas. 353;
Bermon v. *Woolbridge*, 2 Dougl. 781;
The Bona, 71 L. T. Rep. 870; 7 Asp. Mar. Law Cas. 557; (1895) P. 125;
Strang v. *Scott*, 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601;
Montgomery v. *Indemnity Mutual Marine Assurance Company*, 86 L. T. Rep. 462; 9 Asp. Mar. Law Cas. 141; (1902) 1 K. B. 734.

J. A. Hamilton, K.C. and *Simey* for the defendants.—This being a voyage policy the fact that the vessel in commencing her voyage had not sufficient coal in her bunkers to enable her to complete the voyage made her *primâ facie* then unseaworthy. But this unseaworthiness may be cured when the voyage is by stages by her recoaling at each port of call sufficiently to enable her to complete the next stage:

The Vortigern, 80 L. T. Rep. 382; 8 Asp. Mar. Law Cas. 523; (1899) P. 140.

Here on the facts stated she was not coaled sufficiently when she left Monte Video. She therefore commenced that section of the voyage in an unseaworthy condition. It is argued, however, that if this is so the breach of warranty is covered by the clause as to loss through the negligence of the master or engineers. But the loss here was not directly due to any such negligence. The burning of the fittings and cargo were not acts of negligence. The negligence of the master in leaving Monte Video with the vessel in an unseaworthy condition may have been a *sine quâ non* to but was not the *causa causans* of the loss. The negligence was complete long before the loss took place. Then it is argued that the clause "Held covered in case of any breach of warranty . . . at a premium to be hereafter arranged" covers this breach. This clause obviously can apply only to breaches of warranty discovered before any loss has actually occurred. Counsel cited

Quebec Marine Insurance Company v. *Commercial Bank of Canada*, 22 L. T. Rep. 559; 3 Mar. Law Cas. O. S. 414; L. Rep. 3 P. C. 234;
Ionides v. *Universal Marine Insurance Association*, 8 L. T. Rep. 705; 1 Mar. Law Cas. O. S. 353; 14 C. B. N. S. 259;
Pink v. *Fleming*, 63 L. T. Rep. 413; 6 Asp. Mar. Law Cas. 554; 25 Q. B. Div. 396;

Robinson v. *Price*, 36 L. T. Rep. 354; 3 Asp. Mar. Law Cas. 407; 2 Q. B. Div. 295;
Ballantyne v. *Mackinnon*, 75 L. T. Rep. 95; 8 Asp. Mar. Law Cas. 173; (1896) 2 Q. B. 455;
Fawcus v. *Sarsfield*, 6 E. & B. 192;
Hyderabad (Deccan) Company v. *Willoughby*, (1899) 2 Q. B. 530.

Carver, K.C., in reply, cited

Aitchison v. *Lohre*, 41 L. T. Rep. 323; 4 Asp. Mar. Law. Cas. 168; 4 App. Cas. 755;
Thames and Mersey Marine Insurance Company v. *Hamilton, Fraser, and Co.*, 57 L. T. Rep. 695; 6 Asp. Mar. Law Cas. 200; 12 App. Cas. 484;
Dixon v. *Sadler*, 5 M. & W. 405.

Dec. 10.—BIGHAM, J. read the following judgment:—The main question in this case is whether when the *Gulf of Florida* sailed from Monte Video for St. Vincent, on the 23rd Dec. 1897, there existed any implied warranty on the part of the plaintiffs that she was seaworthy for that voyage. It is found as a fact that she was insufficiently coaled; and this was clearly a breach of the warranty, if such a warranty existed. Now, the policy sued upon is a voyage policy—the body of the policy and the attached clauses clearly show it; so that, when the vessel originally started from the United Kingdom on her round, a warranty existed that she was seaworthy for that round voyage. But the warranty is one thing and the observance of it another. It is clear that in such an adventure it is practically impossible for the ship to sail with sufficient coal for the whole of the contemplated voyage. She would have to call at convenient ports on her route for the purpose of replenishing her bunkers; and, therefore, though the warranty at starting is that she shall be seaworthy for the whole voyage, the warranty is sufficiently observed if the voyage is so arranged that the ship can and shall coal at convenient ports *en route*. The warranty may be stated as an undertaking that the vessel shall be sufficiently coaled for the whole of her voyage, the warranty to be observed by coaling sufficiently at successive points to navigate the vessel to the end of her voyage. This, I think, is the true effect of *Thin* v. *Richards* (66 L. T. Rep. 584; 7 Asp. Mar. Law Cas. 165; (1892) 2 Q. B. 141) and of *The Vortigern* (*sup.*). There is, to use the language of the present Master of the Rolls, "a recurring obligation to bring the vessel up to the required standard at each stage." It is true that in both those cases the question arose between shipowner and cargo-owner, and not between shipowner and underwriter. But this, in my opinion, makes no difference; and I am fortified in this view by the judgment of the late A. L. Smith, M.R. in *The Vortigern*. He there states the law as follows: "In my judgment when a question of seaworthiness arises between either a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with sufficiency of coal for the whole voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that, at the commencement of each stage, the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness which *primâ facie* has been established against him. In each case it is a matter for proof as to where the necessity of the case requires that each stage should be, and I think that in the present case the necessity for coaling places at Colombo and Suez has been established." This view of the law does not in any way conflict with the well-known rule that, once the warranty of seaworthiness for the whole voyage is complied with, the shipowner's obligation to the underwriter is at an end. It merely allows of a convenient way of enabling the shipowner to fulfil his warranty—that is to say, to fulfil it by stages instead of once for all at the beginning of the risk. I therefore hold that the warranty of seaworthiness still existed at Monte Video, and was there broken. The result is that when the vessel sailed from Monte Video the policy no longer attached to the risks insured against.

But there are other questions to consider. It is said that the breach was due to the negligence of the engineers, and that therefore the loss is covered by the negligence clause attached to the policy. This clause is one of a number of clauses introduced into the policy by shipowners for their own benefit. It is in the following words: "This insurance also to cover loss through the negligence of masters, mariners, engineers, or pilots. . . . " I do not think this clause has any application to the present case. The underwriters are only responsible for losses which are directly attributable to the risks insured against. The loss in question—namely, the burning of the ship's fittings and spars—was not directly due to any negligent act at all. It was due to the voluntary act of those engaged in the navigation of the ship. The original negligence was, no doubt, a *causa sine quâ non*, but it was not a *causa causans*. Therefore it cannot be taken into consideration. Moreover, as I have before stated, the loss did not happen until after the policy had ceased to attach. The plaintiffs, however, relied upon another of the appended clauses as affording them a right to recover. The consideration of this clause presents more difficulty. It is as follows: "Held covered in case of any breach of warranty, deviation, and (or) any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged." Now, undoubtedly the warranty of seaworthiness is by far the most important of the few implied warranties which a shipowner enters into when he insures his ship, and I am satisfied that if proper effect is to be given to this clause, it must be held to apply to that particular warranty. What, then, is the operation of the clause? In my opinion, it entitles the shipowner, as soon as he discovers that the warranty has been broken, to require the underwriter to hold him covered. It also entitles the underwriter to exact a new premium commensurate with the added risk. But what is to happen if the breach is not discovered until a loss has occurred? I think even in that case the clause still holds good, and the only open question would be, What is a reasonable premium for the added risk? To answer this, the parties must assume that the breach was known to them at the time it happened, and must ascertain what premium it would then have been reasonable to charge. If they cannot

do it by agreement, they must have recourse to a court of law. It is like the case of goods sold at a reasonable, though an unnamed, price. The sale is good, but the price has to be ascertained, either by agreement or at law. In the present case the plaintiffs ask the court to fix this additional premium, and I am prepared to do it. What might an underwriter fairly require as a premium for insuring a steamer which starts on a voyage short of coal? One of the almost inevitable consequences of such a state of things is that some other fuel will have to be used during the voyage—cargo, or ship's fittings, or spars. Such a sacrifice will constitute a general average loss, for which the underwriter will be responsible to the shipowner. Would it be reasonable to require the underwriter to charge as premium a less sum than the amount of a loss so obviously probable? I think not, and, indeed, I think the underwriter would reasonably be entitled to charge more, for the short supply of coal would not merely bring about the general average loss I have mentioned (as it did in this very case), but would also materially increase the risk of a total loss of the vessel herself. Thus I come to the conclusion that the additional premium in this case ought to be at least equivalent to the general average loss now claimed. It follows that the plaintiffs can recover nothing in this action, for the additional premium more than meets the loss claimed. A question was argued before me as to whether the loss in question was a general average loss or gave rise to a larger claim on the part of the shipowner under the sue and labour clause. It is not material to consider this question, for, even if the full value of the burnt goods could be recovered under the sue and labour clause, I should still be of opinion that the additional premium would exceed the amount of the claim; but I desire to say that, in my opinion, the sacrifice cannot be regarded as within the sue and labour clause. At most it is the subject-matter of general average.

Judgment for the defendants.

Solicitors for the plaintiffs, *H. C. Coote* and *Ball*, for *Adamson* and *Adamson*, South Shields.

Solicitors for the defendants, *Field, Roscoe*, and *Co*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Tuesday, Jan. 20, 1903.

(Before LORD ALVERSTONE, C.J., WILLS and CHANNELL, JJ.)

CARDIFF STEAMSHIP COMPANY LIMITED *v.* JAMESON. (*a*)

Bill of lading — Custom — Charges to be paid by the ship—Charges for stowing in transit-shed—Inconsistency—Mersey Docks Acts and Bye-laws.

Bills of lading provided that certain currants were "to be delivered from the ship's deck when the ship's responsibility shall cease . . . Simultaneously with the ship being ready to unload the said goods . . . the consignee is hereby bound to be ready to receive the goods from the ship's side, and in default thereof the master of the agent of the ship is authorised" to enter, land, and warehouse them at the expense of the consignee.

Held, that a custom, that in the discharge of dried fruit cargoes the charges for trucking from the shed and piling in the transit-shed are to be paid for by the ship, was good, as it did not contradict the bills of lading, but merely annexed an incident to them.

Held, further, that these charges were not included in the all-round charge made by the master porters under the Mersey Docks Acts and the bye-laws of the Mersey Docks and Harbour Board.

APPEAL by the plaintiffs from His Honour Judge Shand sitting at the Liverpool County Court.

The action was brought to recover balance of freight due on a cargo of dried currants discharged *ex* plaintiffs' steamship *Dordogne*, at Liverpool, and received by the defendant as agent for the plaintiffs.

The defendant admitted the claim, but claimed 34*l.* 15*s.* 9*d.* as a set-off for money paid for and on behalf of the plaintiffs at their request in respect of the same cargo—namely, for "stowing" at 9*d.* per ton.

The facts found were as follows:—

The *Dordogne*, loaded with a cargo of dried currants from Patras, arrived at Liverpool on the 27th Nov. 1901, and berthed in the Queen's Dock.

The cargo consisted of 37,000 packages, represented by eighty-seven bills of lading and 187 marks, the number of consignees being nineteen.

The bills of lading contained clauses that cases of currants

Are to be delivered from the ship's deck, when the ship's responsibility shall cease . . . Simultaneously with the ship being ready to unload the said goods . . . the consignee is hereby bound to be ready to receive the goods from the ship's side, and in default thereof the master or agent of the ship is authorised to enter the goods at the Custom House and land, warehouse, or place them in lighter at the risk and expense of the consignee after they leave the deck of the ship.

The defendant acted as stevedore on behalf of the ship in discharge of the cargo, and as master porter on behalf of the consignees.

The Queen's Dock was provided with a transit-shed for goods, and the method employed by the defendant in the discharge of the vessel was that the packages, after being brought on deck and after leaving the ship's stage, were trucked to the transit-shed and there piled.

After being piled the defendant sorted the packages to marks and then trucked them to the Customs' scales to be weighed. After weighing they were either loaded on to the consignee's carts or repiled by the defendant in the transit-shed to await the consignees taking delivery.

The defendant had been paid 1*s.* per ton as stevedore for discharging, but sought to charge the plaintiffs, as owners of the ship, with an additional 9*d.* per ton for trucking the packages from the ship to the transit-shed, and then piling them before their being sorted to marks.

There was a custom proved of the Port of Liverpool that in the discharge of dried fruit cargoes the charges for trucking from the ship and piling in the transit-shed are paid for by the ship.

The master porters' charges and duties are regulated by the bye-laws made by the Mersey Docks and Harbour Board, and by bye-law 1 the

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

charges to be made by master porters for work done by them are to be the amounts specified in the schedule; and by bye-law 7 the operations included in the charges stated in the schedule which are to be performed by the master porters for those charges include sorting or selecting goods to bill of lading mark, weighing, piling, or storing on the quay and trucking, &c.

The learned County Court judge decided that the custom was consistent with the bill of lading and allowed the set-off.

By sect. 35 of the Mersey Docks Acts Consolidation Act 1858:

The master or owner of any vessel lying in and using any dock on the quay adjoining to which any transit-shed may have been erected and opened for the reception of goods, or the owner of all or any part of the inward cargo of such vessel, may cause such cargo or any part thereof, without previously making any entry thereof, upon giving due notice to the proper officer of Customs, to be landed and deposited in such transit-shed; and such cargo or such part of such cargo, so landed and deposited in such transit-shed, shall for all purposes be considered as still on board the vessel from whence the same shall have been landed, and shall be removable only from such transit-shed in such manner and by the same process in all respects as the same might by law have been removed from such vessel, in case the same were still actually on board thereof.

J. A. Hamilton, K.C. and *Leslie Scott* for the plaintiffs. — The question is whether a ship's agent who appointed himself stevedore for the owners of the ship, and master porter for the consignee of goods, is entitled to make certain charges. A local Act—namely, the Mersey Docks Acts Consolidation Act 1858—provides that the unloading is to be performed by master porters, and it is desirable that goods should be transferred from the ship to the transit-shed. Here the operation was "trucking" goods from the ship to the transit-shed, and then piling them there. The defendant has been, or ought to have been, paid for performing this operation by the consignee, and ought not to look to the plaintiffs for payment. Reliance is placed upon the Mersey (Liverpool) Docks Acts Consolidation Act 1858 and the Mersey Docks (Ferry Accommodation) Act, s. 33. Under this last section the board may make bye-laws. Reference is made to bye-law 1 as to the charges and the rules as to charges to be made by master porters, and bye-law 7. As the defendant was the ship's agent he had no right to pay himself any charges as master porter that the shipowner was not bound to pay. But he sets up a custom alleged to be universal, not inconsistent with the bill of lading and reasonable, that one or other is paid this amount by the ship. The plaintiffs say this custom is unreasonable, because the Act and bye-laws impose on the master porter the performance of these operations at a certain charge. The defendant paid himself as stevedore and the plaintiffs do not complain, but when he claims this extra 9*d.* as stevedore the plaintiffs say that he did the work as master porter, as he was bound to do under the bye-laws. The custom alleged is inconsistent with the bill of lading, which says that goods are to be delivered from the ship's deck, where the ship's liability shall cease. Here there was no custom and no evidence that the plaintiffs knew of the existence of any, and no case can be cited in which a custom has been allowed to impose charges on a ship contrary to the bill of lading. The obligations of the ship are brought to an end when she has discharged the cargo over her side. They referred to

Boumphrey v. *Houghton*, 55 J. P. 729;
Perry v. *Barnet*, 53 L. T. Rep. 585; 15 Q. B. Div. 388;
Grey v. *Butler's Wharf Limited*, 3 Com. Cas. 67.

Horridge, K.C. (*Tobin* and *O'Conor* with him) for the defendant.—The custom is a good and reasonable one. This is something done at the request of the ship, as the goods must go to the transit-shed. By sect. 166 of the Act of 1858 the goods in that shed are to be considered on board the vessel. The custom proved here does not contradict the bill of lading. It is said that that this work was done by the master porter as stevedore, but that is not so.

Hamilton, K.C. in reply.

The following cases were also referred to:

Brenda Steamship Company v. *Green*, 82 L. T. Rep. 66; 9 Asp. Mar. Law Cas. 55; (1900) 1 Q. B. 518;
Aktieselskab Helios v. *Ekman*, 76 L. T. Rep. 537; (1897) 2 Q. B. 83;
Stephens v. *Wintringham*, 3 Com. Cas. 169;
Petrocochino v. *Bott*, 30 L. T. Rep. 840; 2 Asp. Mar. Law Cas. 310; L. Rep. 9 C. P. 355.

Lord ALVERSTONE, C.J.—This case has been extremely well argued, and raises a point no doubt of very great importance and of interest, although I think after argument it does not appear to be one of any difficulty. The question arises as to whether or not by a custom or on any other ground shipowners who have received goods for several consignees under bills of lading, can be called upon to pay a sum of 9*d.* for trucking consignees' goods and piling them in the warehouse before they are sorted or dealt with by the Customs. It is said on behalf of the appellants that they are not liable upon two grounds. It is first said that by the terms of the bill of lading the goods are to be delivered from the ship's deck, where the ship's responsibility is to cease. By the bill of lading it is provided that "simultaneously with the ship being ready to unload the abovementioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge"; and it is said that any arrangement by custom or otherwise, which imposes the 9*d.* upon the shipowner, would be contrary to that bill of lading. It is further said that the provisions of the Dock Acts which lay down the conditions by which the persons who do the work are controlled, impose upon the consignee the duty of paying for this, or, at any rate, do not allow the master porter to make a charge against the ship. Now, in answer to that, it is said that there is a well-established custom at the port of Liverpool when dutiable goods are sent into a transit-shed, that the expense of wheeling them there and of piling them is one which is to be borne by the ship, but it was not suggested by Mr. Scott, who opened the case for the appellants, that the evidence before the County Court judge did not establish that that practice or custom, if it is a custom which is valid, as applied to this state of circumstances, exists. To deal with the second point first. If

Mr. Scott or Mr. Hamilton could have made good the position that the bye-laws contemplated this charge being paid by the consignee or this work being done by the master porter for the 1*s.* 9*d.* or 1*s.* 10*d.* in the case of dried fruits, he would have gone a very long way, I think, to show that the custom could not put this charge or that the circumstances would not justify this charge being put upon the shipowner. But I think when the statute and bye-laws are looked at, that ground cannot be supported. Sect. 35 of the Mersey Docks Acts Consolidation Act 1858 says: "The cargo of any vessel from any foreign or colonial port entering and using any open dock shall be received, weighed, and loaded off by one set of porters only, who shall be in the employ and under directions and orders of one of the master porters appointed by the board," and if the ship has been dealt with under that section, or, in other words, if all that has been done by the ship or at the express or implied request of the ship, has been done under that section, then I think Mr. Scott would have made good his point that the bye-laws applied. Now, when you come to look at the bye-laws which are made under sect. 221, &c., you find that those sections enable bye-laws to be made for the regulation and good government of master porters. Our attention has been called to these bye-laws and, as I understand, they do provide that the master porters shall do certain services for the sums of money which are there set down; and the schedule which imposes those charges is divided into two classes, both of which are headed with their respective heading: "For goods delivered after having been stowed on the quay," and "For goods delivered without being stowed on the quay." Therefore, upon the face of the headings, it certainly does appear that the charges which are there referred to, are charges for something in respect of services done to goods which either have been delivered straight from the ship or which have been stowed on the quay. Now, when we turn back to rule 7, which includes in a schedule or list "operations included in the charges stated in columns Nos. 1 and 2 of the schedule of charges hereunto annexed, except where otherwise provided in such schedule and in cases to be hereafter determined by resolution of the board, and to be then recorded in such schedule," "the following and all operations incidental thereto are to be performed by the master porters." I need not read them all through. They include piling or stowing on the quay, trucking, refilling, and stowing ready for gauger. Except the "stowing ready for gauger," it is admitted that there are none of those operations that must relate to goods which are dealt with in the transit-shed, and I think it has been fairly put on both sides that "stowing ready for gauger" is something which may have to be done after the original wheeling into the shed and piling has been done. Therefore it does seem to me, upon the bye-laws and upon the statute, that it cannot be said that the Mersey Docks and Harbour Board have, by their statutes or regulations, provided that the master porters should do this work which they have been called to do for the all-round charge which is included in the schedule.

That being so, we have now to consider the other ground in respect of which it was contended that this charge could not be imposed upon the ship—namely, that it contradicted the bill of lading. Now, in order to understand that position, we have to look at what the powers and privileges of shipowners are, independently of those clauses in the bye-laws to which I have referred. By sect. 166 it is provided that "the master or owner of any vessel lying in and using any dock on the quay adjoining to which any transit-shed may have been erected and opened for the reception of goods, or the owner of all or any part of the inward cargo of such vessel may cause such cargo, or any part thereof, without previously making any entry thereof, upon giving due notice to the proper officer of customs, to be landed and deposited in such transit-shed; and such cargo, or such part of such cargo, so landed and deposited in such transit-shed shall for all purposes be considered as still on board the vessel." Now, I accept the view which I understand was indicated by the late Master of the Rolls, Sir A. L. Smith, in *Boumphrey* v. *Houghton* (55 J. P. 729), that that really is a section mainly, if not entirely, to control directly the relations between the shipowners and the customs; but it certainly does put it in the power of the captain and the owners and the agents of the ship to save the ship very considerable expense. They may land without entry; and what is pointed out in the evidence (and I think properly pointed out) is that if the ship is not able to do something of that kind, then, as they will not allow goods to be landed upon the quay without entry being made, there will be great delay, because there will have to be an entry made in respect of the dutiable goods, and that parcel treated, so to speak, specially and separately from the rest of the cargo. In the same way, if this case had been controlled solely by the rights of the shipowner under the bill of lading, without considering the power of discharging the ship, under sect. 166 the shipowner would have to be prepared to deliver to the consignee at the ship's rail his parcel, and the consignee would have to come and demand his parcel and receive his parcel from the ship's side. At one time I thought that the point which Mr. Hamilton and Mr. Scott pressed upon us, that the master porter in doing this work was really taking delivery from the ship, was a point which might raise some difficulty; but it seems to me, when the true facts are ascertained, that it really is not. The fact is that the shipowner does not ask the consignee to act exactly in accordance with the bill of lading; he does not ask the consignee to come and take his parcel; the consignee does not ask the shipowner to deliver his separate parcel; the master porter when he takes the cargo to the transit-shed is not taking, if I may use the expression, the parcel of each separate consignee to the transit-shed as the agent of each separate consignee, but he is taking the bulk cargo to the transit-shed there to be dealt with. Therefore it seems to me that a state of things has arisen which is not dealt with in terms by the bill of lading, and therefore cannot be said to be controlled by the express language of the bill of lading. An incident is annexed to the contract, in the interests both of the shipowner and the consignee, that delivery shall be taken in a substituted way—namely, from the transit-shed—the ship getting

charges to be made by master porters for work done by them are to be the amounts specified in the schedule; and by bye-law 7 the operations included in the charges stated in the schedule which are to be performed by the master porters for those charges include sorting or selecting goods to bill of lading mark, weighing, piling, or storing on the quay and trucking, &c.

The learned County Court judge decided that the custom was consistent with the bill of lading and allowed the set-off.

By sect. 35 of the Mersey Docks Acts Consolidation Act 1858:

> The master or owner of any vessel lying in and using any dock on the quay adjoining to which any transit-shed may have been erected and opened for the reception of goods, or the owner of all or any part of the inward cargo of such vessel, may cause such cargo or any part thereof, without previously making any entry thereof, upon giving due notice to the proper officer of Customs, to be landed and deposited in such transit-shed; and such cargo or such part of such cargo, so landed and deposited in such transit-shed, shall for all purposes be considered as still on board the vessel from whence the same shall have been landed, and shall be removable only from such transit-shed in such manner and by the same process in all respects as the same might by law have been removed from such vessel, in case the same were still actually on board thereof.

J. A. Hamilton, K.C. and *Leslie Scott* for the plaintiffs. — The question is whether a ship's agent who appointed himself stevedore for the owners of the ship, and master porter for the consignee of goods, is entitled to make certain charges. A local Act—namely, the Mersey Docks Acts Consolidation Act 1858—provides that the unloading is to be performed by master porters, and it is desirable that goods should be transferred from the ship to the transit-shed. Here the operation was "trucking" goods from the ship to the transit-shed, and then piling them there. The defendant has been, or ought to have been, paid for performing this operation by the consignee, and ought not to look to the plaintiffs for payment. Reliance is placed upon the Mersey (Liverpool) Docks Acts Consolidation Act 1858 and the Mersey Docks (Ferry Accommodation) Act, s. 33. Under this last section the board may make bye-laws. Reference is made to bye-law 1 as to the charges and the rules as to charges to be made by master porters, and bye-law 7. As the defendant was the ship's agent he had no right to pay himself any charges as master porter that the shipowner was not bound to pay. But he sets up a custom alleged to be universal, not inconsistent with the bill of lading and reasonable, that one or other is paid this amount by the ship. The plaintiffs say this custom is unreasonable, because the Act and bye-laws impose on the master porter the performance of these operations at a certain charge. The defendant paid himself as stevedore and the plaintiffs do not complain, but when he claims this extra 9*d.* as stevedore the plaintiffs say that he did the work as master porter, as he was bound to do under the bye-laws. The custom alleged is inconsistent with the bill of lading, which says that goods are to be delivered from the ship's deck, where the ship's liability shall cease. Here there was no custom and no evidence that the plaintiffs knew of the existence of any, and no case can be cited in which a custom has been allowed to impose charges on a ship contrary to the bill of lading. The obligations of the ship are brought to an end when she has discharged the cargo over her side. They referred to

Boumphrey v. *Houghton*, 55 J. P. 729;
Perry v. *Barnet*, 53 L. T. Rep. 585; 15 Q. B. Div. 388;
Grey v. *Butler's Wharf Limited*, 3 Com. Cas. 67.

Horridge, K.C. (*Tobin* and *O'Conor* with him) for the defendant.—The custom is a good and reasonable one. This is something done at the request of the ship, as the goods must go to the transit-shed. By sect. 166 of the Act of 1858 the goods in that shed are to be considered on board the vessel. The custom proved here does not contradict the bill of lading. It is said that that this work was done by the master porter as stevedore, but that is not so.

Hamilton, K.C. in reply.

The following cases were also referred to:

Brenda Steamship Company v. *Green*, 82 L. T. Rep. 66; 9 Asp. Mar. Law Cas. 55; (1900) 1 Q. B. 518;
Aktieselskab Helios v. *Ekman*, 76 L. T. Rep. 537; (1897) 2 Q. B. 83;
Stephens v. *Wintringham*, 3 Com. Cas. 169;
Petrocochino v. *Bott*, 30 L. T. Rep. 840; 2 Asp. Mar. Law Cas. 310; L. Rep. 9 C. P. 355.

Lord ALVERSTONE, C.J.—This case has been extremely well argued, and raises a point no doubt of very great importance and of interest, although I think after argument it does not appear to be one of any difficulty. The question arises as to whether or not by a custom or on any other ground shipowners who have received goods for several consignees under bills of lading, can be called upon to pay a sum of 9*d.* for trucking consignees' goods and piling them in the warehouse before they are sorted or dealt with by the Customs. It is said on behalf of the appellants that they are not liable upon two grounds. It is first said that by the terms of the bill of lading the goods are to be delivered from the ship's deck, where the ship's responsibility is to cease. By the bill of lading it is provided that "simultaneously with the ship being ready to unload the abovementioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge"; and it is said that any arrangement by custom or otherwise, which imposes the 9*d.* upon the shipowner, would be contrary to that bill of lading. It is further said that the provisions of the Dock Acts which lay down the conditions by which the persons who do the work are controlled, impose upon the consignee the duty of paying for this, or, at any rate, do not allow the master porter to make a charge against the ship. Now, in answer to that, it is said that there is a well-established custom at the port of Liverpool when dutiable goods are sent into a transit-shed, that the expense of wheeling them there and of piling them is one which is to be borne by the ship, but it was not suggested by Mr. Scott, who opened the case for the appellants, that the evidence before the County Court judge did not establish that that practice or custom, if it is a custom which is valid, as applied to this state of circumstances. exists. To deal with the second point first. If

Mr. Scott or Mr. Hamilton could have made good the position that the bye-laws contemplated this charge being paid by the consignee or this work being done by the master porter for the 1*s.* 9*d.* or 1*s.* 10*d.* in the case of dried fruits, he would have gone a very long way, I think, to show that the custom could not put this charge or that the circumstances would not justify this charge being put upon the shipowner. But I think when the statute and bye-laws are looked at, that ground cannot be supported. Sect. 35 of the Mersey Docks Acts Consolidation Act 1858 says: "The cargo of any vessel from any foreign or colonial port entering and using any open dock shall be received, weighed, and loaded off by one set of porters only, who shall be in the employ and under directions and orders of one of the master porters appointed by the board," and if the ship has been dealt with under that section, or, in other words, if all that has been done by the ship or at the express or implied request of the ship, has been done under that section, then I think Mr. Scott would have made good his point that the bye-laws applied. Now, when you come to look at the bye-laws which are made under sect. 221, &c., you find that those sections enable bye-laws to be made for the regulation and good government of master porters. Our attention has been called to these bye-laws and, as I understand, they do provide that the master porters shall do certain services for the sums of money which are there set down; and the schedule which imposes those charges is divided into two classes, both of which are headed with their respective heading: "For goods delivered after having been stowed on the quay," and "For goods delivered without being stowed on the quay." Therefore, upon the face of the headings, it certainly does appear that the charges which are there referred to, are charges for something in respect of services done to goods which either have been delivered straight from the ship or which have been stowed on the quay. Now, when we turn back to rule 7, which includes in a schedule or list "operations included in the charges stated in columns Nos. 1 and 2 of the schedule of charges hereunto annexed, except where otherwise provided in such schedule and in cases to be hereafter determined by resolution of the board, and to be then recorded in such schedule," "the following and all operations incidental thereto are to be performed by the master porters." I need not read them all through. They include piling or stowing on the quay, trucking, refilling, and stowing ready for gauger. Except the "stowing ready for gauger," it is admitted that there are none of those operations that must relate to goods which are dealt with in the transit-shed, and I think it has been fairly put on both sides that "stowing ready for gauger" is something which may have to be done after the original wheeling into the shed and piling has been done. Therefore it does seem to me, upon the bye-laws and upon the statute, that it cannot be said that the Mersey Docks and Harbour Board have, by their statutes or regulations, provided that the master porters should do this work which they have been called to do for the all-round charge which is included in the schedule.

That being so, we have now to consider the other ground in respect of which it was contended that this charge could not be imposed upon the ship—namely, that it contradicted the bill of lading. Now, in order to understand that position, we have to look at what the powers and privileges of shipowners are, independently of those clauses in the bye-laws to which I have referred. By sect. 166 it is provided that "the master or owner of any vessel lying in and using any dock on the quay adjoining to which any transit-shed may have been erected and opened for the reception of goods, or the owner of all or any part of the inward cargo of such vessel may cause such cargo, or any part thereof, without previously making any entry thereof, upon giving due notice to the proper officer of customs, to be landed and deposited in such transit-shed; and such cargo, or such part of such cargo, so landed and deposited in such transit-shed shall for all purposes be considered as still on board the vessel." Now, I accept the view which I understand was indicated by the late Master of the Rolls, Sir A. L. Smith, in *Boumphrey* v. *Houghton* (55 J. P. 729), that that really is a section mainly, if not entirely, to control directly the relations between the shipowners and the customs; but it certainly does put it in the power of the captain and the owners and the agents of the ship to save the ship very considerable expense. They may land without entry; and what is pointed out in the evidence (and I think properly pointed out) is that if the ship is not able to do something of that kind, then, as they will not allow goods to be landed upon the quay without entry being made, there will be great delay, because there will have to be an entry made in respect of the dutiable goods, and that parcel treated, so to speak, specially and separately from the rest of the cargo. In the same way, if this case had been controlled solely by the rights of the shipowner under the bill of lading, without considering the power of discharging the ship, under sect. 166 the shipowner would have to be prepared to deliver to the consignee at the ship's rail his parcel, and the consignee would have to come and demand his parcel and receive his parcel from the ship's side. At one time I thought that the point which Mr. Hamilton and Mr. Scott pressed upon us, that the master porter in doing this work was really taking delivery from the ship, was a point which might raise some difficulty; but it seems to me, when the true facts are ascertained, that it really is not. The fact is that the shipowner does not ask the consignee to act exactly in accordance with the bill of lading; he does not ask the consignee to come and take his parcel; the consignee does not ask the shipowner to deliver his separate parcel; the master porter when he takes the cargo to the transit-shed is not taking, if I may use the expression, the parcel of each separate consignee to the transit-shed as the agent of each separate consignee, but he is taking the bulk cargo to the transit-shed there to be dealt with. Therefore it seems to me that a state of things has arisen which is not dealt with in terms by the bill of lading, and therefore cannot be said to be controlled by the express language of the bill of lading. An incident is annexed to the contract, in the interests both of the shipowner and the consignee, that delivery shall be taken in a substituted way—namely, from the transit-shed—the ship getting

the benefit of discharging her cargo in bulk to the transit-shed and the consignee there receiving it in a separate parcel. To that state of things the custom applies and the custom found is, that when that state of things arises the charge of 9*d.* —which is considered a fair amount for taking the goods from the ship and piling them in the transit-shed—shall be borne by the ship. In my opinion, that is not contradicting the bill of lading. It is annexing an incident to it. I further think it is a case in which the ship and the representatives of the ship have properly not insisted upon the terms of the bill of lading, but have asked that certain work should be done for the ship, making an advance for the ship in respect of which they get a *quantum meruit.* Of course, it is not disputed in this case that Mr. Jamieson acted *bonâ fide*; it is not disputed that he did save the ship demurrage or delay by going to the transit-shed. Under those circumstances it seems to me that the *quantum meruit* which is fixed for the work done on the ship's behalf in that case may be properly fixed by the custom, and that that incident is thereby annexed to the contract. For these reasons I think that the finding of the learned County Court judge was right, and that this appeal ought to be disallowed. With regard to the authorities, I do not think that any of them help us beyond this, that certainly in some of the later cases it does not seem to have been considered that a custom was of necessity bad because it imposed some burden upon the shipowner or, I ought to say, imposed some burden upon the parties to the contract in the bill of lading, not dealt with in terms by the bill of lading itself. With regard to the judgment of the late Master of the Rolls, as to the expense of watching, it is not a judgment upon this point, because I understand the watching there was after the goods had been piled. At any rate, it does not, in my opinion, conflict with the view which I have endeavoured to express, that where the parties have acted in a way not contemplated by the bill of lading, there is nothing improper in the custom of the port suggesting what their relation shall be under those altered circumstances which were not so contemplated. For these reasons I think the appeal should be dismissed.

Wills, J.—I am of the same opinion, and I only wish to express in a very few words why it appears to me that the alleged custom may very well be added to the bill of lading. I apprehend that under the bill of lading as it stands, and in spite of the custom, if either party chose to insist upon having delivery made according to the bill of lading, the other party would be bound to accept that stipulation in performance of the contract in the way that has been pointed out. There seems to me to be nothing inconsistent with that in saying that a term may be superadded and is superadded by practice and custom to the effect that, if both parties so choose, delivery instead of being made in the way provided by the bill of lading may be made through the transit-shed. If that is the case, there is no difficulty in saying that the payment for that service may fall upon the ship instead of on the consignee. The service is eminently for the benefit of the ship. It is quite clear that it is for the benefit of both parties. It is also quite clear that neither does the captain nor the shipowner wish to deliver pursuant to the bill of lading, nor does the consignee wish to take his cargo in the way provided for by the bill of lading in every case, because to do so would be to defeat the rapid discharge of business, which is the soul of commercial life. It seems to me, therefore, that there is nothing in any way inconsistent with the terms of the bill of lading in the annexation of this additional term which custom has annexed.

Channell, J.—I entirely agree with the judgments as to custom which have been delivered already. I only wish to mention one point which was raised in the argument, and which I think my learned brethren have not dealt with. That is this: It was suggested that this practice, which as a practice in fact existing was proved beyond all possible doubt, cannot be taken notice of as a custom binding between the parties, because it merely is a mistaken view of sect. 166 of the Act of 1858. I think that if it clearly appeared that parties had acted upon a mistaken view of an Act of Parliament, and that such action had become perfectly common and usual, parties could not turn round upon it and say: "Well, even if the parties have misunderstood the Act of Parliament, this is binding upon them as a custom because it has been usual to act in that way." But, although it is fairly clear here that the practice which has arisen has some reference, I think, to the fact of this 166th section existing, because it relates to the transit-shed which is created by those sections of the Act of Parliament, we have an Act of Parliament which says that for certain purposes goods which are not in fact on board a ship are to be taken as if they were still on board, and that is a matter which might give rise to difficulty; and if the parties concerned in such matters met frequently and came to the conclusion that, there being a difficulty about it, one party should pay one portion of the expenses and the other party the other portion, it seems to me that that agreement between parties made between individuals in the first instance, and then made so constantly and so frequently as to become perfectly understood in the trade, would then become binding as a legal custom. I do not think it necessary for me to add anything to what my brothers have said as to the view that that is not inconsistent with either the bye-laws or with the terms of the bill of lading.

Appeal dismissed.

Solicitors: *Pritchard* and *Sons; Botterell* and *Roche*, for *Vaughan* and *Roche*, Cardiff.

Feb. 5 *and* 9, 1903.

(Before Bruce, J.)

Wilson and others v. Salamandra Assurance Company of St. Petersburg. (a)

Insurance—Marine—Concealment of facts—Knowledge of Lloyd's agent—Knowledge of individual member of Lloyd's.

The knowledge of Lloyd's agents cannot be taken to be the knowledge of an individual member of Lloyd's, so as to necessarily make void a policy of marine insurance on the ground of conceal-

(a) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

ment of facts, where such individual member has no actual knowledge in fact.

COMMERCIAL CAUSE.

The plaintiffs, who were members of Lloyd's, underwrote two policies of insurance on sugar per the *Professor Woermann* from Hamburg to Gibraltar, and reinsured their liability with the defendants under a reinsurance policy dated the 21st April 1902, and the action was brought to recover money under this last-mentioned policy as the sugar was damaged.

The defence raised by the points of defence was that the defendants were induced to underwrite the policy sued on by the concealment of the following facts: (*a*) That the ship had arrived at Gibraltar on the 17th Feb.; (*b*) that the cargo had been wholly or partially discharged and examined on or before the 22nd and 24th Feb. and found damaged.

As to (*a*), the learned judge found on the facts that there was no concealment.

As to (*b*), in point of fact on the 22nd and 24th Feb. the survey of the cargo on board the *Professor Woermann* was made by a merchant at Gibraltar named Lewis Dasoi, and by his reports of survey, dated the 26th Feb., he found the cargo to have been damaged.

It appeared by a note appended to the reports of survey that Dasoi was employed by Messrs. Smith Imossi and Co., who were agents for Lloyd's at Gibraltar.

By the policies by which the plaintiffs were assured, it was provided that in case of damage notice should be given to Messrs. Smith Imossi and Co., so that they might appoint a surveyor.

It was contended by the defendants that, although the plaintiffs on the 25th Feb., when the slip was initialled, had no actual notice that the cargo had been found damaged on the 22nd and the 24th Feb., yet they must be taken to have known all that Messrs. Smith Imossi and Co. knew at the time the slip was initialled. The defendants argued that if the plaintiffs were once fixed with notice of a material fact, such as the damage to the cargo, the neglect of the plaintiffs to communicate that fact, although it was wholly unknown to them, would operate as a concealment which would vitiate the policy.

The defendants relied upon the printed book of instructions issued by Lloyd's to their surveyors, dated the 27th July 1892. By rule 3, p. 6, especial attention of the agent is called to the necessity of telegraphing any report of the loss of a vessel or a casualty at once and direct to Lloyd's. By rule 8, p. 7, the agent is to furnish on forms supplied by the secretary prompt and regular advices of the arrival, sailing, and speaking of vessels. He is also to send the names of vessels arriving with damage or having damaged goods on board which have been surveyed under his superintendence. There were other provisions in the book of instructions upon which the defendants relied which it is not necessary to refer to.

Having regard to the terms of the instructions and the evidence of the head of the agency department at Lloyd's, the learned judge came to the conclusion that the agents of Lloyd's at foreign ports have a discretion as to the mode of communicating notice of damage to Lloyd's; that there is no obligation upon them to communicate by telegraph in the case of every case of loss or damage, but as a matter of business in the case of serious loss or damage they do communicate by telegraph, though in the case of small loss or damage they do not. In the present case they did not telegraph.

J. A. Hamilton, K.C. and *Theobald Mathew* for the plaintiffs.

Scrutton, K.C. and *Loehnis* for the defendants.

BRUCE, J. (after stating the facts set out above, continued:)—By omitting to telegraph Lloyd's agents did not thereby, I think, omit to perform any duty incumbent upon them. In my opinion there was no duty on the part of Lloyd's agents at Gibraltar to communicate the result of the surveys of the 22nd and 24th by telegraph to Lloyd's, London; but, even if there was a duty so to communicate with Lloyd's, that is quite a different matter from there being a duty to communicate with the plaintiffs. The plaintiffs had no control over the appointment or conduct of Lloyd's agents at Gibraltar, and I think it is quite clear that the knowledge of Lloyd's agents at Gibraltar cannot be said to have been the knowledge of the plaintiffs. Lloyd's have agents in every important port in the world, and, if the knowledge of Lloyd's agents at a distant port is to be taken to be the knowledge of an individual underwriter who may be a member of Lloyd's, the practice of reinsurance would become impossible, because reinsurance is commonly resorted to to cover risks of loss which, while unknown to the underwriter in this country, in most cases must be known to Lloyd's agents in distant parts of the world. I may say I am clearly of opinion that, according to the principles laid down in *Blackburn* v. *Vigors* (57 L. T. Rep. 730; 6 Asp. M. C. 218; 12 App. Cas. 531) and *Blackburn* v. *Haslam* (59 L. T. Rep. 407; 6 Asp. M. C. 326; 21 Q. B. Div. 144), the knowledge acquired by Lloyd's agents at Gibraltar on the 22nd and 24th Feb. cannot be treated as knowledge of the plaintiffs, and the defendants cannot rely upon the non-communication of the facts disclosed by the surveys as affording any ground of concealment. As the plaintiffs had no actual knowledge that the cargo had been partly discharged and found damaged at the time the slip was initialed by the defendants' underwriter, the defence of concealment under head (*b*) fails. I give judgment for the plaintiffs for the amount claimed. *Judgment accordingly.*

Solicitors: *Waltons, Johnson, Bubb,* and *Whatton*; *Pritchard* and *Sons.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 24 *and* 27, 1902.

(Before PHILLIMORE, J.)

THE TAGUS. (*a*)

*Wages and disbursements—Foreign ship—Maritime lien—*Lex fori*—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 167, 260—*Application of sect.* 167 *to master of foreign vessel—Priorities.*

In an action by the master of a ship for wages and disbursements, the lex fori *applies and not the*

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

lex loci contractus, *and a foreign master has a maritime lien for his wages up to the date of the arrest of the ship.*

Sect. 167 *of the Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60) *applies to all vessels, British and foreign, and gives the master of a foreign ship the same rights and remedies as the master of a British ship.*

The Milford (31 *L. T. Rep. O. S.* 42; *Swa.* 362) *followed.*

ACTION by the master and crew of the Argentine steamship *Tagus* claiming wages and disbursements.

The *Tagus* was a steamship of 1366 tons gross register, belonging to the port of Buenos Ayres, and owned by one Savas N. Savas.

By a mortgage dated the 19th June 1901 the owner had mortgaged the vessel to mortgagees in the Argentine for 30,000 dollars, and the mortgagees, not having been paid, took possession of the vessel on her arrival in Sharpness on the 3rd Oct. 1902.

While there she was arrested in an action for necessaries in the County Court of Gloucester, and the master and crew thereupon instituted the present action.

Subsequently all actions were transferred to the High Court, and the vessel was eventually ordered to be sold and the proceeds paid into court.

The owners did not enter any defence to the action by the master and crew, but the mortgagees now appeared as interveners.

The claim of the crew was for their wages from the date of shipment in Buenos Ayres, which was the last voyage, but the master claimed wages during the whole time he was on board the vessel, and also disbursements, in which were included earlier voyages and wages which he had paid to the crew on previous voyages.

The interveners admitted, subject to a reference, that the crew were entitled to their wages for the last voyage, but contended that by the law of the Argentine Republic the master was only entitled to liabilities incurred as master, provided that there was at the time an absolute lack of funds in his possession belonging to the ship or her owners, and that the owner of the ship was not present.

The master was called, and stated in evidence that he was a Greek and brother of the owner of the *Tagus*. He had been to sea for some time as a seaman, but had not until recently held a certificate as master.

In Dec. 1900, the owner being dissatisfied with the late captain and the management of the vessel, put him on board as *commissario*, whose duties correspond with that of a supercargo. As such he had paid the wages of the crew from time to time, and he sometimes kept watch and piloted the vessel.

During this time the master was disrated and acted as mate, and the plaintiff received 300 pesetas a month, the wages of the master.

He continued so to act till Sept. 1901, when he obtained a master's certificate, and the late master left the ship shortly afterwards.

The vessel at this time was chiefly employed in running backwards and forwards between Rio Janeiro and Buenos Ayres.

In Feb. 1902 the present crew were shipped at Buenos Ayres on a voyage to Sharpness and home. She sailed on the 17th Feb. and called at Alexandria, where the plaintiff met the owner, who joined the ship there and travelled in her to England.

A doctor of laws practising at Buenos Ayres was called by the interveners to prove the law of the Argentine Republic with regard to wages and disbursements. He referred to arts. 947, 948, 952, 1366, 1375, and 1377 of the Codigo Comercio de la República Argentina. From these it appeared that by Argentine law there was no maritime lien for wages on any voyage previous to the one immediately prior to the institution of the action. Further, such wages did not constitute a "privileged debt" within the meaning of the articles of the code.

The interveners further contended that the provisions of sect. 167 of the Merchant Shipping Act 1894 did not apply to the masters of foreign ships, because by sect. 260 the application of Part 2 of the Act (which deals with masters and seamen) was limited to ships registered in the United Kingdom.

Sects. 167 and 260 of the Merchant Shipping Act 1894 are as follows:

Sect. 167 (1). The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act or by any law or custom. (2) The master of a ship . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages.

Sect. 260. This part of this Act shall, unless the context or subject-matter requires a different application, apply to all sea-going ships registered in the United Kingdom, and to the owners, masters, and crews of such ships, &c.

Sect. 261. This part of this Act shall, unless the context or subject-matter requires a different application, apply to all sea-going British ships registered out of the United Kingdom, and to the owners, masters, and crews thereof as follows: &c.

Sect. 265. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

Aspinall, K.C. and *Batten* for the plaintiffs.—Sect. 167 of the Merchant Shipping Act 1894 applies to all ships, British and foreign. That section re-enacts the provisions of sect. 191 of the Merchant Shipping Act 1854, and gives the master of a ship the same rights for the recovery of wages as a seaman has under the Act, and, by re-enacting the provisions of sect. 1 of 52 & 53 Vict. c. 46, gives him also the same remedies for the recovery of disbursements as a master has for his wages. In neither of the sections in the previous Acts which are re-enacted in sect 167 is there anything to show that the provisions are limited to the masters of British ships, and it was expressly decided by Dr. Lushington in *The Milford* (31 L. T. Rep. O. S. 42; Swa. 362) that the words of sect. 191 of the Act of 1854 were broad enough to cover the case of foreign masters. The language of sect. 260 and following sections, which provide that Part 2 of the Act shall apply

to "all sea-going ships registered in the United Kingdom," is affirmative and not negative. It may be that with regard to particular ships specially mentioned, the Act only applies to them if they are British. The case of *The Milford* (*ubi sup.*) has been followed and approved of in *Reg.* v. *Stewart* (80 L. T. Rep. 660; 8 Asp. Mar. Law Cas. 534; (1899) 1 Q. B. 964). Channell, J. there says (80 L. T. Rep., at p. 663; 8 Asp. Mar. Law Cas., at p. 537; (1899) 1 Q. B., at p. 970): "It seems to me we must read sects. 260 to 266 in this way, as if they began by saying 'and with respect to the application of Part 2 to ships registered in the United Kingdom be it enacted as follows.'" *The Milford* was also followed by the Court of Session in Scotland in *Hart* v. *Alexander* (36 Sc. L. Rep. 64). It was there pointed out by Lord Moncreiff that some of the provisions of Part 2 were applicable only to British ships, some were also made applicable to foreign ships, and some were provisions quite irrespective of the nationality of the ships or the seamen. See also

Poll v. *Dambe*, 84 L. T. Rep. 870; 9 Asp. Mar. Law Cas. 220; (1901) 2 K. B. 579;
Davidsson v. *Hill*, 85 L. T. Rep. 118; 9 Asp. Mar. Law Cas. 223; (1901) 2 K. B. 606.

It must be admitted that the master is entitled to recover his disbursements before he became master, as they consisted of payments of wages to the crew, and he is therefore in the same position as the crew with regard to them:

The Albion, 27 L. T. Rep. 723; 1 Asp. Mar. Law Cas. 481.

Laing, K.C. and *Maurice Hill* for the interveners.—It is submitted this master is not entitled to recover disbursements and wages in priority to the mortgagees. The Merchant Shipping Act 1854 gave the master a maritime lien for wages, and there was a lien for disbursements given by 52 & 53 Vict. c. 46. Dr. Lushington was wrong in *The Milford* (*ubi sup.*) in the construction he put upon Part 2 of the Act of 1854. He there decided the court ought to apply the *lex fori*, not the *lex loci contractus*, but admitted in *The Jonathan Goodhue* (Swa. 524) that *The Milford* was "a case of great doubt and difficulty." We submit the master has no maritime lien for wages or disbursements by the *lex fori*. Until 1844 (7 & 8 Vict. c. 112, s. 16) the master had no lien at all for wages, and he was then only given the remedies of a seaman in case of the bankruptcy or insolvency of the owners. That section only applied to wages due "from the owner of any ship belonging to any of Her Majesty's subjects." It was extended by sect. 191 of the Merchant Shipping Act 1854, which put the master in the same position with regard to his wages as a seaman, and this section was re-enacted by sect. 167 of the Act of 1894. Sect. 260 expressly limits the application of Part 2 to sea-going ships registered in the United Kingdom. Sect. 261 limits it to British ships registered out of the United Kingdom. Sect. 265 enacts that, where there is a conflict of laws, the case shall be governed by any provision on the subject in Part 2 of the Act, if there is one; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered—that is, the *lex loci*. With regard to disbursements, sect. 10 of 24 Vict. c. 10 gives jurisdiction to the court. In *The Mary Ann* (13 L. T. Rep. 384; 2 Mar. Law Cas. 294; L. Rep. 1 A. & E. 8) Dr. Lushington decided the master had a maritime lien. That case was overruled by the House of Lords in *The Sara* (61 L. T. Rep. 26; 6 Asp. Mar. Law Cas. 413; 14 App. Cas. 209). The master, however, was expressly given a maritime lien for disbursements by sect. 1 of 52 & 53 Vict. c. 46. This must be read with sect. 167 of the Merchant Shipping Act 1894, and the words of that section are, "the same lien . . . as a master has for the recovery of his wages." At that time the master of a foreign ship had no lien for his wages. *The Milford* (*ubi sup.*) was decided in 1858, and Dr. Lushington's reasoning is not sound. At the time the Merchant Shipping Act of 1844 was passed, a master had no lien for his wages. The Act gave the master of a British ship a right; it ought not, therefore, to have been extended beyond the Act. Where it is intended the Act should apply to foreigners, it says so in terms: (see sects. 219 and 238). *Davidsson* v. *Hill* (*ubi sup.*) was a decision under Lord Campbell's Act, which is a general Act, but the Merchant Shipping Act 1894 is, on the contrary, a particular Act, and its sections only apply to particular ships or persons. In *Poll* v. *Dambe* (*ubi sup.*) it was held that the section there in question did not apply to foreign ships. [PHILLIMORE, J. referred to *Leary* v. *Lloyd* (3 E. & E. 178).] Priorities must be settled by the *lex fori*. That is decided by *The Milford* (*ubi sup.*). [PHILLIMORE, J.—If Dr. Lushington was wrong, has not his decision been acted upon by subsequent legislation? See *The Cargo ex Schiller* (36 L. T. Rep. 714; 3 Asp. Mar. Law Cas. 439; 2 P. Div. 145).] No; surely re-enacting a statute would not have that effect. With regard to the disbursements made by the master before he obtained his certificate as master, he cannot at any rate recover these under the Act. The Act must be construed strictly, and it is only as master that he can recover them at all:

The Albion (*ubi sup.*).

Aspinall, K.C. in reply.—*Reg.* v. *Stewart* (*ubi sup.*) supports the case of *The Milford* (*ubi sup.*), as it shows that Part 2 of the Act may apply to foreign ships. In *The Mac* (46 L. T. Rep. 907; 4 Asp. Mar. Law Cas. 555; 7 P. Div. 126) Lord Coleridge points out that a definition clause is not exhaustive, and in *The Immacolata Concezione* (50 L. T. Rep. 539; 5 Asp. Mar. Law Cas. 208; 9 P. Div. 37) and *The Gustaf* (6 L. T. Rep. 660; 1 Mar. Law Cas O. S. 230; Lush. 506) effect was given to a maritime lien.

The following cases were also referred to in the course of the argument:

The W. F. Safford, Lush. 69;
The Coromandel, Swa. 205;
The Evangelistria, 35 L. T. Rep. 410; 3 Asp. Mar. Law Cas. 264; 2 P. Div. 241, n.;
The Rafaelluccia, 37 L. T. Rep. 365; 3 Asp. Mar. Law Cas. 505;
The Castlegate, 68 L. T. Rep. 99; 7 Asp. Mar. Law Cas. 284; (1893) A. C. 38;
The Crystal, 71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508;
Smith v. *Wilson*, 75 L. T. Rep. 81; 8 Asp. Mar. Mar Law Cas. 197; (1896) A. C. 579;
Barraclough v. *Brown*, 76 L. T. Rep. 797; 8 Asp. Mar. Law Cas. 290; (1897) A. C. 615;

The Fairport, 48 L. T. Rep. 536; 5 Asp. Mar. Law Cas. 62; 8. P. Div. 48;
The Ruby (*No.* 2), 78 L. T. Rep. 235; 8 Asp. Mar. Law Cas. 421; (1898) P. 59.

PHILLIMORE, J.—In this case the seamen have proved their case for wages, as I understand by admissions with regard to figures, subject to the necessary reductions bringing the claim to the 21st Oct. instead of some day in November, and they must have judgment for those wages and such subsistence money from that date forward and viaticum as the parties shall agree or the registrar shall determine. For the purpose of determining whether any viaticum shall be paid, the registrar will be guided by the ruling in the case of *The Immacolata Concezione* (*ubi sup.*). I should add that the seamen are to have judgment for payment out of the proceeds in court of their wages, and they will have an order when the other sums have been collected for payment out of those other sums in priority to payment out to anybody else who has appeared on behalf of the ship, or who has any interest in the ship, including the mortgagees whom Mr. Laing represents. With regard to the master the position is a peculiar one. He is the brother of the owner, and he has a very long claim for wages running over a long period, and for disbursements. It is obvious that anybody who comes in hostility to him ought to have a right to have that claim examined, and any decree in his favour must be subject to some examination, either between the parties themselves or before the registrar, probably before the registrar. It appears that he was put on board by his brother in Dec. 1900. He had considerable practical experience as a seaman, but he had no certificate, and therefore could not be passed as a master. If we take his evidence, which is uncontradicted, and, as far as I know, is not at variance with the books which he has produced (and as to that the registrar will inquire), he received from that date forward the master's wages, the master being disrated and taking wages as the mate, and in Sept. 1901 he became a certificated master, and in Nov. 1901 the old master left the ship. In my opinion, and I so decide, he was not master before September, and he became master from September; the date must be ascertained, if necessary, by the registrar —being the date when he can prove that he obtained his certificate. If he cannot prove the certificate, then he must go till November, when the other master left the ship; but, in my opinion, from the moment he got the certificate, or the right to obtain it, from that moment he was master. His claim for wages, of course, must depend upon whether he was master or whether he was in his earlier position, which was mostly analogous to that of a supercargo, but I have myself no doubt it was a position which would give him a claim in the Admiralty Court as a seaman for wages. The points to determine with regard to him are whether or not he comes in priority to the mortgagees, who have a registered mortgage, which was registered on the 19th June 1901. It therefore becomes important that under 24 Vict. c. 10, s. 10, he certainly has a right *in rem* and a right to sue for his wages and disbursements, but, as the case of *The Sara* (*ubi sup.*) has pointed out, that does not necessarily show that that right comes in priority to the mortgagees'. I have first to determine whether the *lex fori* or the *lex loci* applies, and I am of opinion that the *lex fori* applies, because what we are doing is construing an English statute with regard to property which is within the English jurisdiction. This view is in accord with the authority of *The Milford* (*ubi sup.*), which laid down the principles; therefore, both upon principle and authority, I so hold. There may be a question about which I may have to say a word, which may be considered in another court, as to whether with respect to part of this case the very *lex fori* does not import the *lex loci*. I will touch upon that later on. Now, applying for the moment the *lex fori*, the man was a seaman up to the date when he became master—probably, as I have said, in Sept. 1901. I see no reason why by the *lex fori* he should not have his wages for that period. Now, as regards whether at the master's rate or at the mate's rate does not matter; he was then master, and I do not see why he should not have his wages as a seaman at that time. With regard to the wages subsequent to that time I am bound unquestionably by *The Milford* (*ubi sup.*)—that was really admitted, I think, by counsel on both sides—to hold that he has a maritime lien, as good a maritime lien as the master of an English ship for his wages up to the date of the arrest of the ship. I think myself, and I offer this observation really with submission to what may be decided elsewhere, it would be extremely unfortunate if it should be necessary to hold that the law of *The Milford* (*ubi sup.*) must be upset, and I think it is extremely difficult to upset the law even supposing it was a wrong construction, at the time it was decided, of the Act of 1854. I think there are considerable authorities for saying that the matter was rightly decided. At the same time, I cannot help saying that, if the matter was absolutely *res integra*, it would be difficult to arrive at the conclusion which was arrived at in that case. *The Milford* (*ubi sup.*) has been expressly approved of by my brothers Darling and Channell in the case of *Reg.* v. *Stewart* (*ubi sup.*), and has been followed over and over again in this division. The ground upon which it can be supported is that the words are affirmative and general, giving a master of an English or foreign ship the same lien for his wages as a seaman had. The further ground for, if possible, adopting that construction is the ground which will be found expressed in the judgment of the Lord Chief Justice, my brother Lawrance, and myself in the case of *Poll* v. *Dambe* (*ubi sup.*)—namely, that the provision of the Merchant Shipping Act of 1854 was in substance the removal of a very artificial and archaic rule of common law of this country, and bringing the common law of this country in matters maritime, as it is most desirable it should be brought, into harmony with the laws of almost every other country, except, probably, in some period of their history—whether now or not, I do not know—the United States of America. Those are the grounds for adopting the construction of a principle like that laid down in *The Milford* (*ubi sup.*). On the other hand, it is extremely difficult to satisfy the clause with regard to the application of that part which specifies ships, and the strongest reasoning is that of my brother Channell in *Reg.* v. *Stewart* (*ubi sup.*), which will commend itself, I have no doubt, to any court who examines into this matter, as to which I have no more to say than there it is. In

the case of *Poll* v. *Dambe* (*ubi sup.*) we pointed out that the case of *Reg.* v. *Stewart* (*ubi sup.*) can be perfectly well supported upon other grounds, and we did not profess or desire to make any comment upon the decision. Assuming *The Milford* (*ubi sup.*) was rightly decided, there is, of course, nothing more to be said; but assuming it to be wrongly decided, it is very difficult to say if Parliament has not by the great mass of subsequent legislation accepted and given a statutory force to the construction which that case puts upon the Act of 1854. The Act of 52 & 53 Vict. c. 46 was passed avowedly to remedy the decision in *The Sara* (*ubi sup.*) that the master, no doubt in the case of an English ship, had no lien for his disbursements, though he had for his wages, and it extended the maritime rights of the master to his disbursements, in addition to his wages. The Act is perfectly general; it is perfectly true, as has been observed by Mr. Laing, that that gives a master a lien for disbursements where he had a lien for his wages, and if a foreign master has no lien for wages he has no lien for disbursements given him by the Act; but, having regard to the principles upon which the courts of justice act, and subsequent legislation, and having regard to the fact that *The Milford* (*ubi sup.*) is recited in *The Sara* (*ubi sup.*), and that that Act was passed to remedy the decision in the latter case, it does seem extraordinary that if the Act was not intended to extend to foreign masters perfectly wide and general words should have been used. I have therefore great difficulty in saying that the Act of 52 & 53 Vict., whatever may be its construction, does not positively give the remedy for disbursements, and, by implication, a remedy for the wages to a foreign master. No doubt the position is somewhat reversed when you come to the Merchant Shipping Act 1894, which incorporates 52 & 53 Vict. c. 46 in its second part, but in this sort of game of hide and seek into the various sections of the Act the net result obtained is that there is a very old and well known and constantly followed decision, with at least two opportunities when the Legislature could have made it clear that the decision was wrong, and the Legislature has deliberately declined to make any such comment with regard to it. Those are the grounds upon which, had I not thought I was bound by *The Milford* (*ubi sup.*), I think it should be supported. As I say again, I think it would be a very grave matter if the law of England in that respect, that was supposed for forty years to be in harmony with the law of the rest of the world, and which is certainly not an unreasonable law, should be now discovered to be, and to have been, out of harmony with the rest of the world.

So much for the question of the lien of the master for his wages and disbursements, according to the *lex fori*. There is a possible view suggested by the language of my brother Channell in *Reg.* v. *Stewart* (*ubi sup.*)—namely, that the section about conflict of laws operates wherever it is proved that there is a foreign ship subject to a different law. If that were the proper construction of these sections, then the master would have his remedy in this case where the Argentine law gave it, but would not have the remedy where the Argentine law did not give it. In other words, he would be entitled to his wages for the last voyage, and he would be entitled to his disbursements, as I think the true construction of the Argentine law is, for the last voyage only; but, whatever view the Court of Appeal may take, that is not the view which is open to me; therefore, I may here say that I find as a fact, though the evidence, of course, will be open to the Court of Appeal to find otherwise if it disagrees, that by the Argentine law there is no maritime lien, nor anything corresponding with a maritime lien for wages of the master or crew for a previous voyage or for disbursements expended upon a previous voyage; but there is a lien for wages during the last voyage, which means from the time the vessel left her home port till she returned, and for disbursements during the voyage if certain conditions with regard to disbursements are complied with, and it seems to me in this case that they were complied with, and that therefore by Argentine law the master would have a lien for his wages for the last voyage and for his disbursements for the last voyage also, such as the registrar shall find. There remains a question about his disbursements before he became master; in my opinion, if those disbursements are of the ordinary kind—port dues, coal bills, and entries of that kind—he cannot claim them, and I so direct that it shall be held at the reference. I follow in that respect the decision in *The Albion* (*ubi sup.*), which has been cited to me, and I think that is the law, but if the whole disbursements are, as apparently they are (they will have to be looked into if necessary) merely payments of wages of the crew, who might have seized the ship, then I think the doctrine which this court has often applied—that the man who has paid off the privileged claimant is standing in the shoes of the privileged claimant—should be applied, and I think the master has a lien for any disbursements made, although he was not master, in payment of the wages of the crew. In all probability that means for all disbursements which are here at stake. The result, therefore, is that the master is to have a judgment for such sum as shall prove to be his wages whilst he was supercargo first of all; secondly, for such sum as he shall prove to be his wages while master; thirdly, for his disbursements while master; fourthly, for any sums which he dispensed for the ship while he was supercargo in payment of the crew's wages—all subject, of course, to investigation by the registrar, and to reduction in respect of the freights and other sums he received on behalf of the ship; and in the ordinary course he will have his costs of the action.

Solicitors for the plaintiffs, *Thornycroft* and *Willis*.

Solicitors for the interveners, *Withy*, *Wainwright*, and *Pollock*.

Tuesday, Jan. 13, 1903.

(Before Sir F. JEUNE, President.)

THE ALMA. (a)

Collision—Loss of life—Limitation of liability—Exclusion of life claims after time fixed for claims to be brought in—Lord Campbell's Act (9 & 10 *Vict. c.* 93), *s.* 3—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 504.

In an action of limitation of liability, notwith-

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

standing the provisions of sect. 3 of Lord Campbell's Act (9 & 10 Vict. c. 60), the Court of Admiralty may, if it sees fit, under sect. 504 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), fix a time, less than that allowed by the section, within which claims for loss of life shall be made against the fund in court.

The court may also, after the expiration of the time fixed for claims to be made, order money paid into court to meet such claims to be paid out to the plaintiffs in the limitation suit, although all possible claims have not been made.

MOTION on behalf of the London and South-Western Railway Company, as owners of the steamship *Alma*, in objection to part of the registrar's report with respect to money paid into court to meet claims in a collision action.

On the 1st April 1902 a collision occurred in the English Channel between the *Alma* and the sailing ship *Cambrian Princess*, the *Alma* at the time being on a voyage from Southampton to Havre with cargo and passengers, and the *Cambrian Princess* being on a voyage from Lobos de Alfuera to Antwerp with a cargo of guano.

In consequence of the collision the *Cambrian Princess* sank and was totally lost, and eleven of her crew were drowned.

It was admitted that the *Alma* was solely in fault for the collision, and an action was commenced to limit her liability under the provisions of the Merchant Shipping Act 1894, and the sum of 16,758*l.* 6*s.* 5*d.* was paid into court, representing the statutory liability of her owners at 15*l.* a ton and interest.

A decree was obtained, and the 23rd Sept. was fixed as the last date on which claims could be filed, and on the 4th Dec. the claims came on for hearing before the registrar and merchants. Although there were eleven lives lost, only six claims for loss of life were put forward—four in the King's Bench Division and two in the Admiralty Division. In these six cases, and in one other case, claims were made for loss of effects, so that there remained in all four cases in which no claims were put forward.

In dealing with the claims the registrar reported:

Any further claims for loss of property are clearly out of time, and the distribution of so much of the fund (8*l.* per ton) as is applicable to such claims ought not, I think, to be delayed, with the chance of any further claims coming in. But the claimants for loss of life have under Lord Campbell's Act a year and a day for bringing actions, and although that is no reason for deferring payment of the loss of life claims already brought, the fund for such claims (7*l.* a ton) being far more than sufficient to pay in full any possible claims upon it, a small portion of the balance remaining after payment of the present claims ought, I think, to be retained in court until the expiration of the year and a day allowed by Lord Campbell's Act for bringing such claims.

Sect. 504 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) is as follows:

Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to any competent court, and that court may determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just.

Sect. 3 of Lord Campbell's Act (9 & 10 Vict. c. 93) is as follows:

Provided always and be it enacted, that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

Acland for the owners of the *Alma*.—The time for bringing in claims has expired. Lord Campbell's Act allows a year and a day from the date of death for bringing an action, but sect. 504 of the Merchant Shipping Act 1894 gives the court full power, not only in respect of claims for loss of goods, &c., but also in express words for loss of life. The Legislature in framing the words of the section must have had in mind Lord Campbell's Act, because only under that Act can there be claims for loss of life. The Admiralty Court has, in the exercise of its discretion, fixed a period for the bringing in of claims, and it would be a good answer to any future claims in the King's Bench Division to say that that period had expired. Sect. 504 gave the court power to impose a new limitation in respect of claims both for loss of life and loss of goods, and no distinction can be drawn between these two classes of claims.

Bateson for the owners of the *Cambrian Princess*.

Holloway for claimants in respect of loss of life.

The PRESIDENT.—I confess at first my feeling was against the motion made by counsel for the plaintiffs, because I thought it possible, though not probable, there might be further claimants in the King's Bench Division, and that no great harm would be done in keeping back a certain amount to meet their claims. But on further consideration I do not think that is the true view to take, because the words of sect. 504 are to my mind very clear, and do give this court power to do what it has done—to fix a time within which claims must come in. It seems to me on principle important that this court should fix a time, to prevent claims from going on for an unlimited period. It would be contravening the object of the statute to hold that in limitation actions claims for loss of or damage to goods should be allowed to be brought in at any time within six years, the period allowed by the Statutes of Limitation, and it seems to me important that where there is a fund to be distributed persons should come forward and make their claim within the time fixed. I am impressed by the argument that you cannot deal separately with claims for loss of life and claims for loss of goods. On the whole, I am prepared to accede to the view that, as the effect of sect. 504 is to give the court power to do that which it has done, it is only a logical consequence that, after that period has expired, you must treat possible further claims

as non-existent, and it would, therefore, be inconsistent to reserve a portion of the fund. One might arrive at a reasonable figure, but it would be highly uncertain, and in many cases it might be a mere guess to determine the amount which should be reserved for so hypothetical a claim. I therefore think this part of the report ought not to be confirmed. As regards the rest of the report I understand there is no objection, and it will be confirmed. The parties appearing on the motion will be allowed their costs against the plaintiffs personally.

Solicitors for the owners of the *Alma*, *Clarkson, Greenwell*, and *Co.*

Solicitors for the owners of the *Cambrian Princess*, *Charles Russell* and *Co.*

Solicitors for claimants in respect of loss of life, *G.* and *W. Webb.*

Feb. 13 *and* 14, 1903.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE DALLINGTON. (*a*)

Collision—Compulsory pilotage—Duties of pilot—River Scheldt — Belgian law — Liability of owner.

Although the employment of a pilot by a vessel in the Belgian waters of the river Scheldt is compulsory by Belgian law, such pilot is not entitled to supersede the master and take charge of the ship, as is the case in England, but according to Belgian law the master remains in charge, the pilot being merely his adviser. Hence, although the master may in fact allow such pilot to take charge of the vessel, the owners are not exempted from liability for damage done to another vessel by the negligence of the pilot.

ACTION for damage by collision brought by the Peninsular and Oriental Steam Navigation Company, the owners of the steamship *Socotra*, against the owners of the steamship *Dallington*.

The *Socotra* is a twin-screw vessel of 6009 tons gross register, and at the time of the collision was proceeding down the river Scheldt, in charge of a duly qualified Belgian Government pilot, on a voyage from Antwerp to London and the East.

The *Dallington* is a vessel of 2534 tons gross register, and was at anchor at the time in question.

The collision occurred about 6.30 a.m. on the 1st Feb. 1903 in Austruweel Roads, and both vessels suffered considerable damage.

At the trial of the action the learned judge found, on the facts, that the *Socotra* was alone to blame for the collision, but held that the collision had been solely occasioned by the negligence of the pilot in charge.

The plaintiffs alleged that they were not liable for the damage, on the ground that the pilot at the time in question was in charge by compulsion of law.

On the question of compulsory pilotage the plaintiffs and defendants, respectively, called a Belgian advocate to give evidence as to the law.

It was contended on behalf of the plaintiffs that the pilot superseded the authority of the master, and that the master of the ship was bound to, and did in fact, give up the navigation of the ship to the pilot.

On behalf of the defendants it was alleged that the pilot only acted as adviser of the master, and in cross-examination of the plaintiffs' witness it was admitted that the Belgian Code was silent as to the matter, and that the general view of the law was that the pilot did not do more than act as adviser, and that the shipowner was liable in any event for damage done by collision. The defendants referred to art. 228 of the Commercial Code.(*a*)

The following is a translation of the article of the Commercial Code of Belgium referred to (p. 183 of Raikes' Maritime Codes of Holland and Belgium):

Art. 228. In cases of collisions between ships . . . If the collision be caused by the default of any person, all the damages are borne by the ship on board of which the default has been committed. The presence of a pilot on board is no defence to the liability imposed in the preceding paragraph.

Rowlatt (*Finlay* with him) for the plaintiffs.—It is submitted in this case that pilotage is compulsory in the sense in which that term is understood in England. The pilot in fact superseded the master. The ship had to take a pilot and pay for his services in any event. There is no provision in art. 228 that the pilot is only authorised or required to act solely in conjunction with or with the approbation of the captain. The facts are precisely the same as in *The Halley* (18 L. T. Rep. 879; 3 Mar. Law Cas. O. S. 131; L. Rep. 2 P. C. 193). In that case it was alleged that the vessel was compulsorily in charge of a pilot duly appointed or licensed according to Belgian law, and the fact that that plea was never traversed shows that it was accepted by the respondents, who, it must be assumed, only did so after due inquiry. It must be shown that Belgian law says in terms that a pilot is not what we call a compulsory pilot. It is not sufficient that it should be silent on the subject. The correct view of the law, it is submitted, is stated in Maude and Pollock's Law of Merchant Shipping, 4th edit., p. 282.

Aspinall, K.C. (*Dawson Miller* with him) for the defendants, *contra*.—The distinction must be borne in mind between a pilot who is (1) compulsorily on board and (2) a pilot who is compulsorily in charge. The plaintiffs must establish the fact that the relations between the master and the pilot were such that the pilot superseded the master. That is a question of fact in every case. In order to establish that fact they must show that by the foreign law the relations between the master and the pilot are the same as those which exist according to English law. *The Halley* (*ubi sup.*) has nothing to do with this case. Through ignorance of Belgian law, and wrongly, it was there assumed that, if the pilot was compulsorily on board, he was also compulsorily in charge. This was merely an allegation in the pleading, and

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

(*a*) Code de Commerce, Livre II., Titre VIII.—De l'abordage. Art. 228.—En cas d'abordage de navires . . . Si l'abordage a été causé par une faute, tous les dommages sont supportés par le navire à bord duquel la faute a été commise. La présence de pilotes ne fait pas obstacle à la responsabilité établie par le paragraphe précédent.

it was not established by evidence. All that the court decided was that, assuming the ship to be in charge of a compulsory pilot, her owners were relieved from liability for a collision in Belgian waters caused by his negligence, although by Belgian law shipowners are liable for a collision so caused. The court refused to enforce a foreign municipal law, and give a remedy in respect of an act which, by English law, imposed no liability on the person against whom it was sought to recover damages. In all the cases abroad it has been held that the pilot is not compulsorily employed in the sense in which that term is understood in England. [He was stopped by the Court.]

Rowlatt in reply.

The following cases were referred to in the course of the argument:

General Steam Navigation Company v. *British and Colonial Steam Navigation Company*, 20 L. T. Rep. 581; 3 Mar. Law Cas. 237; L. Rep. 4 Ex. 238;

The Guy Mannering, 46 L. T. Rep. 905; 4 Asp. Mar. Law Cas. 553; 7 P. Div. 132.

The Augusta, 57 L. T. Rep. 326; 6 Asp. Mar. Law Cas. 161;

The Agnes Otto, 56 L. T. Rep. 746; 6 Asp. Mar. Law Cas. 119; 12 P. Div. 56;

The Prins Hendrik, 80 L. T. Rep. 838; 8 Asp. Mar. Law Cas. 548; (1899) P. 177.

BUCKNILL, J.—Mr. Rowlatt has given me every possible assistance in the observations which he has made, but I am afraid the authorities are too strong for him. His argument comes to this: He asks me to say that, because there is no positive declaration in terms by the Belgian law that pilotage in the Belgian waters of the Scheldt is not compulsory, I am to assume that it is compulsory in the sense in which he argued. Now, we have had two Belgian lawyers here, and they both agree that according to their law, to the extent to which it is to be found in terms, the pilot is only an adviser and the owners remain responsible. In this case it may be, as a fact, that the captain had handed over entirely the navigation of his ship to the pilot. He told me that in fact he had done so, that the orders were all given by the pilot, and that the orders were all carried out by the crew. So in point of fact the pilot here was solely in charge. But the question I have to ask myself is contained in the language of Lord Esher in the case of *The Augusta* (57 L. T. Rep., at p. 327; 6 Asp. Mar. Law Cas., at p. 163): "We are concerned with the law of England, and in an English action we are bound by the law of France because the law of France establishes what are the circumstances of the appointment and employment of the pilot." So far as we have the law in writing it is to be found in art. 228 of the Commercial Code. It seems to me it would be extraordinary, in face of that article, to find in any other way than that the fact that the pilot is on board or not makes no difference as to the responsibility of the owners where damage is caused in consequence of the negligence on the part of the ship doing the damage. At any rate the Belgian lawyers' opinion is that the owners are still responsible, because the pilot, although compulsory in one sense, is not compulsorily in charge according to English law. In Belgium ships must take a pilot, and if they do not take him they must pay his fee. A pilot comes on board and the master may say, "You may go away or you may come on board, and I will pay your fee, but I do not want you." Pilotage is compulsory in that sense, and if the master does not choose to take the pilot he cannot get out of the responsibility of paying the pilot's fee. As to the authorities, *The Halley* (*ubi sup.*) has nothing to do with the question. Secondly, the other cases of *The Augusta* (*ubi sup.*) and *The Guy Mannering* (*ubi sup.*) are so strong as to show that I am right in the view I am taking. I find as a matter of law, in Belgium, according to Belgian law, though a pilot may be compulsory in the sense that if he is not accepted he must still be paid for, yet he is not a person, in law, so in charge; and that if the ship does damage in consequence of negligent navigation, the owners are responsible according to Belgian law, although in point of fact the pilot is navigating and solely in charge of the ship.

Solicitors for the plaintiffs, *Freshfields*.

Solicitors for the defendants, *Thomas Cooper and Co.*

HOUSE OF LORDS.

Monday, March 30, 1903.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, and LINDLEY, with NAUTICAL ASSESSORS.)

OCEANIC STEAM NAVIGATION COMPANY v. WATERFORD STEAMSHIP COMPANY; THE OCEANIC. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Art 16 *of Regulations for Preventing Collisions at Sea—Fog—Moderate speed.*

The power of stopping in a short distance is one of the circumstances which ought to be taken into consideration in deciding whether a vessel is proceeding at a moderate speed or not. A passenger steamship fitted with twin screws and capable of being brought to a standstill in about 400ft., which was proceeding at six and one-third knots in a thick fog, was held not to be going at a moderate speed, although her engines were so constructed that she could not go slower without stopping them from time to time.

Judgment of the court below affirmed.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), delivered in June 1902, who had affirmed a judgment of Sir F. Jeune, President of the Admiralty Division, delivered in Oct. 1901, by which he found both the appellants' and the respondents' vessels to blame for a collision which occurred between them.

Both the courts below had the assistance of nautical assessors.

The appellants (defendants below) were the owners of the steamship *Oceanic*, and the respondents (plaintiffs below) were the owners of the steamship *Kincora*.

The action was brought to recover damages for the loss of the *Kincora*, in consequence of a

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

collision between that vessel and the *Oceanic*. The collision occurred in the Irish Channel about 1.5 a.m. on the 8th Aug. 1901.

The *Kincora* was a screw steamship of 994 tons gross and 453 tons net register, and was at the time on a voyage from Limerick to Liverpool, manned by a crew of eighteen hands all told. She carried a general cargo and one passenger, and two stowaways were on board her.

The *Oceanic* was a twin-screw steamship of 17,274 tons gross and 6996 tons net register, fitted with triple expansion engines of 28,000 indicated horse-power, and at the time was on a voyage from Liverpool to New York with 1070 passengers, a general cargo, and the mails, and was manned by a crew of 448 hands all told.

The respondents' case was that the *Kincora* shortly before the collision was off the south-east coast of Ireland, between Barrels and the Tuskar Rock lightships, and was proceeding dead slow on a course E.¼N. magnetic, making about two knots through the water. The weather at the time was a dense fog, the wind a light breeze from the westward, and the tide about half flood of the force of about a knot. The whistle of the *Kincora* was being sounded at regular intervals for fog, her regulation lights and a stern light were being duly exhibited and a good look-out was being kept on board.

In these circumstances several whistles were on the port side of the *Kincora* and duly replied to, when after an interval of about five minutes a whistle was heard on the port bow, and immediately afterwards the masthead and cabin lights of the *Oceanic* came into view about a ship's length distant and broad on the port bow. A short blast was at once sounded on the whistle of the *Kincora*, the helm ordered hard-aport and the engines stopped, but the *Oceanic* with her stem and port bow struck the *Kincora* on the port side, cutting into her and doing so much damage that she sank in a few minutes and seven of her crew were drowned.

The respondents charged the appellants (*inter alia*) with navigating at an improper rate of speed in the circumstances, with not stopping to ascertain the position of the *Kincora*, and with failing to comply with arts. 16, 19, 22, 23, and 29 of the Regulations for Preventing Collisions at Sea.

The appellants' case was that the *Oceanic* was proceeding on her voyage and was about two miles S. 60 degrees E. of the Tuskar Light. The weather was foggy, the wind light from the west-south-west, and the tide flood running to the eastward at the rate of about two to two and a half knots.

The *Oceanic* was on a course of S. 31 degrees W. magnetic, and was making six and one-third knots through the water with engines working at slow, and her automatic whistle was being sounded for fog. She was exhibiting the regulation lights, an extra masthead light and stern light, and a good look-out was being kept on board.

In these circumstances a long blast was heard from the *Kincora* about one and a half points on the starboard bow, and immediately afterwards the *Kincora* came into sight showing her masthead and red lights; and although the engines of the *Oceanic* were immediately put full speed astern and her helm hard-aport, the vessels collided, the *Oceanic* striking the *Kincora* on the port quarter and sinking her.

The appellants charged the respondents (*inter alia*) with neglecting to go at a moderate speed in the circumstances, with not stopping and navigating with caution when the whistle of the *Oceanic* was heard, and with not sounding her whistle properly for fog in accordance with the regulations. They also charged the respondents with neglecting to comply with arts. 15, 16, 21, 27, and 29 of the Regulations for Preventing Collisions at Sea.

At the trial it was contended on behalf of the plaintiffs that the *Oceanic* was, under the circumstances, being navigated at an excessive rate of speed, and that even assuming that her speed was not more than six and one-third knots, this was not a moderate speed within the requirements of art. 16 of the Regulations for Preventing Collisions at Sea.

It was contended by the defendants that the *Oceanic* was being navigated at the lowest possible speed consistent with her safety, that owing to her great size and length she would become unmanageable if navigated at a lower speed, and the effect of stopping the engines from time to time in order to reduce the speed would be that knowledge of her exact position would probably be lost, and the interests of safety required her to keep her course. Evidence was given that at a speed of twenty-five revolutions of the engines, which was the speed at which she was going at the time of the collision, she could be brought to a standstill in 400ft., and the evidence of those on board was that the *Kincora* came into sight about 200 to 250 yards off, and that six and one-third knots was under the circumstances a moderate speed.

The President, in his judgment, after commenting on art. 16 of the regulations, held that those on board the *Kincora* were to blame for not stopping the engines when the whistle of the *Oceanic* was first heard, and also because the *Kincora* was being navigated under the circumstances at an excessive rate of speed. He found, as a fact, that the fog was denser than alleged by those on board the *Oceanic*, and that the *Oceanic* was making twenty-five revolutions a minute, and proceeding at a speed of six and one-third knots. He accepted the evidence of the witnesses that, at the speed at which she was going, she could be brought to a standstill in 400ft., but he was of opinion that the vessels were less than 700ft. apart when they came into view of one another. He further held that although the fact that the *Oceanic* could be brought to a standstill in a very short space was a material element for the consideration of the court, yet it did not suffice to relieve her from the consequence of going at the speed of six and one-third knots. He therefore found both vessels to blame for the collision. This decision was affirmed by the Court of Appeal.

The owners of the *Oceanic* appealed to the House of Lords.

The case was in fact on appeal from the decision in *The Campania*, reported 83 L. T. Rep. 511; 9 Asp. Mar. Law Cas. 151, on appeal 84 L. T. Rep. 673; 9 Asp. Mar. Law Cas. 177; (1901) P. 289, which was the first case decided under art. 16 of the Regulations for Preventing Collisions at Sea of 1897.

Robson, K.C., *Butler Aspinall*, K.C., and *Dawson Miller* appeared for the appellants.

Pickford, K.C., *Laing*, K.C., and *C. Head* for the respondents.

The following cases were referred to in the course of the argument:—

The Ceto, 62 L. T. Rep. 1; 6 Asp. Mar. Law Cas. 479; 14 App. Cas. 670;
The Ebor, 54 L. T. Rep. 200; 5 Asp. Mar. Law Cas. 560; 11 P. Div. 25;
The Dordogne, 51 L. T. Rep. 650; 5 Asp. Mar. Law Cas. 328; 10 P. Div. 6;
The Beta, 51 L. T. Rep. 154; 5 Asp. Mar. Law Cas. 276; 9 P. Div. 134.

At the conclusion of the arguments their Lordships gave judgment as follows:

The LORD CHANCELLOR (Halsbury). — My Lords: I am of opinion that the judgments of the two courts ought to be affirmed. I am unable to rely upon the skilled assistance of which we have had the advantage, because unfortunately the two gentlemen in question differ in their views as to whether this was or was not a moderate speed within the meaning of the rule. That leaves me to free to exercise my own judgment upon that question. A good deal depends in each case upon the facts and circumstances as they are proved, and the President of the Admiralty Court had an opportunity of judging the evidence of the different witnesses in a way which we have not. So far as the judgment is affected by the particular facts put in proof I must accept what he has found, but, of course, a great deal turns, not upon any conflict of testimony, but upon the inferences which are to be drawn from facts which hardly appear to be disputed on either side. Now the rule appears to me to be a very intelligible and common sense one to avoid danger to vessels in the navigation of the seas, and the question what is or is not a moderate speed in a fog must depend in a great measure whether the fog is slight or dense, and whether there is an opportunity of seeing the near approach of a ship so as to know what can be done or ought to be done by nautical skill to avoid collision. Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the common sense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise. My own impression is that if two persons were running in opposite directions and they could not see but heard the approach of each other the natural instinct of self-preservation would induce them to moderate their pace or stop until they had ascertained that they were not running into each other. When one is dealing with these enormous masses of machinery ploughing the seas, and the danger, meaning possibly death, to all on board, the force of the observation is enhanced to a degree which need not be emphasised. The question here is what was the condition of things in which the *Oceanic* was placed, for we are only concerned at present with the conduct of one vessel, as it is not denied that the *Kincora* was negligent. Here is the *Oceanic*, the largest ship on the ocean, and the fact appears that she was going at a pace which she could have made more moderate if she had liked. If she had moderated it no collision probably would have taken place. She was going at a speed which rendered it impossible to stop within the limit of observation. These were circumstances of extreme danger, and I cannot disagree with either of the courts that in these circumstances the *Oceanic* was disobeying the rule and was going at a speed which was not moderate in relation to the circumstances in which she was placed. I should very much hesitate to adopt the notion that there is no relation between the power of stopping which a vessel possesses and the speed at which she may reasonably and properly go. I say that it would be of very material value, but I think that the President did give consideration to it. But he came to the conclusion that, notwithstanding the power of stopping quickly, the speed was not moderate in regard to the circumstances. I entirely agree that the power of stopping is a test to be considered, and is one of the circumstances which any tribunal ought to take into consideration when determining the question whether a ship is travelling at a moderate speed or not. I concur with what the President said as to the careful management and vigilance exhibited by those on board the ship, which I am compelled to find was also to blame. Except with regard to this matter of speed, it seems to me that the *Oceanic* did everything that could be done to avoid the danger. Still there is the question of speed, and on that account I have to move that the judgment appealed against be affirmed.

Lord MACNAGHTEN concurred.

Lord SHAND.—My Lords: It is not denied that the *Kincora* was to blame, and the question now is whether she was solely to blame. The *Oceanic* seems to possess a remarkable stopping power, and it was said that that power of stopping justified the speed at which she was going. I have come to the opinion after the full arguments which we heard that taking that power of stopping into account, the *Oceanic*, nevertheless, was not going at a moderate speed having regard to the circumstances of the case. The power of stopping within a short distance is no doubt a material circumstance to be taken into account in such a question as this, but here the fog was so thick that the power of stopping was not timeously exercised. As it was not timeously exercised the way on the vessel was such that she by her speed conduced to the collision, and so the *Oceanic* was also, in my opinion, to blame. It appears to me that in every other particular the *Oceanic* was carefully navigated; the single exception was with regard to the speed.

Lord DAVEY.—My Lords: I concur; but, in common with the Master of the Rolls, I wish not to be understood as expressing any opinion on the question whether the court ought to take into consideration any peculiarities in the construction of a vessel in determining whether or not she was going at a moderate rate of speed.

Lord ROBERTSON.—My Lords: I concur. It appears to me that the judgments appealed against make it clear that full weight was given in the courts below to the power of speedy stopping possessed by the *Oceanic*.

Lord LINDLEY.—My Lords: I am of the same opinion. I cannot possibly assent to the idea that the power of stopping ought not to be taken into account. It is one of the most important factors in the consideration of what is a moderate speed. But, after making every allowance for that, I think the courts below were right in holding that the speed of the *Oceanic* was, in the circumstances, not moderate.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Hill, Dickinson, Dickinson, Hill*, and *Roberts*, Liverpool.

Solicitors for the respondents, *Thomas Cooper and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Feb. 13, 1903.

(Before Lord HALSBURY, L.C., Lord ALVERSTONE, C J., and Sir FRANCIS JEUNE, P.)

TAGART, BEATON, AND CO. *v.* JAMES FISHER AND SONS; WEST HARTLEPOOL STEAM NAVIGATION COMPANY LIMITED, Third Parties. (*a*)

Charter-party — Sub-freight — Lien of shipowner on sub-freight—Right of shipowner to exercise lien after freight has been paid.

A lien on sub-freights given in a time charter-party to a shipowner as security for the payment to him of the hire of the vessel, gives the shipowner a right to stop sub-freights only before such sub-freights have been paid to the time charterer or his agent; but when once sub-freight has been paid as freight to the charterer or his agent, the shipowner's lien or right to stop the freight is gone, and he cannot follow such freight after it has been paid.

APPEAL from the judgment of Bigham, J. in a commercial cause tried before him without a jury, dated the 10th Feb. 1902.

The plaintiffs, Tagart, Beaton, and Co., were timber brokers in London, and they acted as agents for the sale of timber shipped to England from Pensacola by a firm named Baars, Dunwody, and Co.

The action was brought by the plaintiffs against Messrs. Fisher and Sons of Barrow-in-Furness, who brought in the West Hartlepool Steam Navigation Company Limited as third parties, and during the proceedings these third parties were ordered to be joined as defendants.

The facts were stated in the judgment of Bigham, J. as follows:—

By a charter-party dated the 6th Oct. 1900, the West Hartlepool Steam Navigation Company Limited, who were the owners of the steamship *Askehall*, chartered the *Askehall* to Messrs. Baars, Dunwody, and Co. for three years (thirty-six calendar months).

The only material terms of this charter-party were that the captain was to be under the orders and directions of the charterers as regards employment, agency, or other arrangement, the charterers indemnifying the owners from all consequences or liabilities that might arise from the captain signing bills of lading or otherwise complying with the same, and that the owners should have a lien upon all cargoes and sub-freights for any amount due under the charter.

The hire under the charter-party was to be 1750*l.* per month, payable monthly in advance; also by the terms of the charter-party the vessel was while in dry dock to be "off hire."

By the course of business between the plaintiffs and Baars, Dunwody, and Co., when Baars, Dunwody, and Co. made shipments of timber from Pensacola to the plaintiffs in London, they drew upon the plaintiffs for a part of the value of the shipments, and when the goods were sold the proceeds were placed by the plaintiffs to the credit of Messrs. Baars, Dunwody, and Co.'s account with them. In June 1901 Messrs. Baars, Dunwody, and Co.'s account with the plaintiffs was in debit to about 7000*l.*

The ship being at Pensacola, Baars, Dunwody, and Co. desired to load her with a cargo of their own, and they therefore, by a charter-party dated the 15th May 1901, purported to charter the vessel from some nominees of their own for a voyage to Barrow to carry timber at a fixed freight at so much per standard. Having entered into this charter-party, they shipped the goods and then drew out the bill of lading, in which they appeared as shippers and by which the goods were to be delivered to their assignees, he or they paying freight as per this charter-party of the 15th May 1901. The captain then, at Baars, Dunwody, and Co.'s request, signed bills of lading indorsing upon them a statement that he had received 3750*l.* on account of the freight. The captain also gave a freight note by which he acknowledged that he had received a further sum of 1000*l.* on account of freight.

The freight note for 1000*l.*, which was signed by the captain, was, so far as is material, in the following terms:

27th May 1901.—Five days after arrival at port of destination of the *Askehall*, of which I am master, I promise to pay to the order of myself one thousand pounds, value received, for account of freight on cargo now on board my said vessel, payable under terms of charter-party dated the 15th May 1901, and for the payment of this note I pledge my said freight, and the consignees of my cargo and (or) my agents are hereby directed to pay the amount of this obligation from the first amount due for freight.

This note was indorsed by the captain as follows:

Pay Tagart, Beaton, and Company or order.—A. TRITTON.

On the 29th May 1901, Baars, Dunwody, and Co. sent to the plaintiffs the shipping documents—namely, the bills of lading—for the quantity of timber shipped on the *Askehall*; the shipping value of the timber was represented as 3867*l.* These bills of lading, which were signed by the captain in the ordinary way, showed that the goods were shipped by Baars, Dunwody, and Co. to order, and that the freight was payable by the consignees as per the charter-party dated the 15th May 1901. The bills of lading contained an acknowledgment on their face that 3750*l.* had been advanced against the freight at the port of shipment, so that the value of the goods with the paid

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

freight amounted to 7617*l.* Against this Baars, Dunwody, and Co. drew on the plaintiffs for 6000*l.*, and instructed the plaintiffs to sell the goods on Baars, Dunwody, and Co.'s account in the ordinary way and place the proceeds to Baars, Dunwody, and Co.'s credit. In the same letter of the 29th May 1901 there was inclosed to the plaintiffs the above freight note for 1000*l.*, and it was referred to in the letter in the following way:

We inclose freight note per *Askehall* for 1000*l.* to credit of our account.

As a matter of fact the captain had received nothing on account of freight, nothing for the indorsement of the receipt of the 3750*l.* on the bills of lading, and nothing for the 1000*l*, freight note.

The receipt of the bills of lading and freight note was acknowledged by the plaintiffs in a letter of the 18th June 1901, the reference to the freight note being as follows:

We are very much obliged to you for freight note 1000*l.*, which we will pass to the credit of your account after collection.

On the 9th July 1901 the plaintiffs sold the timber to arrive to a firm of Crosfield and Co., the vessel being ordered to Barrow.

The defendants, Messrs. James Fisher and Sons, were shipping agents at Barrow, and they wished to secure the ship's business at that port. Accordingly on the 10th July they telegraphed to the plaintiffs asking if they might have the business. To this telegram the plaintiffs answered directing the defendants, Messrs. Fisher and Sons, to address their request to a Captain Dyason of Poole, who was the agent in England of Baars, Dunwody, and Co. to attend to their shipping business. On the same day the defendants wrote to Captain Dyason asking for the consignment to them of the ship, and the business was given to them. It thus became the defendants' duty to superintend the delivery of the cargo and to collect from the buyers of the cargo so much of the freight as remained payable in England.

On the 13th July Captain Dyason wrote to the defendants giving the particulars of the freight to be collected:

Freight.—The freight is to be taken up as follows: Total per bills of lading, 6385*l.*; advances, 3750*l.*, 1635*l.* Captain's note on freight, 1000*l.*; balance 635*l.*

So that the defendants knew that they had to collect 1635*l.*, of which 1000*l.* was to be used in redeeming the captain's freight note, and the balance was to be accounted for to Captain Dyason.

On the 15th July the plaintiffs sent a note to the defendants that they were the holders of the note for 1000*l.*, adding:

We will forward same for collection to your address in due time.

This notice was acknowledged by the defendants on the 16th July:

We note you have the captain's promissory note for 1000*l.* Bills of lading show 3750*l.* advanced freight, so it will be several days before we can get freight to meet your promissory note.

This meant that as so much freight had apparently been paid in advance, a great part of the cargo would have to be delivered before more freight could be asked for.

On the 19th July the *Askehall* arrived at Barrow, and on the 20th July the discharge began.

On the 25th July the plaintiffs sent the promissory note through their bankers for presentation to the defendants.

The note was duly presented on the 26th July, but the defendants, not having collected any freight from Messrs. Crosfield and Co., it was refused payment and was marked by the bankers:

Answer, cannot pay at present, not having been provided with funds for it.

On the 29th July Messrs. Crosfield and Co. paid the defendants 1000*l.* on account of freight, and the discharge of the vessel was completed.

On the 3rd Aug., the cargo having been measured, Crosfield and Co. paid a further 400*l.* to the defendants, so that by that time the defendants had ample funds in hand to pay the note. But in the meantime—namely, on the 1st Aug.—the owners of the vessel, the West Hartlepool Steam Navigation Company, intervened by sending to the defendants the following telegram:

Don't pay either captain or time charterers' drafts out of freight. Hold same our account and risk; we hold you free all liability in consequence thereof.

Before this telegram was received, the defendants had sent word to the bankers that if the note was presented again it might be met in three or four days, and they wrote to the West Hartlepool Company telling them so, and adding:

We look upon the note as a first charge upon the freight.

On the same day, the 1st Aug., the West Hartlepool Company wrote a letter to the defendants which explained the reason of their intervention. It was as follows:

West Hartlepool, 1st Aug. 1901.—Messrs. James Fisher and Sons, Barrow-in-Furness.—Dear Sirs,—*S.S. Askehall.*—We telegraphed you this morning as per copy inclosed which we beg to confirm. The time charterers' representative, Captain Dyason, intimated to Captain Tritton to-day that time charterers did not intend continuing the charter although the *Askehall* is fixed for three years, and has so far only been six months under charter, and as the hire is also due to-day and has not been paid we intend exercising our lien on the freight in accordance with the terms of the charte for the hire unpaid and consequential damages. We therefore asked you not to make any remittance of any part of the freight due on present cargo to time charterers, not to pay either their drafts or captain's drafts drawn at the loading port against the freight and payable at this side, we of course holding you harmless in regard to any consequences resulting out of such action. For the present we wish you simply to hold the freight as trustees until we have been able to come to some agreement with time charterers and will keep you informed. In reference to bankers we may communicate with you again.

It appeared that it was inaccurate to say that on the 1st Aug. any chartered freight was due under the original charter-party of Oct. 1900, a month's hire in advance falling due on the 2nd Aug. at noon. It would have fallen due on the 1st Aug. but for the fact that the ship had gone into dry dock on completing her discharge, and did not come out until noon on the 2nd Aug.

and while in dry dock she was, by the terms of the charter-party, "off hire."

On the 1st Aug. a formal notice of the alleged lien for chartered hire was served on the defendants on behalf of the West Hartlepool Company. On the 6th Aug. the note was again presented to the defendants for payment and was marked "still unable to pay."

The present action was then brought for 1000*l.*, the amount of the freight note, by the plaintiffs, Tagart, Beaton, and Co, against the defendants, James Fisher and Sons, who were defending the action under the direction and with the indemnity of the West Hartlepool Steam Navigation Company.

J. A. Hamilton, K.C. and *Loehnis*, for the plaintiffs.

Bankes, K.C. and *Noad*, for the defendants.

Cur. adv. vult.

BIGHAM, J. (after stating the facts as above set out:)—The question is whether the defendants, who have now, and who had on the 6th Aug., sufficient funds in hand from the freight to meet the freight note, are bound to pay the plaintiffs. The defendants are resisting the plaintiffs' claim under the directions and with the indemnity of the West Hartlepool Company, who, without any interpleader proceedings, have been brought in as third parties, and they rely, as I understand, on the absence of any title in the plaintiffs. I do not think that in the circumstances it lies in the mouth of the defendants, as between themselves and the plaintiffs, to deny the latter's title. The defendants received the money under authority from Captain Dyason, and with his consent and approval they undertook with the plaintiffs that if the plaintiffs would forward the note to them for payment they would meet it out of the moneys to be collected. I am satisfied that if the defendants had paid the money to the plaintiffs before the intervention of the West Hartlepool Company, no action would have lain against them at the company's suit, and it seems to me that having entered into a binding promise to pay, a promise for which there was good consideration, they ought to pay notwithstanding the company's intervention. When the company intervened, the defendants had become trustees for the plaintiffs of so much of the 1000*l.* already paid by Messrs. Crosfield and Co. as would be left in their hands after payment of their own charges in connection with the ship's business at Barrow, and they were bound to hold any further freight which they might subsequently receive subject to the same trust. But perhaps it is desirable to examine the nature of the plaintiffs' title outside any promise made or obligation incurred by the defendants, for it is said that the company received no consideration for the note, and that as it is not negotiable there is no obligation to pay it, however innocently or for whatever consideration the plaintiffs' may have taken it. The circumstances under which the note was given are these: [Having stated the facts as to the giving of the note, his Lordship proceeded:] The captain then, at the request of Baars, Dunwody, and Co., signed bills of lading (that is, under the charter-party of the 15th May 1901), and indorsed upon them a statement that he had received a certain sum, and he also gave the freight note by which he acknowledged that he had received a further sum on account of freight. He had in fact received nothing on account of freight, nothing for the indorsement of the receipt of 3750*l.* on the bills of lading, and nothing for the 1000*l.* freight note. The defendants describe the charter-party of the 15th May 1901 and the freight note as bogus documents, and suggest that in some way they are fraudulent, but I do not take that view. Baars, Dunwody, and Co. had hired the ship, and they had regularly paid the stipulated monthly sum. They were therefore entitled to use the ship for their own benefit either by carrying in it other people's goods for an agreed freight, or by carrying their own goods and so enhancing the value of the same. They were entitled also to require the captain to sign bills of lading as they might choose to draw them—all freight paid if they so pleased; and bills of lading so signed would, in the hands of indorsees for value as the plaintiffs were, defeat the shipowner's lien under the time charter on the goods mentioned in the bills of lading, but the lien on so much of the freight as remained unpaid on the face of the bill of lading would not be affected. This would be a sub-freight in respect of which the shipowner might assert his lien. Can this right be taken away by the creation of a document such as this freight note? I think not. Unlike the bill of lading, this document is not negotiable, and if it comes into the hands of a third party it can give him no better right than the maker of it had; and certainly the captain had no right to make any arrangement between himself and the time charterers which would have the effect of varying the terms of the charter-party by excluding the owner's lien. Therefore in my opinion, when the plaintiffs received this note they only got the time charterers' right to receive the 1000*l.*, a right which was subject to the shipowners' lien. But in the present case these considerations appear to me to be immaterial, for before the lien could be exercised, there being then no chartered freight payable, 1000*l.* of the bill of lading freight had been paid to the defendants, who, for the purpose of the receipt of the money, stood in the position of the time charterers themselves, and no lien afterwards could be exercised on that sum, and, as to the balance of the bill of lading freight which was paid on the 3rd Aug., this also reached the constructive possession of the time charterers before any lien was exercised, for the notice of the existence of the lien served upon the defendants was of no value; it ought, in order to become operative, to have been served upon the persons who had to pay the freight, not upon the persons who were receiving it for the time charterers. It is alleged that, in addition to the chartered freight due on the 1st Aug., there were some arrears, about 150*l.*, due in respect of the July freight, and it was suggested that some lien had been exercised in respect of that sum. I am not satisfied that any such sum was due in respect of the July freight. It depends upon a very complicated account as to which the evidence was not to my mind satisfactory; and, even if there were, for the same reason I have already given I should hold that the lien had not been exercised. The judgment will therefore be for the plaintiffs for 1000*l.*, subject to the deduction of any proper disbursements made by the defendants as agents for and on account of the time charterers, as to

which the defendants are entitled to a first charge.

Judgment for the plaintiffs for 1000*l.*, *less proper disbursements by the defendants.*

The defendants James Fisher and Sons and the West Hartlepool Steam Navigation Company appealed.

Bankes, K.C. and *Noad* for the defendants.—By the terms of the charter-party of the 6th Oct. 1900 the shipowners were to have a lien upon all cargoes and sub-freights for the amount of the hire due under the charter-party. The defendants stand upon the right of the shipowners, and have, as against the plaintiffs, the same lien as the shipowners would have had against them; and the shipowners would have had a right under their lien for the sub-freight to seize the freight at any time, so long as it could be identified as freight. So long as the money paid as sub-freight can be identified it is subject to the shipowners' lien, and the shipowners can seize it even after it has come into the hands of the charterers' agents. The plaintiffs were at the most merely agents for collecting and handing over to Baars, Dunwody, and Co. the moneys received by them, and they can have no higher rights than Baars, Dunwody, and Co. They were not *bonâ fide* holders of this freight note for value. There is no case exactly in point, but upon principle the plaintiffs are not entitled to recover.

J. A. Hamilton, K.C. and *Loehnis* for the plaintiffs.—The shipowners did not exercise their lien until it was too late to affect the rights of the plaintiffs, and the rights of the plaintiffs are not affected. The question as to the lien on the cargo does not arise, as the cargo had all been delivered. No case seems to have been decided with regard to lien on sub-freights, and the question has been considered an open one. See

Carver on Carriage by Sea, 3rd edit., s. 655.

The right claimed by the shipowners here is not properly a lien; it is at the utmost an equitable right or lien which can only be made effective by giving notice of it to the time charterers or their agents and to the consignees of the goods before the freight is paid by the consignees. It is simply a right to stop the freight on its way from those who have to pay it to the time charterers, and, once the freight has come into the hands of the time charterers or their agents, then it ceases to exist as freight and the shipowners' right to seize it under their lien is gone. The shipowners' right is a contractual right arising under the charter-party to have the sub-freight paid to them, instead of to the time charterers or other persons entitled to it, but this right can only be exercised so long as the sub-freight exists as freight, and when the freight has been paid the right is gone. In the present case the freight was paid by Crosfield and Co. to the defendants as agents for the time charterers, Baars, Dunwody, and Co, before the shipowners' lien was exercised, and the freight note operated as an assignment to the plaintiffs of that freight which was due to Baars, Dunwody, and Co., and the defendants had notice of that assignment before they had notice of the lien of the West Hartlepool Company. The plaintiffs therefore are entitled to recover.

Noad in reply.

Lord HALSBURY, L.C.—I am of opinion that the judgment in this case was perfectly right. Confining myself to the only question with which I think it is necessary to deal, I am of opinion that it is quite clear that the right—which is an important right, whether it is called a lien or is called by any other name—must be exercised at the time when there is freight to be paid. That really is the short point. If the freight has been paid the lien is gone, and the moment it is paid into the hands of the agents for Baars, Dunwody, and Co., who are the persons entitled to receive it, the shipowners' right to stop it on its way to them is gone. If it has been paid as freight, then it has been paid, and the thing has ceased to exist as freight. It is not necessary to descend into any subtleties to consider what is the freight in the sense of in what particular form it has been paid, whether it has been paid by a cheque or in what way as a matter of business it has been disposed of. The right to stop the payment of it to the person to whom it is due must be exercised while the right for such payment exists. If that payment has been already made, the opportunity of exercising the lien is gone; and I am of opinion that, as the freight had been handed by the consignees to the defendants, Fisher and Sons, who were the agents of Baars, Dunwody, and Co., it was as much paid in this case as if it had been handed over to Baars, Dunwody, and Co., and they had been physically there present and put it into their own pockets. Under those circumstances could it be contended that there was some right of stoppage of the money in their pockets? If that is not so, I am of opinion that it is exactly the same thing if their agents received it in the character in which it was paid, and that when it was so paid there was no longer any lien upon it. I am of opinion, therefore, that the judgment of Bigham, J. was right, and must be affirmed.

Lord ALVERSTONE, C.J.—I only wish to add a few words, because the ground on which I concur is entirely that which has been stated by the Lord Chancellor; but I think that, as there are certain other matters referred to in the judgment of Bigham, J., I should indicate one or two on which I am not quite clear. If we had had to decide that its being freight, and received by James Fisher and Sons as freight, and being still in their hands as freight, the shipowners could not claim it because James Fisher and Sons were trustees for Tagart, Beaton, and Co., I should have had very great doubt, and therefore I do not want to indorse that part of the judgment at all. It is, however, curious to note that, long before I delivered the judgment in a case recently before me, Bigham, J. has expressed what seems to me to be the right view about these freight notes, because he says: "The captain had no right to make any arrangement between himself and the time charterers which would have the effect of varying the terms of the charter-party by excluding the owner's lien." I only mention that because it bears out the judgment I gave a short time ago. The ground on which I desire to concur with what the Lord Chancellor has said and with the judgment of Bigham, J. is this, as stated by Bigham, J. in his judgment: "In the present case these considerations appear to me to be immaterial, for before the lien could be exercised, there being then no chartered freight pay-

able"—I will leave that out of the question—"1000*l.* of the bill of lading freight had been paid to the defendants, who, for the purpose of the receipt of the money, stood in the position of the time charterers themselves, and no lien afterwards could be exercised on that sum." Then with regard to some arrears of freight said to be due, amounting to 150*l.*, he finds in the same way that it got into the pockets of the agents of Baars, Dunwody, and Co. before any lien could be exercised. Putting the matter in my own way, as I understand it, a lien for sub-freight in these time charters means a right to stop freight and receive freight as such, and does not mean the right to follow the proceeds into the pockets of somebody else because the money which has been so received was paid in respect of a debt due for freight. Upon the grounds which the Lord Chancellor has put, I think that this judgment clearly ought to be supported; but I express no opinion on the other parts of the case, to which it is not necessary further to refer.

Sir FRANCIS JEUNE, P. — I agree entirely with the judgments which have been delivered, and have nothing to add.

Lord HALSBURY, L.C. — I may add for myself that I designedly avoided dealing with the question to which the Lord Chief Justice referred, and I desire to confine my judgment entirely to the point which has been mentioned.

Appeal dismissed.

Solicitors for the plaintiffs, *Druces* and *Atlee*.

Solicitors for the defendants, *Downing, Bolam*, and *Co.*, for *Bolam* and *Co.*, Sunderland.

Wednesday, March 4, 1903.

(Before WILLIAMS, STIRLING, and MATHEW, L.JJ.)

ANDERSON *v.* RAYNER AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Seaman — Injury in service of ship — Medical expenses and maintenance—Liability of shipowner—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 207, *sub-s.* 1.

Where a seaman is injured in the service of the ship, the owners of the ship are not liable under sect. 207, *sub-sect.* 1, *of the Merchant Shipping Act* 1894 *to defray the expenses of providing the necessary surgical and medical advice and attendance and medicine after he has been brought back to port.*

APPEAL by the defendants from the judgment of Wills, J. at the trial of the action without a jury.

The plaintiff was master of the schooner *Emily*, of which the defendants were the owners.

The action was brought to recover the expenses of medical attendance and maintenance incurred in consequence of injuries received by the plaintiff while in the service of the ship, on a voyage from Liverpool to Falmouth.

The plaintiff's leg was broken, and he was taken back to Liverpool, where he remained for four months before he was able to come back to the vessel.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides as follows:

Sect. 207 (1). If the master of, or a seaman or apprentice belonging to, a ship receives any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice and attendance and medicine and also the expenses of the maintenance of the master, seaman, or apprentice until he is cured or dies or is brought back, if shipped in the United Kingdom, to a port of the United Kingdom, or if shipped in a British possession to a port of that possession and of his conveyance to the port, and in the case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages.

Wills, J. held that, upon the true construction of this section, the shipowners were liable for the whole of the expenses of the plaintiff in respect of the necessary surgical and medical advice and attendance and medicine both before and after he was brought back to Liverpool, but that they were only liable for the expenses of his maintenance until he was brought back to Liverpool; and he gave judgment for the plaintiff accordingly.

The defendants appealed.

Horridge, K.C. and *Dawson Miller* for the defendants. — The words "until he is cured or dies or is brought back" apply just as much to the expenses of surgical and medical attendance as to the expenses of maintenance.

W. F. Taylor, K.C. and *Keogh* for the plaintiff. —This is an enactment passed in favour of seamen, and it should therefore be construed in their favour rather than in favour of the shipowners. In the case of most merchant ships there is no surgeon on board, and there would be no expenses for surgical and medical advice and attendance until after the seaman has been brought back to port. So that, if the defendants' construction of this section is the right one, this enactment will in most cases have no effect at all. The provision at the end of the section as to burial expenses shows that the shipowner is not to consider himself free from all liability the moment he has put the injured seaman ashore.

WILLIAMS, L.J.—I cannot recognise as sound the canon of construction which Mr. Keogh suggested to us at the end of his argument. I do not mean to say that there is not a certain amount of authority for it in courts of high and of low degree, but I do not think that at present it is a recognised rule of construction of an Act of Parliament that a section which has been passed to benefit workmen ought therefore to be construed liberally in their favour. I believe that the well-known canon of construction still prevails, that, though an Act of Parliament may impose upon a citizen a liability beyond his common law liability, a section of doubtful meaning ought not to be construed as imposing such a novel liability unless the words of it are perfectly clear. It seems to me that it is by no means clear that this Act of Parliament was intended to impose upon shipowners any liability to provide the expenses of either medical attendance or maintenance after the injured sailor has been brought back to the home port. Looking at the various provisions in sect. 207, I think, notwithstanding the provision as to burying expenses, that the general intention of the Legislature, so far as one can gather it from the whole

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

of the contents of the section, was to impose a liability on the shipowner until the sailor has been brought back to the home port and while he is on the voyage, and not otherwise.

STIRLING, L.J.—I am of the same opinion. I cannot think from these words that the Legislature meant to impose on the shipowner the duty of providing medical attendance for the injured seaman during the whole residue of his life. It is only reasonable that the expenses of medical attendance and of maintenance should be treated in the same way.

MATHEW, L J —I am of the same opinion. If the contention of the plaintiff were correct, a very serious liability would be imposed on the shipowners of this country. Sect. 207 of the Merchant Shipping Act 1894 is practically a re-enactment of sect. 228 of the Merchant Shipping Act 1854. It has never yet occurred to anyone to construe the section in the way in which the plaintiff attempts to do. For nearly fifty years these words have been construed as meaning that a seaman injured on a merchant ship must be looked after at the expense of the owners while on board and be brought back to the home port. If he was unfit, while in a foreign port, to go back to his work before the ship left, he would be entitled to be left behind and would be entitled under this section to be sent back to his own country at the expense of the shipowner. That, I think, is the limit of the liability imposed on the shipowner.

Appeal allowed.

Solicitors: for the plaintiff, *Pritchard, Englefield,* and *Co.*, agents for *Simpson, North, Harley,* and *Birkett,* Liverpool; for the defendants, *H. Forshaw* and *Hawkins,* Liverpool.

March 16, 17, *and* 18, 1903.

(Before VAUGHAN WILLIAMS, STIRLING, and MATHEW, L.JJ.)

MILLER *v.* LAW ACCIDENT INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance — Marine — Construction of policy — "Restraint of princes and people" — "Warranted free of capture, seizure, or detention" — General decree forbidding importation of diseased cattle.

A policy of insurance was effected on a cargo of cattle on a voyage from Liverpool to Buenos Ayres. The risks insured against included "arrests, restraints, and detainments of all princes and people," but the policy contained a warranty against "capture, seizure, or detention."

On arrival at Buenos Ayres the cattle were found to be suffering from foot-and-mouth disease. In pursuance of a general decree of the Government forbidding the importation of cattle suffering from contagious disease, the Argentine officials forbade the landing of the cattle in question.

The assured gave notice of abandonment, and brought an action on the policy as for a total or partial loss.

Held, that the loss was covered by the words "restraint of princes and people," but that by the terms of the warranty the underwriters were relieved from their liability under the policy.

APPEAL by the plaintiff from the judgment of Bigham J. (2 K. B. 694, 1902) at the trial of the action without a jury.

The action was brought to recover the amount of a total or partial loss of cattle under a Lloyd's policy of marine insurance for a voyage from Liverpool to Montevideo and (or) Buenos Ayres granted by the defendants to the plaintiff.

The risks insured against were described in the usual way, and included "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality whatsoever . . . and all perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the said goods and merchandises or any part thereof."

The policy also contained the following clause:

Warranted free of capture, seizure, or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities, warlike operations, and all risks of riots and civil commotions, whether before or after declaration of war.

The plaintiff shipped a number of bulls by the steamer *Bellevue* to be carried from Liverpool to Buenos Ayres; and, having made the shipment, effected the policy sued on.

Some time before the shipment was made the Argentine Government had passed a decree forbidding the entry of animals suffering from contagious diseases or coming from countries where such diseases prevailed. The decree contained articles describing the diseases, and providing how animals suspected of being affected were to be dealt with.

On the 10th Sept. 1900 the *Bellevue* arrived at Buenos Ayres. The cattle were duly inspected on board the vessel by the Argentine officials, with the result that the Ministry of Agriculture came to the conclusion that they were suffering from disease within the meaning of the decree, and the same day the vessel was ordered to leave the port.

The order contained a provision that the captain, if he so wished, might tranship the cattle to another vessel outside the limits of the port for carriage to some other destination.

On the 11th Sept. the Ministry issued a general order forbidding the discharge of any cattle arriving from the United Kingdom until further notice.

At the trial of the action Bigham, J. found as a fact that the animals were suffering from disease within the meaning of the decree, and that the order forbidding their landing was lawfully made by the Argentine authorities.

In obedience to the order, the *Bellevue* left the dock in Buenos Ayres, and on the 14th Sept. the cattle were transhipped into lighters at Santiago, a place outside the limits of the port.

On the same day notice of abandonment was given.

The cattle remained in the lighters for some days, when a ship called the *Sallust* was found to take them on to Montevideo, at which place after being forty days in quarantine, they were landed and sold at considerable loss.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

BIGHAM, J. delivered a written judgment in which, after stating the facts, he said: It is in these circumstances that the plaintiff claims for a total or partial loss, alleging (to follow the words of the pleader) that the prohibition of the landing constituted a restraint of people within the meaning of the policy. The right to recover depends upon whether the loss is directly due to a restraint of people. I am of opinion that it is not. It is not necessary for me to give an exhaustive definition of the expression "restraint of people," and I shall not attempt to do so. It is sufficient to say that the mere operation of an ordinary municipal law affecting or preventing the delivery of the insured goods at their destination is no "restraint of people" within the meaning of the policy. As in the case of perils of the sea, there must be something violent and out of the ordinary course of things before the peril is brought within the meaning of the policy. The maker of a bill of lading protects himself by an exception of the acts and restraints of princes. Such an exception was held in *Finlay* v. *Liverpool and Great Western Steamship Company* (23 L. T. Rep. 251; 3 Mar. Law Cas. O. S. 487) not to cover the case of a judgment in a court of law of the United States of America directing the goods to be delivered to third parties who had claimed them. "The acts and restraints of princes," said Martin, B. in that case, "mentioned and provided against in the bill of lading have reference to the forcible interference of a State or of the Government of a country taking possession of the goods *manu forti*, and do not extend to the legal proceedings which, it is alleged in the plea, afterwards took place in the courts at New York." So in the present case the words do not, in my opinion, cover the operation of the ordinary law of the land, but relate only to some violent departure from the ordinary course of things. The plaintiff relied upon the authority of *Rodocanachi* v. *Elliott* (31 L. T. Rep. 239; 2 Asp. Mar. Law Cas. 399; L. Rep. 9 C. P. 518). In that case goods were in transit from Marseilles to London. They had to pass through Paris, and on their way they came within the lines of the German army by which Paris was then completely invested. In consequence of this state of things the goods could not be moved. This was held to constitute a restraint of princes. Bramwell, B. in delivering the judgment of the Exchequer Chamber, says: "But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army." This shows that the court was of opinion that the goods were, for all effective purposes, seized by the German army and taken out of the control and disposition of the owners—it was by the forcible, and therefore by the violent, act of the German army that the goods were prevented from reaching their destination. No other view of the facts in that case could have been taken, and, having regard to that view, no other conclusion could be arrived at than that the plaintiffs had lost their goods by a restraint of princes. But in the present case no force of any kind was used; the captain was required to obey the ordinary law existing in the country at the time when the goods arrived, and he obeyed it. To call the resulting consequence a loss by restraint of people or princes is, in my opinion, to give to the expression a meaning which it was never intended to bear. A further point arose in the case, on which also I think that I ought to give judgment for the defendants, although, having regard to my decision on the first point, it is not really necessary to consider it. The policy contained the following clause: "Warranted free of capture, seizure, and detention." It was said that this exception ought not to be interpreted to include "restraint." I think, however, that the very object of this exception is to free the underwriters from liability under the words "arrests, restraints, and detainments" in the body of the policy. It is true that the same words are not used, but the exception must be taken to refer to something which has gone before—and to what, if not to the words I have mentioned? An attempt was made to bring the loss within the general words, "all other perils, losses, and misfortunes that shall come to the damage of the goods"; but as to this it is sufficient to say that these words only cover losses of a kind similar to those particularly enumerated in the previous part of the policy, and do not include a loss of an exceptional kind like that which has happened in this case.

Judgment for the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C. and *Maurice Hill* for the plaintiff.—The loss was caused by a "restraint of people" within the terms of the policy. The action of the Argentine Government was the direct cause of the loss. The frustration of the adventure by the decree of the Government which prevented the cattle from being delivered at Buenos Ayres caused a constructive total loss of the goods:

Arnould's Marine Insurance, 7th edit. ss. 1142, 1143
Barker v. *Blakes*, 9 East, 283.

In that case the voyage was frustrated by the port of destination being blockaded. In another case, a ship with a cargo of corn touched at a port where, in consequence of a scarcity of food, an embargo was laid on the cargo, and it was held that the assured were entitled to recover as for a total loss:

Cologan v. *London Assurance Company*, 5 M. & S. 447.

The same was held in a case where an embargo was laid by the Government of the country at the loading port:

Rotch v. *Edie*, 6 T. R. 413.

A blockade which excludes a ship from getting into a port is just as much a "restraint of princes and people" as though the ship were prevented by the blockade from getting out:

Geipel v. *Smith*, 26 L. T. Rep. 361; 1 Asp. Mar. Law Cas. 268; L. Rep. 7 Q. B. 404.

So, too, where some silk in transit from Marseilles was stopped by the siege of Paris by the German

army, it was held that this constituted a "restraint of princes":

Rodocanachi v. *Elliott*, 28 L. T. Rep. 840; 2 Asp. Mar. Law Cas. 21, 399; L. Rep. 8 C. P. 649; affirmed 31 L. T. Rep. 239; L. Rep. 9 C. P. 518.

A ship with a cargo of explosives for delivery at Yokohama arrived at Hong Kong, when the master learnt that war had been declared between China and Japan. Explosives being contraband of war, the master, reasonably believing that the ship would be seized if he proceeded to Yokohama, landed the explosives at Hong Kong. It was held that delivery of the goods was prevented by "restraints of princes":

Nobel's Explosives Company Limited v. *Jenkins and Co.*, 8 Asp. Mar. Law Cas. 181; 1 Com. Cas. 436.

Quarantine regulations have been held in America to come within that expression:

The Progreso, 50 Fed. Rep. 835.

In *Brunner* v. *Webster* (5 Com. Cas. 167) the importation of the goods was not in fact forbidden; that case, therefore, has no application here. The warranty does not relieve the defendants from liability. The words there used, "capture, seizure, or detention," are not the same as the "restraints and detainments" named in the perils insured against. They point to something in the nature of an act of warfare.

Scrutton, K.C. and *Loehnis* for the defendants.—The goods in this case were never really lost, and in fact they always remained in the custody of the assured. The only ground upon which a constructive loss is based is that the cattle never arrived at the port of destination, and it is said that the reason of their non-arrival was that there was a law of the country forbidding their arrival. The real cause of their non-arrival was not a "restraint of people." The condition of the animals which prevented their discharge was not the result of any "restraint" within the meaning of the policy. The plaintiff might have effected an insurance against loss by disease, but he had not done so. The words "arrests, restraints, and detainments" imply some forcible interference with a man's goods. They are not applicable to the effect of the enforcement of the ordinary law of the country:

Finlay v. *Liverpool and Great Western Steamship Company*, 23 L. T. Rep. 251; 3 Mar. Law Cas. O. S. 487;

Crew, Widgery, and Co. v. *Great Western Steamship Company*, 4 Times L. Rep. 148.

No force was used at Buenos Ayres to compel the obedience of the captain. The immediate cause of the non-delivery of the cattle was not the Argentine law, but the voluntary act of the master, who acted merely from fear of what might happen if he persisted:

Hadkinson v. *Robinson*, 3 B. & P. 388;

Havelock v. *Hancill*, 3 T. R. 277;

Forster v. *Christie*, 11 East, 205;

Nickels v. *London and Provincial Marine and General Insurance Company Limited*, 6 Com. Cas. 15;

Phillips on Marine Insurance, 3rd edit., ss. 1114 and 1115.

A policy of insurance is not to be construed in the same way as a charter-party, and cases on the construction of charter-parties are not applicable in deciding on the meaning of "restraints of princes and people" in this policy. The reason of that is that the object of the contracts is different. A restraint may well operate so as to prevent a shipowner from arriving with the ship at a given port, without at the same time causing any damage to the cargo carried:

Arnould's Marine Insurance, 7th edit., s. 807.

The warranty relieves the defendants from any liability under the earlier part of the policy. The warranty is not limited to what may be done in warfare It covers the case of a ship forcibly taken possession of by a foreign Government in order to be condemned for smuggling:

Cory v. *Burr*, 49 L. T. Rep. 78; 5 Asp. Mar. Law Cas. 109; 8 App. Cas. 393.

In a more recent case where the Government of the South African Republic, in accordance with a law of the republic, seized and kept possession of gold, the property of a mining company, the Court of Appeal held that, under a warranty similar to this, the underwriters were not liable:

Robinson Gold Mining Company v. *Alliance Insurance Company*, 86 L. T. Rep 858; (1902) 2 K. B. 489.

They referred also to

Cunard Steamship Company v. *Marten*, 8 Com. Cas. 17.

J. A. Hamilton, K.C. in reply.—The cases from *Hadkinson* v. *Robinson* (*ubi sup.*) to *Nickels* v. *London and Provincial Marine and General Insurance Company Limited* (*ubi sup.*) were cases where the captain had the right to go somewhere else, and, in the exercise of his discretion, did so. There it was rightfully held that no loss was due to "restraint of princes or people." But here the action of the Argentine Government was the direct cause of the loss. The regular application of the law of a country in the case of a private suit, though it may cause the restraint of a ship, is not a "restraint of princes or people" within the meaning of a policy of insurance.

VAUGHAN WILLIAMS, L.J.—This is an appeal from Bigham, J. I concur in the conclusion my brethren have arrived at, but my voice is in a condition in which I wish to say as little as possible. In my judgment there can be no doubt that, so far as the words in the body of the policy are concerned, the events which occurred in this case would bring the case within the word "restraint," and therefore, that but for the warranty, which I will deal with presently, the underwriters would be insurers liable for the risk. I have no doubt myself, this being an insurance of cattle shipped to Buenos Ayres, which happened to be the only place where commercially it was worth while to sell them, that the result of what happened at Buenos Ayres was that the adventure was altogether defeated, so far as the cattle were concerned, and that the underwriters—if liable at all—are liable in respect of the value of the cattle. The only other thing that I have to say about this part of the case is that, in my judgment, that which was done here by the issuing of the decree and the other documents which were issued by the Government was an act of State, and comes within the words in the body of the policy, and really has no analogy whatever to a case where there has been an arrest or detention of a ship for the purpose of instituting a suit to enforce the rights of a private individual.

But then I come to the warranty. Now, if one were dealing with a document other than a policy of marine insurance, I should have been disposed to say, according to the natural meaning of the words, that a restraint of this sort was after all only a restraint in the nature of an injunction forbidding the landing of the cattle and the other cargo on board, but allowing the cargo other than the cattle to be landed upon certain conditions if the master of the ship thought fit to do so. I should not have said myself, according to the ordinary meaning of the English language, that such a proceeding was either capture, seizure, or detention. It is manifest that it is not capture, and I should have thought that it was not either seizure or detention, according to the ordinary meaning of the words. But I accept that which was put in argument, that really one must not construe a policy of insurance in the way one would construe any other document. Bigham, J. in delivering judgment, said: "It was said that this exception ought not to be interpreted to include 'restraint.' I think, however, that the very object of this exception is to free the underwriters from liability under the words 'arrests, restraints, and detainments' in the body of the policy. It is true that the same words are not used, but the exception must be taken to refer to something which has gone before—and to what, if not to the words I have mentioned?" I see Mr. Parsons in his book on the Law of Marine Insurance does not speak with any great certainty about it, but he suggests that the word "detention," which is the word that he seems to prefer, includes, perhaps, being lawfully restrained from entering a port of destination by a blockade in force. For this purpose I do not see that it makes any difference whether it is a blockade in force or a sanitary law, and under those circumstances I have not sufficient confidence in a conclusion founded merely upon the natural meaning of the words to say that the meaning which the authorities seem to say has been put upon the words of the exception in the warranty is wrong, and therefore I concur in the judgments which are going to be delivered. The result is that the judgment of Bigham, J. will be affirmed, not for the reason that he gives in the first part of his judgment—that, I think, is wrong—but for the reason that he gives in the latter part of his judgment, that is, the reason based upon the warranty.

STIRLING, L.J.—I am of the same opinion. As we are differing in part from Bigham, J., I desire to state as shortly as possible the grounds upon which I have arrived at the conclusion which has been expressed by the Lord Justice. In the first place, I think with him that the proceedings which took place in Buenos Ayres in Sept. 1900 amounted to an exercise of force by the Government of the Argentine Republic so as to bring the case within the perils insured against by the policy. What took place was substantially this, that the ship, having arrived, was visited by a veterinary surgeon, and it was discovered that certain of the cattle on board were or might be suffering from an infectious disease. Thereupon the Minister of Agriculture of the Government intervened and served the captain with a formal resolution, dated the 10th Sept. 1900, by which the consignees were informed that, the animals brought by the ship being attacked by aphthose fever, "It has been resolved, in accordance with art. 5 of the regulations, that the said steamship go out immediately from the port, you being able, if it suits you, to effect the transhipment of the animals to another vessel outside the port, but the *Bellevue* must be previously and completely disinfected before the rest of her cargo can be landed, or she moored on the Argentine coast:" And on the following day an order was made by the President of the Republic and the Minister of Agriculture that, in consequence of the arrival of this steamer having this live stock on board, a decree was made stopping until further notice the discharge of all cattle, sheep, and pigs which might arrive from the United Kingdom of Great Britain and Ireland. I understand that what happened was this, that the captain of the steamship, being served with this resolution, took his ship outside the port, and, with the view of minimising the loss, transhipped the cattle to another vessel, by which they were carried to Montevideo and there sold at a great loss. I have already stated the conclusion at which I arrive upon these facts. It seems to me that this was an act of intervention of the Government, and it is none the less an exercise of superior force that neither the army nor the police force, nor any other force of the Government, actually intervened; but it is absolutely certain to my mind, as a matter of inference, that if the captain had not seen fit to do as he did the ship would have been taken possession of or entered and the cattle destroyed in accordance with what is described as art. 5 of the regulations. I think that the captain was well justified with a view of minimising the loss, in taking the steps which he did, and I think that, in fact, he yielded only to superior power in doing what he did. I think, also, that this is not the less an act on the part of the Government of the Argentine Republic that it is done in accordance with the laws in force in the country. It has been decided that the peril insured against in the same terms was within the policy in a case when the intervention of the Government took place in enforcing the revenue laws of the country; and I do not see that any effectual distinction can be drawn between the intervention of the Government for the purpose of enforcing the revenue laws and the intervention of the Government for the purpose of enforcing the sanitary laws for the benefit of the public. This seems to me to be recognised both in the case of *Cory* v. *Burr* (*ubi sup.*) where the seizure which took place was of a vessel which was engaged in smuggling, and also in the case of which was mentioned in the course of the argument of the *Robinson Gold Mining Company* v. *Alliance Insurance Company* (*ubi sup.*).

On behalf of the defendants, it was very much urged before us that a long line of authorities, of which *Hadkinson* v. *Robinson* (*ubi sup.*) is a leading example, applied to the case, but those were cases the effect of which is summed up by Lord Esher, then Brett, J., in the case of *Rodocanachi* v. *Elliott* (*ubi sup.*), where he puts it thus: "If the master of the ship, of his own accord, or in obedience to the orders of the officers of the Queen abstains from entering a blockaded port, the *causa proxima* is not the blockade, but the voluntary act of the master." It seems to me that the present case goes far beyond what was laid down there. In the view of the facts which I take, the master did not act voluntarily in any sense. If

when he entered the harbour he had been informed by some person that there was a law forbidding the landing of such cattle as he had on board, and that the Government were likely to put it in force, and he had, nevertheless, gone on, the case, I think, would have been very analogous to *Hadkinson* v. *Robinson* (*ubi sup.*) and that class of authorities; but here he went as far as he could, and he only desisted from landing when the Government actually interfered and served upon him the notice which I have spoken of. I have already explained the view which I take of what he did, and in my judgment those cases do not apply. That being so, I regret that I find myself differing as I do from Bigham, J.; but having arrived at that conclusion, it is my duty to express it. On the second question, which was also decided by Bigham, J., I find myself unable to differ from him. I admit that the words are difficult to construe, but having regard to the opinion which was expressed by him, and the opinion about to be expressed by my brother Mathew, I do not feel myself at liberty to differ from the learned judge's conclusion in that respect.

MATHEW, L.J. read the following judgment:—The material facts may be stated in a few words. By the order of the Administration, the executive authority of Buenos Ayres, the vessel, the *Bellevue*, was stopped before she reached her berth. The discharge of the cattle was prohibited, and the animals were detained on board the vessel. The master was directed to leave Buenos Ayres and land the cattle at some other port. He obeyed. The animals were transhipped outside the port and sent to Montevideo. It was not disputed that the object of the assured in shipping the cattle to Buenos Ayres in consequence was altogether defeated. It was argued for the defendants that the loss thus occasioned was not due to "arrest, restraint, or detainment" within the meaning of the policy. The words, it was contended, implied the use of direct force, and none had in fact been employed. The case of *Finlay* v. *Liverpool and Great Western Steamship Company* (*ubi sup.*), upon which reliance was placed by the defendants' counsel, afforded no grounds for this position, and no other satisfactory authority was referred to. If actual force was not used it was because there was no opposition. The master submitted to the orders of the Administration. The result to the assured was the same as if force had been used, and even if the defendants were right in their interpretation of the words in question, the loss was *ejusdem generis* with the peril described in the policy, and was covered by the general words, "other losses and misfortunes," which end the enumeration of the perils insured against. It was further argued for the defendants that the loss was not within the policy because the acts of the Administration were illegal—that is to say, were out of the ordinary course of the law. There was no reason for saying that what was done by the Administration was out of the ordinary course of the law of the port of destination. Even if it were, I do not see how it would help the underwriters. I am of opinion that but for the warranty the underwriters would be responsible for the loss in question. This conclusion is in accordance with the decisions referred to in the argument with respect to the meaning of similar words in charter-parties when shipowners and charterers have been exonerated from the performance of their obligations by a blockade which renders access to a port commercially impracticable. No reason was given with respect to this insurance why the words "arrest of princes" in this policy and in an ordinary charter-party should have different meanings.

But the policy contains the warranty against "capture, seizure, and detention," commonly called at Lloyd's the f.c.s. clause; and it was argued for the defendants that their liability under the earlier part of the policy was cancelled. The warranty goes beyond the words "arrest" and "restraint." "Capture" and "seizure" are stronger expressions. It was suggested that what was meant were acts of warfare, but it is clearly settled that the words have no such restricted meaning: (see *Cory* v. *Burr*, *ubi sup.*). It is not, in my opinion, intended by the alteration of terms to describe a different class of perils from those previously mentioned. Counsel for the plaintiff failed to suggest any practical difference for the present purpose between the two sets of phrases. It seems to me sufficient to point out that the word "detention" in the warranty cannot be distinguished from the word "detainment" in the earlier part of the policy. The loss, in my judgment, is within the warranty, and the underwriters are not liable in this action. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Rowcliffes, Rawle, and Co.*, agents for *Hill, Dickinson, and Co.*, Liverpool.

Solicitors for the defendants, *Waltons, Johnson, Bubb, and Whatton.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 12, 15, 1902, *and Jan.* 12, 1903.

(Before BIGHAM, J. without a Jury.)

WESTERN ASSURANCE COMPANY OF TORONTO v. POOLE. (*a*)

Marine insurance — Reinsurance — Constructive total loss—"To pay as may be paid thereon"—Suing and labouring clause—Exclusion of salvage charges.

Where underwriters reinsure a ship against total and (or) constructive total loss with an undertaking "to pay as may be paid" on the original policy and a suing and labouring clause, but an exclusion of salvage charges, then, in the event of the ship experiencing a disaster during the insured voyage which would have justified the owners in giving notice to the original insurers of abandonment, the reinsurers will not be liable, either as for a constructive total loss or under the suing and labouring clause, for money paid by the original insurers in respect of the cost of bringing the ship to port and of repairs, though such money amounts to 100 *per cent. on the insured value of the ship, if in fact the owners gave no notice of abandonment.*

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

Uzielli v. Boston Marine Insurance Company (60 *L. T. Rep.* 787; 5 *Asp. Mar. Law Cas.* 405; 15 *Q. B. Div.* 11) *considered.*

ACTION tried before Bigham, J. without a jury.

By a policy dated the 21st Nov. 1900 the owners insured the ship *Edmund* with the plaintiffs for the voyage from Santa Rosalia to Portland (Oregon) and thence to the United Kingdom. The policy was in the usual Lloyd's form and covered partial as well as total loss, and the ship was valued therein at 19,000*l.* agreed value.

By a policy of reinsurance dated the 11th Dec. 1900 the plaintiffs reinsured with the defendant (among others) for 1500*l.* upon the same ship, valued as per original policy, for the same voyage. This policy was underwritten by the defendant for 100*l.*

It was in the ordinary Lloyd's form, but written on its face were four special clauses: First, "including valuation clause if in original policy"; secondly, "being a reinsurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon"; thirdly, "being against the risk of total and (or) constructive total loss only"; and, fourthly, "no claim to attach to this policy for salvage charges."

While on the insured voyage the *Edmund* stranded. The London Salvage Association, acting in the interests of the underwriters, sent a tug to her assistance, by aid of which she was floated, and ultimately towed to San Francisco, the nearest port at which permanent repairs could be done.

The cost of temporary repairs and of getting her to San Francisco amounted to 9000*l.* and the cost of the permanent repairs to 11,207*l.*, making altogether 20,207*l.*

It was admitted that the owners might have treated the ship when stranded as a constructive total loss, but, as her real repaired value was much more than the insured value, they did not elect to do so.

The plaintiffs had paid in all 107 per cent. on the original policy, made up partly of a large partial loss and a claim under the suing and labouring clause.

The plaintiffs in this action claimed against the defendant on the reinsurance policy 100*l.* as for a constructive total loss consequent upon the stranding, or, in the alternative, for 39*l.* 5*s.* under the suing and labouring clause.

Hamilton, K.C. and *Loehnis* for the plaintiffs —This was a constructive total loss. If the owners had given notice of abandonment that could not be disputed. But notice of abandonment is not necessary where in fact the insurers are liable for the whole agreed value of the ship, at any rate where the reinsurer is by his policy "to pay as may be paid" on the original insurance:

Chippendale v. *Holt*, 73 L. T. Rep. 472; 8 Asp. Mar. Law Cas. 78;
Uzielli v. *Boston Marine Insurance Company*, 52 L. T. Rep. 787; 5 Asp. Mar. Law Cas. 405; 15 Q. B. Div. 11.

If the defendant was only to be liable, not in case of a constructive total loss, but only in case the shipowners elected to give notice of abandonment, then the reinsurance policy would be open to the objection stated by Mathew, J. in *Chippendale* v. *Holt* (*sup.*), that it is in the nature of a wagering contract. In the second place, if the defendant is not liable as for a total loss, he is at any rate liable under the suing and labouring clause. By the rule that if possible every part of a document is to be given effect, the "no salvage charges" clause is not to be read as rendering the suing and labouring clause meaningless.

Scrutton, K.C. and *Mackinnon* for the defendant.—The words "pay as may be paid thereon" refer only to money paid upon the original policy under a legal liability to pay. Here there was no legal liability to pay as for a total loss, since there never was a total loss. The defendant reinsured only against a total loss, and for moneys paid under any other liability he is in no way liable. Here the money was paid for a partial loss. There can be no constructive total loss without notice of abandonment:

Chippendale v. *Holt* (*sup.*);
Marten v. *Steamship Owners' Underwriting Association*, 87 L. T. Rep. 208; (1902) 7 Com. Cas. 195.

Secondly, the exclusion of salvage charges covers all claims under the suing and labouring clause, because, firstly, by custom salvage charges include charges under the suing and labouring clause, and the neglect to strike out the latter clause does not prevent this:

Cunard Steamship Company Limited v. *Marten*, 87 L. T. Rep. 400; (1902) 2 K. B. 624.

And, secondly, this being a reinsurance policy, if the salvage charges did not include the charges under the suing and labouring clause, there was no meaning in excluding them, since costs of volunteer salvage are a partial loss by the perils of the seas, and consequently are not covered by a reinsurance against total loss:

Cunard Steamship Company Limited v. *Marten* (*sup.*);
Aitchinson v. *Lohre*, 41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755;
Dixon v. *Sea Insurance Company*, 43 L. T. Rep. 365; 4 Asp. Mar. Law Cas. 327.

Uzielli v. *Boston Marine Insurance Company* (*sup.*) is not an authority in favour of the plaintiff if, as we contend, the true explanation of that case is that given in sect. 866 of Arnould's Marine Insurance, 7th edit.

Hamilton, K.C., in reply, cited

Re Eddystone Marine Insurance Company; Ex parte Western Marine Insurance Company, 66 L. T. Rep. 370; 7 Asp. Mar. Law Cas. 167; (1892) 2 Ch. 423;
Livie v. *Janson*, 12 East, 648.

Cur. adv. vult.

Jan. 12.—BIGHAM, J.—This is an action brought on a policy of reinsurance dated the 11th Dec. 1900, and expressed to be for 1500*l.* upon the ship *Edmund*, valued as per original policy, from Santa Rosalia to Portland, and thence to the United Kingdom. It is subscribed by the defendant for 100*l.* The policy is in the ordinary Lloyd's form, but written on its face are four special clauses, which are in the following terms: First, "including valuation clause if in original policy"; secondly, "being a reinsurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon"; thirdly, "being against the

risk of total and (or) constructive total loss only"; and, fourthly, "no claim to attach to this policy for salvage charges." The original policy, dated the 21st Nov. 1900, was issued by the plaintiffs to the shipowners, the ship being valued therein at 19,000*l*. This policy was also in the usual Lloyd's form, but it covered partial as well as total loss. Attached and incorporated with it was a clause to the effect that general average and salvage charges should be payable according to foreign statement if so claimed, and a further clause that the value of 19,000*l*. should be mutually admitted and taken to be the sound value of the ship for all purposes of constructive total loss under the policy. The plaintiffs claim on the reinsurance policy is for 100*l*. as a constructive total loss consequent upon a stranding, or, in the alternative, for 39*l*. 5*s*. under the sue and labour clause. The defendant, while admitting the interest of the plaintiffs and the stranding of the ship, denies that there ever was any total loss or that the plaintiffs ever became liable to pay such a loss, and that the plaintiffs ever incurred any suing or labouring expenses; and says that, if they did, their right to recover such expenses from him is barred by the clause in the reinsurance policy excluding claims for salvage purposes. Thus the question is whether any, and if so, what, loss has happened which can be brought within the meaning of the reinsurance policy. The material facts are very simple. On the 28th Nov. 1900 the *Edmund* while on the insured voyage stranded at a place near Santa Rosalia, which is on the coast of Mexico. On the 11th Dec. a tug was employed by the London Salvage Association for the purpose of getting her afloat again. She floated on the 16th Jan. 1901 and was then in safety. Temporary repairs were done to her at a neighbouring port called San Diego, and she was then towed to San Francisco, where she arrived on the 20th Feb. There she was dry-docked and permanently repaired. The cost of getting her to San Francisco under temporary repairs was 9000*l*., and the cost of the permanent repairs was 11,207*l*.—total, 20,207*l*. The defendant admits that the shipowners might in the circumstances have treated the vessel when on the bank at Santa Rosalia as a constructive total loss; in other words, that the probable cost of getting her to a repairing port, and then making good the damage she had sustained, would have exceeded her repaired value of 19,000*l*. as fixed in the original policy. But the shipowners did not take this course; they gave no notice of abandonment, but elected to keep the vessel and claim for a partial loss, and on this footing the plaintiffs have paid. They have paid in all 107 per cent. on the original policy, the amount being made up of a large partial loss and of a heavy claim for suing and labouring. A demand seems to have been made upon the plaintiff for even more than 107 per cent., but by some compromise the claim was settled at the smaller sum.

The first question is whether there has been any constructive total loss within the meaning of the contract sued on. It is quite a common practice for an insurer against total and partial loss to reinsure the risk of total loss while keeping himself uncovered as to partial loss. Of course he does this at a premium much lower than that which he himself receives for the double risk; and, in the event of the insured vessel sustaining damage by the peril insured against, it is very much to his interest that the damage should be sufficiently serious to constitute a constructive total loss, for in that event only can he get his loss recouped by his reinsurer and secure his profit—namely, the difference between the two premiums. So in the present case the plaintiffs are anxious to make that which the shipowners treated as a partial loss under the original policy into a total loss under the reinsurance policy. But can they? I think not. What the defendant promised by his contract was to indemnify the plaintiffs if they were called upon to pay a constructive total loss What, then, constitutes a constructive total loss? I think that to constitute a constructive total loss there must be not only such damage to the vessel as to make her not worth repairing, but there must also be a notice of abandonment. "A constructive total loss in insurance law is that which entitles the assured to claim the whole amount of the insurance on giving due notice of abandonment": (Arnould, 7th edit., s. 1091). The notice of abandonment is a necessary preliminary to a claim for a constructive total loss; and this is so not only according to insurance law, but also according to the universal practice of merchants and underwriters. The notice of abandonment is an offer made by the shipowner to the underwriter to vest the property in the ship in the underwriter so that he may deal with it as his own. Without such an offer the underwriter cannot deal with the ship as his own; it remains the shipowner's property; and such a position is inconsistent with the existence of a claim for a constructive total loss. Of course the owner is not compellable to give any notice of abandonment; there is nothing in his policy which obliges him to divest himself of his property in the ship, and this is true whatever the extent of the damage may be. He can always keep his ship and claim for a partial loss, even though the cost of repairs may amount to 100 per cent. of the insured value. But, if he elects to take this course, his claim is a claim for a partial loss only. But it is said that the case is concluded in the plaintiffs' favour by the judgment in *Uzielli* v. *Boston Marine Insurance Company*. That was an action by reinsurers against second reinsurers. The original insurers had received and had ultimately accepted a notice of abandonment from the shipowners, and had settled on the basis of a constructive total loss. They did not, however, pay 100 per cent. There appears to have been some dispute between themselves and the shipowners as to whether the facts justified the abandonment and the claim for a constructive total loss, and this dispute was settled by the shipowners agreeing to take 88 per cent., giving up the ship to their underwriters. These underwriters had spent a large sum in suing and labouring which, after deducting the price at which they sold the ship, amounted to 24 per cent. of the insured value. Thus the original underwriters were out of pocket 88 per cent. and 24 per cent., or, in all, 112 per cent. The plaintiffs, who were the reinsurers of the original underwriters, paid the whole 112 per cent., and brought their action against their reinsurers to recover the amount. No notice of abandonment was served on the defendants. The case was heard before Mathew, J., when it was

contended on behalf of the defendants that there was no constructive total loss. The learned judge rejected this contention. The case went to appeal, and upon this point the decision of Mathew, J. was affirmed. The reasons submitted in support of the contention (see the argument as reported) appears to have been that the compromise of 88 per cent. showed that the parties had elected to treat the loss as a partial and not a total loss. This reasoning was treated with scant courtesy by the members of the Court of Appeal. The then Master of the Rolls said "it is perfectly obvious there was" a constructive total loss, and there he leaves the matter. The two Lords Justices (Cotton and Lindley) dismissed the argument equally curtly. The point, however, received as much respect as it deserved. There had been a notice of abandonment, which the underwriters had accepted and acted on by taking the ship and selling it on their own account. That stamped the claim as one for a constructive total loss; and the mere fact that the amount of the claim was abated could not alter its character. The next point taken in the case on behalf of the defendants was that, whether or not there was a total loss as between the shipowners and the original underwriters, there certainly was none as between the plaintiff and the defendants; and this upon the ground that the defendants had not been served in their turn with any notice of abandonment. With reference to this point, the Master of the Rolls said: "It appears that notice of abandonment was given to the first insurers, and that, according to insurance law, was sufficient"; and Lindley, L.J. said: "The point has not perhaps been decided in this country, but it appears to have been considered in America that no notice of abandonment is necessary—at least it has been so laid down in Phillips on Marine Insurance, s. 1506. . . . It seems plain upon principle that no notice of abandonment is necessary in the case of a reinsurance." The soundness of this part of the judgment in *Uzielli's* case is questioned in a note to sect. 1191 in the last edition of Arnould, where it is suggested that when an original insurer has accepted a notice of abandonment from a shipowner he has become entitled to something which he in his turn ought to abandon to his reinsurer. I am not going to criticise the judgment of the Court of Appeal. It is my duty to accept it, and I do it with all the more alacrity because I think it is absolutely right. What is the contract which a reinsurer enters into when he underwrites a policy as existed in *Uzielli's* case and such as exists here? It consists of a promise to indemnify the reinsured against any liability that he may come under to the shipowner in respect of the risk reinsured, and "to pay as may be paid thereon." What is the effect of such a promise? What is the position as between reassured and reinsured? It is, in my opinion, this: the reinsured when called upon to perform his promise is entitled to require the reinsured first to show that a loss of the kind reinsured has in fact happened; and, secondly, that the reinsured has taken all proper and businesslike steps to have the amount of it fairly and carefully ascertained. That is all. He must then pay. He has nothing in his contract, either express or implied, which entitles him to have the ship or to deal with it in any way, though he is no doubt entitled to require that the original underwriters should realise it in such a way as to reduce the loss as much as may be reasonably possible. Nor is he entitled to rip up the settlement between the shipowner and the original underwriter, except upon the ground that it is dishonest or has been arrived at carelessly. So long as liability exists, the mere fact of some honest mistake having occurred in fixing the exact amount of it will afford no excuse for not paying; he has promised to "pay as may be paid thereon." Such is, in my opinion, the meaning and effect of these reinsurance policies, and it follows that a notice of abandonment is inapplicable to them. The third point decided in *Uzielli's* case was that in the circumstances of that case the plaintiffs could recover nothing under the sue and labour clause. It was held that the original underwriters who incurred the suing and labouring expenses were not the "factors or servants or assigns" of the plaintiffs within the meaning of the policy sued on, and that therefore the claim did not come within the clause. Mathew, J. had held differently at the trial. He regarded the original underwriters as the "factors" of everyone concerned in averting a loss, including the ultimate reinsurer, and had accordingly given judgment for 112 per cent.—88 per cent. for the total loss and 24 per cent. for the suing and labouring charges. If it were open to me and necessary to choose between these conflicting judgments, I should prefer that of the judge at the trial. It seems to me that where there is a chain of reinsurance policies and nothing in any of them to qualify the operation of the suing and labouring clause, the intention of all parties is that the clause shall operate to bind each successive underwriter to make good the expenses which have been incurred for his benefit. But it is not necessary to discuss this question. For the purpose in hand—to see whether *Uzielli's* case assists the present plaintiffs—it is sufficient to say that in conclusion the Court of Appeal allowed the plaintiff 100 per cent. It is on this circumstance that the present plaintiffs rely. Counsel for the present plaintiffs asks, "Why did the court give the 12 per cent. beyond the 88 per cent?" And he answers the question by saying, "Because of the clause 'to be paid as may be paid thereon,'" and refers to the last sentence in the judgment of Lindley, L.J. He says the 12 per cent was no part of the total loss, for that had been compromised at 88 per cent.; then he says it was not recoverable under the sue and labour clause, because the court had already declared that no cause of action existed on that clause, and he therefore concludes that it was payable only because of the promise "to pay as may be paid thereon." From this he argues, as I understand, that it is sufficient in the present case to say that the plaintiffs have paid 100 per cent., and that it matters not whether the payment was accepted in satisfaction of a total or a partial loss claim; it was as much as, and no more than, could have been asked for on the basis of a total loss, and, having been paid, is recoverable in this action by virtue of the promise to pay as may be paid on the original policy. On the other hand, counsel on behalf of the defendant in the present case says that the reason why the Court of Appeal allowed the plaintiffs in *Uzielli's* case to recover the 12 per cent. was (as suggested in sect. 866 of

Arnould, 7th edit.) that it could be claimed as a loss due to perils of the sea, and therefore as within the reinsurance policy. Neither of these explanations appear to me to be very satisfactory, for I think that either the whole 24 per cent. ought to have been allowed as recoverable under the sue and labour clause, or none of it if that clause was not operative. But, whatever the explanation may be, I am quite satisfied that the court never meant to say that where there had been in fact no original liability for a constructive total loss the reinsured could recover from his reinsurer on the mere ground that he had paid a sum of money which amounted to what perhaps might have been claimed from him as the amount of such loss if such a loss had happened. The essential difference between the present case and *Uzielli's* case is that in the one there was and in the other there was not a constructive total loss. I think the one case has no application to the other, and that the plaintiffs' claim for a total loss fails.

The other question in the case is whether the plaintiffs can recover on the sue and labour clause I think the answer to that question depends upon the meaning to be put on the written words "no claim to attach to this policy for salvage charges," and, in my opinion, those words are intended to exclude any claim under the printed words in the body of the policy. Counsel for the plaintiffs says that if it had been intended that the printed clause should not form part of the contract it would have been deleted; and he argues that it is possible to give effect to both the print and the writing if the writing be read as referring to salvage charges proper—that is, to a salvage claim arising out of volunteer services. Of course, if I am right in supposing, as I do, that "salvage charges" is an equivalent for suing and labouring expenses (and it will be observed that the word "charges" occurs in the print), then the printed clause and the written clause are inconsistent and the latter must prevail. But, even if I am wrong, I must still consider whether the printed words were intended to stand part of the contract or were by carelessness omitted to be deleted. If the latter, I ought to read the policy without the words; for, although carelessness should be discouraged, it is not to be punished by injustice. It is quite well known that in policies of marine insurance clauses are frequently left standing which are not intended to constitute any part of the contract. "It is," as was said by Walton, J. in *Cunard Steamship Company* v. *Marten*, "obviously necessary in every case to consider carefully the description of the risk or special kind of indemnity expressed in the written words of the policy in order to ascertain whether any particular clause of the printed form applies to the insurance effected by the policy. It is most unusual to find that the superfluous or inapplicable words have been struck out in the printed form." I do not forget the argument of counsel for the plaintiffs that the words in the present case are neither superflous nor inapplicable. I am only drawing attention to the fact that in the hurry of business parties frequently omit to alter the printed words so as to make them exactly conform to the contract which they intend to make. Now, the contract which I have to interpret was first reduced into writing in the form of what is called a "slip"—a memorandum of the heads of agreement initialled by the different underwriters who were subsequently to subscribe policies. On this slip appear the letters "No s/c," which it is agreed means "no salvage charges." In pursuance of this slip the policy now sued on was issued, in which the printed words of the sue and labour clause were not struck out. But it was proved before me that other underwriters on the same slip had issued a policy in which the words were struck out. The plaintiffs apparently accepted both policies without objection. Was one policy right and the other wrong? I think not, for in my opinion both parties knew quite well that the words were inapplicable to the contract they were making, and thought that it was of no importance whether they were left in the print or struck out. "Salvage charges" may no doubt in some connections mean claims for volunteer salvage services. But it is quite common to use the words for the purpose of describing those expenses which come within the scope of suing and labouring expenditure; and several witnesses of great experience were called before me to say, and they did say very plainly, that, used in a policy such as this, they were always understood to bear that meaning and no other. Before the action was tried express notice was given to the plaintiffs that evidence of this kind would be called, and yet the plaintiffs called no one to refute it. I am quite satisfied that, if I were to allow the plaintiffs to recover under the sue and labour clause I should be inventing and giving effect to a contract which the parties never intended to make Further, I think, on the authority of *Aitchison* v. *Lohre* and *Dixon* v. *Sea Insurance Company*, that volunteer salvage would not be recoverable at all under this policy. Such a claim would be a claim for a partial loss arising from perils of the sea, and could not be recovered under a policy limited to total loss only. And, if this is so, it was a useless form to insert the words "no claim for salvage charges" unless they were intended to exclude claims under the sue and labour clause. The fact is that this policy is an indemnity against total or constructive total loss only, and against nothing else, and such a loss has not happened. The plaintiffs' claim therefore wholly fails.

Judgment for defendant.

Solicitors for plaintiffs, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for defendants, *Thomas Cooper* and *Co.*

Tuesday, Feb. 10, 1903.

(Before GRANTHAM, J.)

HERNE BAY STEAMBOAT COMPANY LIMITED v. HUTTON. (a)

Contract—Impossibility of performance—Charter of ship for review and cruise—Review abandoned.

A ship was chartered for the 28th June "for the purposes of viewing the Naval Review and for a day's cruise round the fleet; also on Sunday, the 29th June, for a similar purpose. . . . Price 250l., payable 50l. down, balance before ship leaves H. B."

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

On the Naval Review being abandoned the plaintiffs telegraphed to the defendant: "What about C.? She is ready to start six to-morrow. Waiting cash." Receiving no reply, they continued the C. in her ordinary sailings.

Held, in an action to recover 200l., the balance under the agreement, that the plaintiffs could not recover.

Marquis of Bute *v.* Thompson (13 *M. & W.* 487) *considered.*

Action.

The plaintiffs' claim was for 200*l.*, alleged to be due under an agreement dated the 23rd May 1902, the balance of the hire of the ss. *Cynthia*, and the defendant counter-claimed for 50*l.* paid by him under that agreement.

The plaintiffs were the owners of the *Cynthia*, and after negotiations the following agreement was entered into between the defendant and Henry C. Jones on behalf of the plaintiffs:

George Hutton, 28, Rembrandt-road, Lee, S.E. 23.5.1902.—The *Cynthia* to be at Mr. Hutton's disposal at an approved pier or berth at Southampton on the morning of June 28, perils of the sea, &c., permitting, to take out a party not exceeding the number for which the vessel is licensed to the position assigned by the Admiralty for the purposes of viewing the Naval Review, and for a day's cruise round the fleet; also on Sunday, June 29th, for similar purposes. Owners to provide crew, coals, and all necessary assistance. Mr. Hutton to pay all tolls, pier dues, &c. Owners to have the right of ten persons above crew, &c., on board. Price 250*l.*, payable 50*l.* down, balance before ship leaves Herne Bay.—G. Hutton; Henry C. Jones.

The *Cynthia* was fitted for this trip, and supplied with coal.

When it became known that the review would not take place, the plaintiffs telegraphed to the defendant on the 26th June: "What about *Cynthia?* She is ready to start six to-morrow. Waiting cash.—Jones, Herne Bay."

No reply being received, the ordinary sailings of the *Cynthia* were continued by the plaintiffs on the days mentioned in the agreement of the 23rd May, and the difference between the takings on those days and the price under the agreement was 90*l.*

Hansell (*Firminger* with him) for the defendant.—The plaintiffs cannot recover in this action, which is covered by the decisions in *Blakeley* v. *Müller* and *Hobson* v. *Pattenden* (88 L. T. Rep. 90). There it was plainly laid down, following the decisions in *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826) and *Appleby* v. *Meyers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651), that where performance of a contract becomes impossible, both parties are excused from any further performance under it. He also referred to

Nicholl and Knight v. *Ashton* (84 L. T. Rep. 804; 9 Asp. Mar. Law Cas. 209; (1901) 2 K. B. 126.

Here the contract was to charter the vessel for the purpose of viewing the Naval Review, and as the Naval Review did not take place the balance of the money for the hire of that vessel cannot be recovered.

Montague Lush, K.C. (*A. S. Poyser* with him) for the plaintiffs.—This was a contract to hire the vessel for two days, and the principle which applies to the case of seats to view the Coronation does not apply here. Although the contract was that the ship was for the purpose of viewing the Naval Review it was also for a cruise round the fleet on the 28th June, and for a similar purpose on the 29th June. If a contract is made in the expectation that a certain state of things will exist, the contract may be binding although that state of things does not exist. He referred to

Marquis of Bute v. *Thompson*, 13 M. & W. 487.

Grantham, J.—I have no doubt what my judgment should be in this case, and that is for the defendant. I think the case is one which has been brought within the old authorities which have been cited, and which I think determine the principle upon which most of the latter cases have been determined. With regard to the case Mr. Lush has mentioned of *Marquis of Bute v. Thompson* (13 M. & W. 487), it is a very old case, a very much older case than *Appleby* v. *Meyers* (16 L. T. Rep. 669), decided by Blackburn, J. I do not say Blackburn, J.'s decision is not compatible with it, but I have no doubt that if the earlier case had been argued after the decision of Blackburn, J. the decision would have been different. It may be it was binding as far as it goes with regard to a dead rent which has to be paid under colliery contracts or mining contracts whether they work or do not. A great deal has to be said for that, and it has to be paid under all circumstances. In this case, to my mind, there are many distinctions between that case and what we have to determine here to-day. With regard to the differences between that case, and those Mr. Lush referred to, upon which he bases his claim for judgment, I think the difference is all against him. In the first place this is a ship, and the ship when complete with coal and with a crew is capable of going about and earning money for the person who has made a contract, and who is in the unfortunate position of not being able to fulfil it under the circumstances which arose. In the case of the seats put up they are absolutely useless. A person may be put to a very great expense indeed in erecting seats and paying money to the freeholder to view some spectacle, and yet if the spectacle does not take place the whole of the money spent by him has gone absolutely. The seats are useless and could not be used for anything else. In fact, not only that; not only do the persons incur very great expense in putting up the seats, but expense has to be incurred in pulling them down. Here the plaintiffs fortunately are in the position of being able to do something with the ship in the way of other employment, and the money which they spent no doubt in doing the ship up and paying the crew and buying coal was an available asset for the use of the ship afterwards. I do not mean to say they got the full value for it, for they did not, but at the same time they got something. The plaintiffs behaved very honourably in that matter by endeavouring to lessen the loss to the defendant (if he was liable) as much as they did. They keep her on her route and send her out as much as they possibly can. They could not do that with the seats; they would be fixtures and quite useless.

That being the position of the two parties, that shows the way this case differs from the others. The plaintiffs are in a little more fortunate position, and so is the defendant also, because he may reduce his liability. Now, it is said in the next place by Mr. Lush that there was a part of a

contract which could be performed because the contract was a two-fold one. It purported to be for the Naval Review, and for a day's cruise round the fleet, and it was stated that the second part of the contract could have been performed. It seems to me there is something to be said with reference to that. The fleet was there, there is no doubt, although some of it may have gone, but I think the fair way to test it is to see what was the contract contemplated. Was it not a contract between these two parties which would put the defendant in a position to enter into a *quasi* similar contract with people who wanted to see the Naval Review—that is to say, the people who would go to see the Naval Review and go round the fleet? But if he had done what he would be obliged to do, to put up a notice, "The Naval Review is off; the fleet is there. Will you go down and see the fleet?" how many people would have taken a ticket? I do not think that the defendant is liable to pay the money to the plaintiffs. The primary part was the Naval Review, and the other was merely secondary to that, and without the primary part of the contract the other is useless. It cannot have been in the contemplation of the parties that this should be a contract for merely going round the fleet. That I find as a fact. Then, looking at the contract, I have to see whether or not the plaintiffs fulfilled their part of the contract. I do not think the plaintiffs did so as to entitle them to this money, because this money is not to be paid until the ship leaves. The sum contracted for was 200*l.* She never did leave, and therefore the plaintiffs have not performed their part of the contract. Why she did not leave was because the plaintiffs were endeavouring to reduce the loss as much as they could, but I have to determine this on the strict legal aspect of the contract which was made between the parties before they knew there was likely to be any difficulty. As the plaintiffs found there was this difficulty, and they would very likely have a difficulty in getting the money, they first of all telegraphed to the address given them, then to the defendant's home, and got no reply. That may have been quite accidental on the defendant's part, but there is no evidence to show anything about that except there is nothing to show that he did not receive the first one or either of them. Without waiting for any reply the plaintiffs themselves determined the contract because they, without getting any authority, and relying upon the full benefit of the contract, and the agreement made, took the boat off the route to which she was invited and to which the contract applies, and used her by sending her somewhere else, and making money out of her. Under these circumstances it seems to me the plaintiffs are not entitled to recover the 200*l.*, and my judgment is for the defendant.

Judgment accordingly.

Solicitors: *Jones* and *Hamp*; *Biggs, Roche, Sawyer*, and *Co.*

March 4 *and* 9, 1903.

(Before WALTON, J.)

SHILLITO *v.* BIGGART AND ANOTHER. (*a*)

Mortgage of ship — Possession by mortgagee — Freight due but unpaid at date of possession by mortgagee—Right of mortgagee to unpaid freight.

A mortgagee of a ship, on taking possession of the ship under the mortgage, does not become entitled as against an assignee of the freight to receive freight which is due and payable to the ship-owner before the mortgagee takes possession, but which is unpaid at the time when the mortgagee so takes possession.

INTERPLEADER issue tried before Walton, J. as a commercial cause, the question being whether a sum of 527*l.* 9*s.* 11*d.* was the property of the plaintiff or of the defendants.

On the 11th Oct. 1900 Messrs. Woodruff, Shillito, and Co., by a mortgage of that date, mortgaged their ship *Craigearn* to the defendants, Messrs. Biggart and Fulton, and the mortgage was duly registered under the provisions of the Merchant Shipping Acts then in force.

Under a charter-party dated the 26th March 1902 the Brazilian Coal Company Limited (whose agents in London were Cory Brothers and Co. Limited) owed a sum of 527*l.* 9*s.* 11*d.* for freight to Messrs. Woodruff, Shillito, and Co., owners of the *Craigearn*, in respect of the carriage of a cargo of coal from Cardiff to Santos by that ship. This balance of freight of 527*l.* 9*s.* 11*d.* became due and payable to Messrs. Woodruff, Shillito, and Co. on the 17th June 1902

On or about the 9th Aug. 1902 Woodruff, Shillito, and Co. assigned to the plaintiff in the interpleader issue (Edwin Shillito) this sum of 527*l.* 9*s.* 11*d.*, due from the Brazilian Coal Company to Woodruff, Shillito, and Co. as registered owners of the *Craigearn*, and on the 24th Nov. 1902 they executed a legal assignment of the freight so assigned on the 9th Aug., and notice of this assignment was served upon the Brazilian Coal Company.

The vessel, after discharging her cargo of coal at Santos, loaded a cargo in the River Plate for Hull; she arrived in Hull on the 14th Aug. 1902, and on her arrival the defendants, Messrs. Biggart and Fulton, entered into possession of the vessel as mortgagees under the mortgage of the 11th Oct. 1900, and at the time when they so entered into possession the balance of freight of 527*l.* 9*s.* 11*d.*, although due and payable on the 17th June 1902, had not in fact been paid.

On the 22nd Oct. 1902 an action was commenced by Messrs. Biggart and Fulton against the Brazilian Coal Company Limited and their agents in London, Cory Brothers and Co. (in whose hands the money was), for the recovery of this balance of freight.

Messrs. Biggart and Fulton claimed the balance of freight as first mortgagees under the mortgage of the 11th Oct. 1900. The balance was also claimed by the plaintiff under his assignment as second mortgagee of the ship.

Ultimately it was ordered that the defendants Cory Brothers and Co. should pay the sum into court, after deducting the amount of the defendants' costs of the action to be taxed, and an

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

interpleader issue was ordered in which E. Shillito was to be the plaintiff and Biggart and Fulton the defendants.

This issue recited that there had been paid into court the 527*l.* 9*s.* 11*d.* (less the taxed costs), being the balance due from the Brazilian Coal Company to Woodruff, Shillito, and Co., the then registered owners of the ship, in respect of the freight in question; that Edwin Shillito affirmed that the rights of the owners of the steamship to this balance of freight had passed to and been assigned to and were vested in him, and that he was entitled to have this balance paid to him; that Messrs. Biggart and Fulton affirmed that they as first mortgagees in possession (before payment of the balance of freight) of the ship were entitled to the balance of freight, and that their claim took priority of any claim by, or rights of, the owners of the steamship or those who claimed under them, in respect of the balance of freight.

The question to be tried was whether the sum of 527*l.* 9*s.* 11*d.* (less taxed costs) was the property of Edwin Shillito (the plaintiff in the issue) or of Messrs. Biggart and Fulton (the defendants in the issue).

For the plaintiff it was contended that the defendants, though they might have been entitled to freight which became due after they took possession as mortgagees, were not entitled to the freight which was earned and became due and payable before the date when the defendants as mortgagees entered into possession of the ship, although such freight had not been paid at the time when the mortgagees took possession; that such freight was still payable to the shipowners; and that the plaintiff was entitled to receive the same as assignee of the shipowners.

For the defendants it was contended that they were entitled to receive all freight which remained unpaid at the date of their taking possession, although such freight was due and payable before they took possession.

J. A. Hamilton, K.C. and *Loehnis* for the plaintiff.

Pickford, K.C. and *Joseph Hurst* for the defendants.—In addition to the cases referred to in the judgment, the following cases were cited:

Rusden v. *Pope*, 18 L. T. Rep. 651; L. Rep. 3 Ex. 269;
Japp v. *Campbell*, 57 L. J. 79, Q. B.;
The Benwell Tower, 72 L. T. Rep. 664; 8 Asp. M. C. 13.

Cur. adv. vult.

March 9.—WALTON, J. read the following judgment:—In this interpleader issue the question is whether a sum of 527*l.* 9*s.* 11*d.*, which is in court, is the property of the plaintiff or of the defendants. The sum in question is a balance of freight which became due from the Brazilian Coal Company Limited to Woodruff, Shillito, and Co., who were owners of the steamship *Craigearn*, in respect of the carriage of a cargo of coals to Santos by such steamship. This balance of freight was earned and became due and payable on the 17th June 1902. The plaintiff claims it as the assignee of the shipowners, Messrs. Woodruff, Shillito, and Co. The defendants dispute his claim, and contend that they are entitled to the money in question as mortgagees of the steamship by a mortgage dated the 11th Oct. 1900. After discharging her cargo of coals at Santos the steamer loaded a cargo in the River Plate for Hull, where she arrived on the 14th Aug. 1902, and on her arrival the defendants entered into possession of the steamship as mortgagees. Although the freight in question had become due on the 17th June, it had not been paid when the mortgagees entered into possession on or about the 14th Aug. 1902. The defendants contend that they are entitled to all freight earned by the vessel and unpaid at the time when they entered into possession. The plaintiff, on the other hand, contends that, although the defendants are entitled to freight which became due after they took possession, they are not entitled to freight which became due and payable before, although it may not have been paid until after they took possession. It is somewhat surprising to find that the question which arises in the present case has not been settled by an express decision in some reported case. I am not satisfied that *Chinnery* v. *Blackburne* (1 H. Bl. 117, n.) is precisely in point. The judgment of Parker, V.C. in *Cato* v. *Irving* (18 L. T. Rep. O. S. 345; 5 De G. & Sm. 210) proceeds upon the assumption that the mortgagee of a ship is not entitled to freight unless he takes possession before the freight has accrued due. The Vice-Chancellor there says (18 L. T. Rep. O. S., at p. 346; 5 De G. & Sm., at p. 224): "The authorities referred to in the argument establish that the mortgagee of a ship, who takes possession before the conclusion of the voyage, is entitled to the then accruing freight. It was contended by the defendants that the present case does not come within this rule because the plaintiffs did not take possession until the ship was in the docks, and the voyage therefore concluded. I consider that a mortgagee who takes possession of the ship at any time before the cargo is discharged comes within the rule. The right to the freight does not accrue until the goods are not only conveyed to their destination, but are also delivered; and a mortgagee who takes lawful possession of the ship while the goods are still on board, and is thereby entitled to deliver the goods and receive the freight, to the exclusion of the mortgagor, must be as much within the reason of the rule when the ship is in the docks as where she is only on her way to the docks at the time when possession is taken." This was in the year 1852. In *Brown* v. *Tanner* (18 L. T. Rep. 624; 3 Mar. Law Cas. O. S. 94; L. Rep. 3 Ch. App. 597) the Lords Justices in the year 1868 had to deal with a question as to a mortgagee's right to freight. In delivering the judgment of the court, Page-Wood, L.J. said: "But it appears to us that this case must be determined in the appellant's favour on the ground of his having taken possession of the ship before the freight under the charter-party had become due. It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken." The defendants rely upon the last sentence in this passage of the judgment as indicating that in the opinion of the Lord Justice the mortgagee on taking possession became entitled to all freights then due and unpaid. I think, however, that the

Lord Justice meant no more than that the mortgagee on taking possession became entitled to all unpaid freight which the ship was then in the course of earning. This seems clear from what follows in the judgment. At p. 603 (L. Rep. 3 Ch. App.; 18 L. T. Rep., at p. 626) the Lord Justice says: "The only question then really is, Had the freight become due when the appellant took possession? And this point we wished to have reargued, the matter not appearing to have been fully discussed either in the court below or at the first hearing before us." And the Lord Justice proceeds to consider this question and comes to the conclusion that the freight had not been earned before the mortgagee took possession, and that therefore the mortgagee was entitled to it. In *Liverpool Marine Credit Company* v. *Wilson* (26 L. T. Rep 717, at p. 719; 1 Asp. Mar. Law Cas., at p. 324; L. Rep. 7 Ch. 507, at p. 511), James, L.J., in delivering the judgment of himself and Mellish, L.J., stated the law upon this subject as follows: "He (the mortgagee) had no absolute right to the freight as an incident to his mortgage; he could not intercept the freight by giving notice to the charterer before payment; but if he took actual possession, or, according to a recent decision in the Court of Exchequer, if he took constructive possession of the ship before the freight was actually earned, he thus became entitled to the freight as an incident of his legal possessory right, just as a mortgagee of land taking actual possession of the land before severance of the growing crops would have the right to sever and take the crops." In *Keith* v. *Burrows* (37 L. T. Rep. 291; 3 Asp. Mar. Law Cas. 481; 2 App. Cas. 636) Lord Cairns, as I understand him, states the law to the same effect at p. 646 (2 App. Cas.; 37 L. T. Rep., at p. 292), and Lord Blackburn at the top of p. 660 (2 App. Cas.); and in *Anderson* v. *Butler's Wharf Company Limited* (48 L. J. 824, Ch.) Hall, V.C. stated the result of the decisions as follows: "In the case of the mortgagee of a ship, which was referred to in the argument, the mortgagee is not entitled to the earnings of the ship, except the earnings thereof after the time of his taking possession." The defendants relied upon certain dicta of Malins, V.C. in *Wilson* v. *Wilson* (26 L. T. Rep. 346; L. Rep. 14 Eq. 32); but, when carefully considered, the language of the Vice-Chancellor does not appear to me to be really inconsistent with the statements of the law to which I have already referred. In the present case it is admitted that the freight in question became due and payable before the defendants entered into possession, and for this reason I think the defendants' claim fails, and that the plaintiff is entitled to judgment.

Judgment for the plaintiff. Leave to appeal.

Solicitors for the plaintiff, *Botterell* and *Roche*, for *Vaughan* and *Roche*, Cardiff.

Solicitors for the defendants, *E. F. Turner* and *Son*.

March 4, 5, 6, *and* 11, 1903.

(Before WALTON, J.)

PRICE AND CO. v. UNION LIGHTERAGE COMPANY LIMITED. (a)

Carrier — Lighterman — Contract of carriage — Exemption in contract for "loss of or damage to goods which can be covered by insurance" — Loss by negligence of carrier's servants — Liability of carrier.

A contract of carriage, by which the owners of a barge contracted to carry a cargo of oil from a wharf in the river Thames to another part of the river, contained a clause that the barge-owners were not to be liable "for any loss or damage to goods which can be covered by insurance." The oil was shipped on the barge, and through the negligence of the barge-owners' servants the barge was sunk and the oil lost.

Held, that the clause did not exempt the carriers from the obligation of using reasonable skill and care in the carriage of the goods, and therefore did not exempt them from liability for loss or damage to the goods caused by the negligence of their servants.

If a carrier in such cases wishes to protect himself by contract from liability for the negligence of himself or his servants, he must do so in express and unambiguous terms.

COMMERCIAL CAUSE tried before Walton, J. without a jury.

The plaintiffs claimed 371*l.* damages for the loss of a cargo of petroleum oil on the defendants' barge *Iron King*.

The plaintiffs alleged that a verbal contract was made between them and the defendants in the month of Oct. 1902 for the carriage by the defendants in their barge *Iron King* of a cargo of petroleum from the Roumanian Oil Trust Company's wharf at Thames Haven to Belvedere; that there were breaches of this contract by the defendants whereby the barge sank at the Roumanian Company's wharf, and the plaintiffs' petroleum, amounting to 107 tons 13cwt., and of the value of 371*l.*, was lost. They alleged in support of their claim that the barge was unseaworthy and unfit for the carriage of the cargo in certain specified particulars, and also that the defendants' servant in charge of the barge was negligent in certain respects, by reason whereof the barge became jammed under a projection from the wharf as the tide rose, and sank at her moorings. The acts of negligence alleged were that the defendants' servant improperly moored the barge to the wharf; that he did not properly attend to the mooring ropes as the tide fell and rose; that he did not stand by the barge as the tide rose, and that he did not, in accordance with the usual practice, remove the barge when loaded to one of the buoys provided for that purpose.

The defendants in their points of defence said that, as the plaintiffs well knew, they carried goods in the ordinary course of business on the terms that they were not liable for any loss of or damage to goods which could be covered by insurance, and that such insurance must be effected without recourse to lighterman; that these terms were part of the contract, and that, while admitting that the barge sank and the oil was lost, the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

loss was covered by insurance, and in the alternative they denied that the barge was unseaworthy or that their servant was negligent, and said that the loss was caused by the action of the wind and tide jamming the barge under the jetty, and that they were not liable therefor.

The contract was not in writing, but it was admitted by the parties that the lighterage was subject to the following clause which was printed on the defendants' forms:

The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman.

The oil was shipped on the barge about high water on the day in question, and the barge when loaded was allowed to remain moored to the jetty until after low water. There were projections from the face of the jetty, and as the barge rose with the rising tide its gunwale caught against one of these projections from the jetty, and as the tide rose the barge was held down and was in consequence submerged and sunk and the oil was lost. The barge was left unattended by the defendants' servants as the tide rose, and the plaintiffs alleged that the loss was caused by the negligence of the defendants' servants in so leaving the barge unattended while the tide was rising.

The defendants contended that the loss was a loss by perils of the seas and therefore one which could have been covered by insurance, and that therefore they were protected by the terms of the clause in question, even if the loss were caused by the negligence of themselves or their servants.

J. A. Hamilton, K.C. and *Bailhache* for the plaintiffs.

Scrutton, K.C. and *Loehnis* for the defendants.

The cases cited are referred to in the judgment.

Cur. adv. vult.

March 11.—WALTON, J. read the following judgment:—In this case the plaintiffs seek to recover damages from the defendants for the loss of a quantity of oil which was shipped at a jetty at Thames Haven in a barge of the defendants under a contract between them and the plaintiffs, by which the defendants agreed to receive and lighter the oil for the plaintiffs to Belvedere up the river Thames. The oil was shipped about high water early in the afternoon of the 31st Oct. 1902, and the barge when loaded was allowed to remain moored to the jetty until after low water. As the barge rose with the rising tide its gunwale caught under a projecting part of the face of the jetty, against which it was lying, and as the tide rose the barge was held down and so was submerged and sunk. The plaintiffs allege that the loss was caused by the negligence of the defendants' lightermen in leaving the barge unattended during the rise of the tide, or by the unseaworthiness of the barge, or by both causes. In my opinion the plaintiffs have failed to prove that the barge was unseaworthy, and it follows that if they are entitled to succeed at all it must be on the ground that the loss was caused by the negligence of the defendants' servant. As to this the defendants say that by the terms of the contract they are exempt from liability for a loss so caused, and they say further that there was no negligence. It is necessary, therefore, to ascertain what the terms of the contract were. The contract was not contained in any written document, but it is admitted that by the course of dealing between the parties the lighterage was subject to the terms of a clause which was printed on the forms of stationery used by the defendants in their business, and is as follows: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman. We will not be responsible for any consequences arising from strikes or other labour disturbances." In dealing with the question of construction, I shall assume that the loss was brought about by the negligence of the defendants' lighterman. Upon the question of construction, the controversy between the parties is as to whether the clause in question exempts the lighterage company from liability for a loss caused by the negligence of their servants. It is plain that such a loss as occurred in the present case is covered by an ordinary marine policy. The loss of cargo by the accidental sinking of a barge is a loss by perils of the sea, and is recoverable from underwriters as such whether brought about by the negligence of the lighterman or not. It may be and probably is true that when the clause speaks of losses which can be covered by insurance, it means losses which can be covered by insurance in the ordinary course of business. Negligence of lightermen is not one of the risks named in the common forms of policies on goods, but there is no doubt it can be insured against specifically without any difficulty, and, as I have said, a loss such as occurred in the present case is covered even by the ordinary form of a marine policy on goods, whether the loss was brought about by negligence or not. It follows that the words of the clause, "loss of goods which can be covered by insurance," are wide enough to include the loss which occurred in this case, even assuming that it was caused by negligence. And if it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases and looking only at the language used, it might very well be said that its meaning was that the defendants were to be exempt from liability for insurable losses whether caused by negligence or not. But there is, I think, a well-established rule of construction applicable to the present case. The law of England, unlike in this respect to the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants, but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms. In *Phillips* v. *Clark* (29 L. T. Rep. O. S. 181; 2 C. B. N. S. 156) the damage was by leakage and breakage, and by the bill of lading the shipowner was "not to be accountable for leakage and breakage"; but it was held that if the leakage and breakage were due to the negligence of the servants of the shipowner he was not protected from liability by the exemption in the bill of lading. In that case Willes, J. said (2 C. B.

N. S., at pp. 163-4): "The introduction of the words in the margin of the bill of lading is sufficiently accounted for by the fact that without them the defendant would have been bound to the strictest care, so as to deliver the goods at the end of the voyage in the same state and condition as they were in when he received them, without reference to negligence. It appears from the observations of Lord Wensleydale in *Walker* v. *Jackson* (10 M. & W. 161, at p. 169), that, in the absence of fraud, the carrier is bound as an insurer to carry and deliver the goods as they are when he receives them—as is pointed out by some members of the court in *Wyld* v. *Pickford* (8 M. & W. 443). The defendant gets rid of that liability in the present case by the introduction of the words 'not accountable for leakage or breakage,' but not of the obligation which the law imposes upon him of taking reasonable care of the goods intrusted to him . . . The true meaning of this contract is—'I will take all reasonable care of the goods, but will not be accountable for a loss arising from leakage or breakage such as usually happens without the exercise of extraordinary care.' The owner engages only to abstain from negligence." In *Steinman and Co.* v. *Angier Line Limited* (64 L. T. Rep. 613; 7 Asp. Mar. Law Cas. 46; (1891) 1 Q. B. 619) the exemption in the bill of lading was from liability from losses caused by "thieves of whatever kind, whether on board or not," but the court held that this did not protect the shipowner from liability for a theft committed by his servants. The general rule is stated by Bowen, L.J. in his judgment as follows (64 L. T. Rep., at p. 615; 7 Asp. Mar. Law Cas., at p. 48; (1891) 1 Q. B., at pp. 623-4): "This question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as land—namely, that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions, the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss. Accordingly, in *Grill* v. *General Iron Screw Collier Company Limited* (14 L. T. Rep. 711; L. Rep 1 C. P. 600; on appeal, 18 L. T. Rep. 485; 3 Mar. Law Cas. O. S. 77; L. Rep. 3 C. P. 476), an exception in a bill of lading of 'accidents of whatever nature or kind soever' was held not to cover a collision caused by the negligence of master and crew: (see also *Phillips* v. *Clark, ubi sup.*; *Czech* v. *General Steam Navigation Company*, 17 L. T. Rep. 246; 3 Mar. Law Cas. O. S. 5; L. Rep. 3 C. P. 14). It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils; the exception, in other words, limits the liability, not the duty." I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as insurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words.

I may refer to *Mitchell* v. *Lancashire and Yorkshire Railway Company* (33 L. T. Rep. 161; L. Rep. 10 Q. B. 256) as another illustration of this rule. There the carriers, who were the Lancashire and Yorkshire Railway Company, after the goods had arrived at their destination, gave notice to the consignees that the railway company held the goods to the order of the consignees "not as carriers but as warehousemen, at owner's sole risk." But it was held that the words "at owner's sole risk" amounted to no more than a notice that the railway company after giving such notice undertook no liability as insurers, and did not relieve them from liability for a loss arising from the negligence of their servants. It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants, he must insert in his contract in one form or another something equivalent to what is well known as a negligence clause. I think that this view of the law as applicable to the present case is, at all events, supported by the judgment of the House of Lords in *Sutton and Co.* v. *Ciceri and Co.* (62 L. T. Rep. 742; 15 App. Cas. 144); and I may point out, as Lord Herschell did in that case, that the clause in question in this case, as in that, seems to refer to conveyance in contradistinction to insurance. I think that, in obedience to the rule laid down in the cases which I have cited, the clause must be read as meaning: "I will use reasonable skill and care in the conveyance of the goods, but I will not undertake any liability as insurer for loss or damage which can be covered by insurance with underwriters." In my opinion, therefore, if the loss was in fact caused by the negligence of the lighterman the defendants are liable. It may be convenient to add a reference to the case of *Compania de Navigacion La Flecha* v. *Brauer* (168 U. S. Rep., or 61 Davis, 104), in which the Supreme Court of the United States had to consider the effect of the English authorities upon this question. I have now to consider whether there was negligence in fact. I have considered the evidence given on each side, and have arrived at the following conclusions: There were projections from the face of the jetty against which the barge was moored, which, in my opinion, made it dangerous to leave the barge unattended after low water to rise with the tide. I think the danger was apparent. It is true that there was a floating boom attached to the jetty, which was intended to act as a fender to prevent barges whilst loading from striking against the woodwork of the jetty. But it is clear that this was insufficient to prevent barges, if unattended, from getting caught, as they rose with the tide, under the projecting parts of the jetty. I am satisfied from the evidence that it was not reasonable or proper to leave the barge unattended, relying on the boom to prevent such an accident as in fact occurred. It is said that no such accident had

occurred before. But there is no evidence to show that it was usual to leave loaded barges unattended and moored to the jetty to rise with the tide. On the contrary, there were buoys provided just above and just below the jetty for loaded barges to moor at whilst waiting for their tugs; and in the present case, after the barge was loaded, the lighterman was told to take the barge to one of the buoys, but he neglected to do so because, in my opinion, he did not care to take the trouble to move the barge, and thought that his tug might perhaps come at or about low water. I am satisfied also upon the evidence that the lighterman did leave the barge without sufficient or proper attendance. He says that after leaving the jetty in the afternoon he returned two or three times to look after the barge. I cannot accept his evidence as to these visits as accurate; and I have no doubt that he neglected to attend to the barge reasonably and properly under the circumstances. I agree that it is not in all cases necessary that a lighterman should be in attendance upon a barge moored in the river. If, for instance, this barge had been moored at one of the buoys, it might, I think, have been left unattended without danger. But I am satisfied that it was not reasonably safe or proper, at all events after the tide began to rise, to leave this barge moored as she was without attendance. In consequence of the barge being so left her gunwale caught under a projection of the jetty and she sank. I think that the defendants are liable for the loss thereby occasioned. There will be judgment for the plaintiffs for 370*l.* 3*s.* 7*d.* with costs, except the costs of the issue of unseaworthiness, which are to be paid by the plaintiffs.

Judgment for the plaintiffs for 370*l.* 3*s.* 7*d.*

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitors for the defendants, *Charles E. Harvey.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, April 3, 1903.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE EMILIE GALLINE. (a)

Salvage—Collision—Service without engagement—Right to reward.

The steamship G. *while coming out of dock with the tugs* H. *and* S. G. *in attendance fouled her propeller, and drove against the barque* E. G., *which was lying moored to the dock wall with three tugs fast to her, waiting to go into dock, causing her to break her moorings, and drift down with the* G. *on to a sandbank. The* G. was *eventually towed clear by her tugs, and the* E. G. *was then towed off. In an action for salvage by the five tugs against the* E. G.:

Held, that the three tugs in attendance on the E. G. *were, under the circumstances, entitled to salvage, but that there was not sufficient evidence, according to the principle laid down in* The Vandyck (47 *L. T. Rep.* 694; 5 *Asp. Mar. Law Cas.* 17; 7 *P. Div.* 42), *from which a constructive acceptance of the services of the tugs* H. *and* S. G. *could be inferred, and that they were not entitled to salvage.*

ACTION for salvage by the owners, masters, and crews of the tugs *Scotsman, Humber, Powerful, Huntsman,* and *Stephen Gray* against the owners of the French barque *Emilie Galline,* the owners of her cargo, and freight.

The *Emilie Galline* was a steel barque of 2040 tons register belonging to Havre, and at the time the services were rendered was on a voyage from San Francisco to Hull with a cargo of grain, and manned by a crew of twenty-three hands all told.

The value of the *Emilie Galline* was 9750*l.*, of her cargo 13,429*l.*, and of her freight at risk 3201*l.*, making 26,380*l.* in all.

The plaintiffs' case was that on the 31st Jan. 1903 the services of the *Scotsman* were engaged off Spurn Head to tow the *Emilie Galline* up to Hull, and in Grimsby Roads the *Humber* was also engaged to assist in docking her.

The vessels reached the Alexandra Dock about 8.15 a.m., and on her arrival the *Emilie Galline* was ordered by the dock master to wait alongside the eastern pierhead until her turn came to enter.

The weather at the time was a gale from the S.W., and there was a strong ebb tide running, and, in addition to being moored head towards the dock, the *Scotsman* was lashed to her port side, and the *Humber,* which was fast to her port quarter, towed to the W.S.W. to keep her stern in position, whilst the services of a third tug, the *Powerful,* were also engaged to straighten her as she went into the dock.

Under these circumstances the *Gorjistan,* a steamship of 3261 tons gross register, in water ballast, left the dock in tow of the tug *Huntsman,* and in doing so her propeller was fouled by a rope which had been used as her after check rope. She fell down towards the *Emilie Galline* under the force of wind and tide and with her forward davit on the port side fouled the jibboom of the barque, and, as she drove ahead, forced her bodily astern until she took the ground on the Hebbles Bank.

The *Scotsman* held on to the *Emilie Galline,* and by order of the pilot went ahead and prevented her being swept into the river, as all except one of her mooring ropes had parted.

The *Humber* also held on, and kept the barque's stern up, and in so doing was caught between the *Gorjistan* and the *Emilie Galline* and seriously damaged.

In the meanwhile the *Emilie Galline* lay heading about W.N.W., having grounded fore and aft, and with the *Gorjistan* locked to her on the port side and pressing against her owing to the force of wind and tide.

The *Huntsman* continued all this time fast to the *Gorjistan,* and towed off her starboard bow, and the *Stephen Gray*—which had previously been assisting the *Gorjistan*—was hailed to take a rope from her starboard quarter. After towing for about half an hour the *Huntsman* and the *Stephen Gray* got the *Gorjistan* clear of the barque, and subsequently the other three tugs towed the *Emilie Galline* off the bank and took her into dock.

The defendants did not admit the facts alleged by the plaintiffs, and contended that the *Emilie*

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Galline was at no time in a position of real danger. They also contended that the services of the *Scotsman*, *Humber*, and *Powerful* were little more than towage within their towage agreements, and that no services were rendered by the *Huntsman* and *Stephen Gray*, and that such services as were rendered to the *Gorjistan* came within their towage agreement.

Aspinall, K.C. and *Lauriston Batten* for the plaintiffs.—It is submitted that the tugs *Huntsman* and *Stephen Gray* rendered valuable services to the *Emilie Galline* in towing the *Gorjistan* away. The services were of direct benefit to the *Emilie Galline*, and consequently should be remunerated by her. No prudent master would have refused the services of the tugs had they been offered him. The services were outside the ordinary towage agreement between the tugs and the steamship:

The Annapolis, Lush. 355;
The Vandyck, 47 L. T. Rep. 694; 5 Asp. Mar. Law Cas. 17; 7 P. Div. 42.

The tugs *Scotsman*, *Powerful*, and *Humber* performed valuable services to the *Emilie Galline*, and are entitled to be rewarded for them.

Laing, K.C. and *Stubbs* for the defendants.—The *Huntsman* and *Stephen Gray* were under contract to assist the *Gorjistan*, and were bound to tow her clear. There was no request on the part of the *Emilie Galline*, and no request can be implied, nor can it be said that a prudent master would, under the circumstances, have engaged their services, for there were already three tugs fast to the *Emilie Galline*. Possibly the *Huntsman* and *Stephen Gray* might have a claim against the *Gorjistan* for salvage, but that question does not arise in this case:

The J. C. Potter, 23 L. T. Rep. 603; 3 Mar. Law Cas. O. S. 506; L. Rep. 3 A. & E. 292.

Aspinall, K.C. in reply.

BUCKNILL, J.—In this action salvage claims are made by five tugs—the *Scotsman*, the *Humber*, the *Powerful*, the *Huntsman*, and the *Stephen Gray*—and the question arises how many of them are entitled at law to salvage; and, secondly, how much is due to such of them as are so entitled. The facts of the case are not difficult, and may be taken to be almost admitted, so far as they raise the question of law. The barque *Emilie Galline* wanted to be docked in the Alexandra Dock, and she had two tugs in attendance on her under contract—the *Scotsman* and the *Humber*—and by accident, so far as those tugs are concerned, she eventually got aground on the East Hebbles. The way she got there was this. She had been brought up, in a gale of wind, to the entrance of the Alexandra Dock, where she had been properly made fast whilst waiting for certain vessels to come out of dock before she herself could go in. The first of those vessels passed out safely, but another vessel, the *Gorjistan*, a large steamer, was following the first steamer out, preceded by a tug, the *Huntsman*, which was made fast to her, and followed by the *Stephen Gray*, which was not fast to her, when by the negligence of somebody—not being the negligence of those on the *Huntsman* or the *Stephen Gray*, but by the negligence of some other person, either on the *Gorjistan* or the dock-head—the *Gorjistan* got a rope foul of her propeller, with the result that she fouled the barque, and squeezed down upon the tug *Scotsman*, pinching or nipping her between herself and the barque, and carrying away all the head-lines by which the barque was made fast to the dock-head, except one wire hawser. In that way the barque, the *Scotsman*, and the *Gorjistan* went down river until the barque was brought up by touching the ground, and the two ships, with the *Scotsman* in between them, remained in that position for about an hour, until the *Gorjistan* was towed free from the barque by the *Huntsman* and the *Stephen Gray*. Those two tugs are plaintiffs in this action, and the question is whether in law they are entitled to succeed. Two cases have been cited in support of their claim. The first is *The Annapolis* (*ubi sup.*), in which the Privy Council affirmed a decision of Dr. Lushington, and the other is the more recent case of *The Vandyck* (*ubi sup.*). Now, in neither of these cases are the facts the same as in this case. In the case of *The Vandyck* (*ubi sup.*) the facts were, shortly, that the plaintiffs' tug, the *Stormcock*, was lying alongside the Liverpool landing-stage when she saw two steamships in contact over on the Cheshire side of the river; that one of those vessels was at anchor, and the other was the *Vandyck*, which had driven down river until she got athwart the hawse of the other ship; that the vessels were grinding together, and, in consequence of the propeller of the *Vandyck* being fouled, that vessel was powerless to get away by her own steam; that the *Stormcock* went across the river, and, without any contract being made with the *Vandyck*, got hold of the other vessel and dragged her away. The question was whether the *Stormcock* was entitled to claim salvage from the *Vandyck*. The court said "Yes," on the ground that any prudent man in the position of the master of the *Vandyck* would, if asked the question, have said, in answer to it, "By all means get me away from this vessel as soon as you can," and the question I have to ask myself here is: Would the master of the *Emilie Galline*, as a reasonably prudent man, if he had been asked by the tugs *Huntsman* and *Stephen Gray*, or one of them, whether they should free the steamer from the barque, have said "Yes" or "No"? The evidence does not enable me to answer the question one way or the other. Therefore I have to look at the question from a broader point of view. Neither party has thought proper to ask the master the question—perhaps from excessive prudence. The position was this: He had two tugs in attendance on him, one of which was pinched and helpless and powerless, and the other, the *Humber*, was made fast to the port quarter, and I do not think she was in a position at that time, or was strong enough herself, to have taken the steamer away. But the master of the barque knew, or had reason to believe, that the *Huntsman* and the *Stephen Gray* were in attendance upon the steamer and were her tugs, bringing her out, and he knew that one was fast and he saw the other coming out. In the circumstances, is it more reasonable to come to the conclusion that the master would have said, "Let them tow her clear—they are in attendance upon her; let them do it; here I am aground"; or is it more reasonable to suppose that if he asked the question, he would have said, "Yes; tow away, and you shall be entitled to a salvage award hereafter from me"? It is so near the line that I am puzzled

to know what answer to give; but the answer I do give is that there is not sufficient evidence to justify me in coming to the conclusion that the master would have accepted the services of those tugs in the circumstances of the case, and that it is reasonable to draw the inference that he was satisfied that they would continue to tow at the ship which they had contracted to tow. I know of no case where the facts are exactly similar to this case; but I decide that those two tugs are not entitled to claim salvage from the *Emilie Galline*, and, therefore, the defendants are entitled to judgment against them. With regard to the other tugs, the case is simple. According to the log, the barque was considered to be in a precarious and critical position. Her master was afraid that serious consequences might arise if he was not towed off, and a third tug, the *Powerful*, had to be engaged to assist. The *Scotsman* did most of the work, and was the most powerful of the three tugs, but they all three did their work very well. The evidence of the master of the *Scotsman* was given with extreme fairness, without any attempt at exaggeration. I cannot make a large award, because the Elder Brethren advise me that, in their opinion, the barque was not in anything like serious danger, though she was in that danger which every vessel of her size is in when she finds herself aground, in a gale of wind, in a place where there is a strong tide running. The value is not large—26,380*l.*—and I award 650*l.* Of that sum, I give the *Scotsman* 300*l.*, the *Humber* 250*l.*, and the *Powerful* 100*l.*

Solicitors for the plaintiffs, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the defendants, *Stokes* and *Stokes*, for *Hearfields* and *Lambert*, Hull.

HOUSE OF LORDS.

March 3, 5, *and May* 25, 1903.

(Before the LORD CHANCELLOR (Halsbury) Lords ASHBOURNE, MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.)

HULTHEN v. STEWART AND CO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Discharge of cargo—Demurrage —"As fast as steamer can deliver"—"According to custom of port."

By charter-party it was agreed that a steamer should proceed to a named port, and there deliver a cargo of timber "to be discharged with customary steamship dispatch, as fast as the steamer can deliver . . . according to the custom of the port," with an exception in respect of delay caused by a strike or lock-out.

The ship arrived at the port, and was ready to deliver the cargo, but delivery was delayed by the crowded state of the dock to which she was ordered. There was evidence that she could not have been discharged more quickly, under the circumstances, elsewhere in the port, and that the consignees had used all reasonable means to procure the discharge.

Held (affirming the judgment of the court below) that they had performed their obligation under the charter-party, and were not liable for demurrage.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.), reported 86 L. T. Rep. 397; 9 Asp. Mar. Law Cas. 285; (1902) 2 K. B. 199, who had affirmed a judgment of Phillimore, J. without a jury, in the Commercial Court, reported 6 Com. Cas. 65.

The appellant, as owner of the steamship *Anton*, claimed from the respondents, as indorsees of a bill of lading, which incorporated the terms of a charter-party, demurrage for the detention of the *Anton* at London, her port of discharge.

The respondents alleged that the detention was not due to causes for which they were responsible, and that, having regard to the then existing circumstances, the *Anton* was duly discharged according to the provisions of the charter-party.

The charter-party was dated the 22nd Aug. 1900, and its material clauses were as follows:

(1) . . . and being so loaded shall therewith proceed to London, or so near thereto as she may safely get, and deliver the same always afloat . . . (3) The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sunday, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 30*l.* per day, and *pro rata* for any part thereof. The cargo to be brought to, and taken from, alongside the steamer at charterer's risk and expense, as customary. (5) If the cargo cannot be loaded and (or) discharged by reason of a strike or lock-out of any class of workmen essential to the loading and (or) discharge of the cargo, or by reason of epidemics, the time for loading and (or) discharging shall not count during the continuance of such strike or lock-out or epidemic (a strike or lock-out of the shippers' and (or) receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter, if by the use of reasonable diligence they could have obtained other suitable labour), and in case of any delay by reason of the beforementioned causes, no claim for damages shall be made by the shippers, the receivers of the cargo, the owners of the ship, or by any other party under this charter-party.

The following facts were proved or admitted:—

The cargo of the *Anton* consisted of deals, battens, and boards, and in the most favourable circumstances could have been discharged in five days.

The usual place for discharging deal cargoes was the Surrey Commercial Docks.

From September onwards the timber trade had been very active, and the docks and quays were, during September and October, crowded with vessels and goods.

On the 12th Oct. 1900 a lightermen's strike in the Port of London commenced. The strike lasted till the 22nd Jan. 1901. During the continuance of the strike it was practically impossible to obtain barges. The strike increased the congestion already existing in the port.

The *Anton* arrived at Gravesend on the 12th Oct. 1900.

The master on arrival received from the respondents a letter, dated the 3rd Oct. 1900,

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

ordering the *Anton* into the Surrey Commercial Docks to discharge. As these docks were full, the respondents applied both to the West India Dock and to the Millwall Dock to take in the *Anton*. The Millwall Dock were unable to offer even water space. The West India Dock could not offer a quay berth, but offered water space for overside delivery. They did not offer barges. Water space was useless from the impossibility of obtaining barges.

On the 18th Oct. 1900 the *Anton* entered the Surrey Commercial Dock, but could not get a discharging berth till the 20th Oct. (Saturday). The discharge commenced on the 22nd Oct., and was completed on the 29th Oct. The discharge was at various times interfered with by the whole quay not being clear for landing.

Phillimore, J. held that under the charter-party all that the respondents had to do was to exercise all reasonable means to enable the cargo to be discharged with customary steamship dispatch, as fast as the steamer could deliver according to the custom of the port, and that as the respondents had done this, they were not liable for any demurrage. The Court of Appeal affirmed the decision.

J. A. Hamilton, K.C. and *Leck* for the appellant.—The case is not within any of the exceptions in the charter-party, and the Court of Appeal drew a wrong inference from the decision of this House in *Hick* v. *Raymond* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22). The facts, which are not in dispute, show that the delay arose from the busy state of the port and the difficulty in procuring lighters, not from such a state of things as existed in *Postlethwaite* v. *Freeland* (42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599), where the charterer was held not to be liable for demurrage. The time in which the steamer could discharge was known, and as the time to be occupied could be ascertained, the agreement must be read as if it had been expressed in it. The charter-party is in the common form used in this trade, and it must be taken that its meaning was well-known to both parties. They also referred to

Good v. *Isaacs*, 67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555;
Wylie v. *Harrison*, 13 Ct. Sess. Cas. 4th series, 92; 23 Sc. Law Rep. 62;
Lyle Shipping Company v. *Cardiff*, 83 L. T. Rep. 329; 9 Asp. Mar. Law Cas. 128; (1900) 2 Q. B. 638;
Temple v. *Runnalls*, 18 Times L. Rep. 822;
The Jaederen, 68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351;
Rodenacher v. *May*, 6 Com. Cas. 37.

Robson, K.C. and *Loehnis* for the respondents.—We have discharged the ship in a reasonable time under the circumstances, which is all the respondents were bound to do under the charter-party. If the contention of the appellant is right the decision in *Hick* v. *Raymond* should have been the other way. See also the judgment of Lord Blackburn in *Postlethwaite* v. *Freeland* (*ubi sup.*). In *Lyle Shipping Company* v. *Cardiff* (*ubi sup.*) the same rule was laid down, and most of the authorities were considered. The obligation on the charterer is to do his best under the circumstances. In any case the charterer must discharge in a reasonable time, which means that he must avail himself of the ordinary appliances of the port, and the addition of such words as "according to the custom of the port," or "as fast as steamer can deliver," imposes no additional obligation on him. If more is intended a definite time should be named, or a definite rate of discharge fixed, which is not uncommon in the timber trade. They referred to

Fawcett v. *Baird*, 16 Times L. Rep. 198;
Weir v. *Richardson*, 3 Com. Cas. 20; 14 Times L. Rep. 80;
Reid v. *Lee*, 17 Times L. Rep. 771;
Rodgers v. *Forrester*, 2 Camp. 483;
Burmester v. *Hodgson*, 2 Camp. 488;
Castlegate Steamship Company v. *Dempsey*, 66 L. T. Rep. 742; 7 Asp. Mar. Law Cas. 186; (1892) 1 Q. B. 854;

and the cases of *Good* v. *Isaacs*, *Rodenacher* v. *May*, and *The Jaederen* cited on the other side.

J. A. Hamilton, K.C. in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 25.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the question of fact has been disposed of by Phillimore, J., and I think that no one of the learned judges in the Court of Appeal entertained any doubt upon the question of fact which has been found, and found satisfactorily. Practically, there has been no serious dispute that the facts are as found by the learned judge. The sole question which really remains is as to the construction of a common clause in the charter-party. The charter-party is in these terms: "The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 30*l.* per day, and *pro rata* for any part thereof." I confess that I entertain some surprise that this question should have been debated, because, in my view, it has practically been decided by a somewhat long series of authorities, and also by decisions of this House. There are two forms in which charter-parties of this character can be made. In one case a specific number of days are given within which the discharge is to be taken, and if those days are exceeded, quite apart from the circumstances, the demurrage is due. If, on the other hand, the parties choose to agree not to a definite number of days, but to a charter-party such as is to be found here, they necessarily import into it the circumstances under which the discharge takes place. If the learned judge in this case was right in thinking that, humanly speaking, everything was done to enable the discharge to be taken, it is idle to suggest that that which is a well-recognised form in which an absolute unconditional obligation is taken is to be imported into that which of itself, I think, involves the necessity of considering the circumstances of the case. The reasonable amount of diligence which can be exacted is that which the circumstances of the case suggest.

In this case the learned judge has, with great precision, as I think, taken every hypothesis. He has ascertained when the ship arrived, he has pointed out, by reasoning which I think it impossible to answer, that all the diligence which could be expected was exhibited by the charterers, and, as I said, it comes back to the question, What is the true construction of the words? Now, so far as I can understand the argument—and, as I said, I feel some little surprise that it should have been suggested after the series of cases which have been decided on this subject—it is that you are to take the capacity of a vessel as being equivalent to a number of days—that is to say, in this case you are to take the description of what was done in discharging in relation to the capacity of the vessel, which you say is equivalent to five days. Now, the discharging took seven days, therefore there are two days on demurrage. But the whole fallacy is involved in saying that because the capacity of the vessel was five days therefore you are to substitute in a contract between the parties, because that is what it comes to, the words "five days" for the words which you actually find, and that would be an absolute and unconditional term, and, if you take the capacity of the vessel as the test, that amounts to five days. Seven days are more than five, and therefore demurrage is due. It seems to me that this is reasoning for which there is no foundation. Without going through the cases it appears to me that every one of these attempts to impose an absolute unconditional burthen upon the charterers has always failed, because in this, as in every other contract where no specific time is mentioned, it is to be measured by the legal test—namely, what is reasonable under the circumstances of the case. It appears to me, therefore, that there is no doubt as to what the decision of this case ought to be.

Another argument which appears to me to have as little foundation, is that there is a strike clause here, and, inasmuch as the parties have provided for the event of a strike expressly, therefore everything which has delayed the discharge, but is not caused by a strike, must be imported into the contract as a thing for which the charterers are responsible. I am wholly unable to follow the urgency of that argument. It seems to me absolutely unreasonable, and one for which there is no foundation at all. Under these circumstances I move that the appeal be dismissed. I think that the judgments of Phillimore, J. and of the Court of Appeal are perfectly right, and should be affirmed.

Lord MACNAGHTEN.—My Lords: The question in this case turns on the meaning and effect of the provisions of a charter-party in use in the White Sea Wood Trade, and commonly known as the Chamber of Commerce White Sea Wood Charter. The appellant, as the owner of the steamship *Anton*, sued the respondents, who were receivers of the cargo under a bill of lading which incorporated all the terms and exceptions of the charter-party in question. The claim was for demurrage or damages for detention of the *Anton* at London, her port of discharge. The charter provides that the cargo is to be "discharged with customary steamship dispatch as fast as the steamer can . . . deliver during the ordinary working hours" of the port of discharge, "but according to the custom" of the port, Sundays, general or local holidays (unless used) excepted. The question is, What is the meaning of this provision? Is it tantamount to fixing a certain definite number of days or hours as the period within which the discharge of the vessel is to be accomplished? Taking the words by themselves, apart from all authority, I should say certainly not. The words used do not specify, or even, I think, point to a definite period of time. What they do point to is the discharge of the cargo with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time not being circumstances brought about by the person whose duty it is to take delivery or within his control. The learned counsel for the appellant laid much stress upon the fact that this was a charter in common form and in use in a particular trade. They urged that the convenience of the parties interested required that it should be expressed in general terms. The shipowner, they said, would know and the charterer would ascertain the time required for delivery of the cargo when the ship was working as fast as she could, and that time would, of course, be measured by days and hours. Their contention, therefore, was that the language actually used had precisely the same meaning and effect as if the obligation of prompt dispatch described by reference to the ship's power of discharging her cargo had been translated into measured portions of time. That, however, is not, I think, the way in which such a provision would strike an ordinary person glancing over the terms of a printed form of charter, and at the moment perhaps more intent on securing an advantageous freight than on providing for strange emergencies. I cannot help thinking that any person who might happen to sign a charter-party in this form would be much astonished to be told that by so doing he had come under an unconditional liability to take delivery within a fixed limit of time. He would probably say that he had not meant to do anything of the kind; possibly he might complain that he had fallen into a trap. The suggestion, for it was nothing more than a suggestion, that the convenience of business requires that the charter-party, though intended in each case as between the contracting parties to impose a special and peculiar liability, should be expressed in general terms and in a common form is not, I think, one of much weight. Nothing, as it seems to me, would be easier than to add to this common form half a line which, if not wanted, might be struck out or left partly in blank, but could be filled up with the number of lay days allowed if the charterer were willing to take upon himself the burden of unconditional liability. That, and an appropriate note in the margin would, I suppose, answer every purpose.

I have only to add on this part of the case that the special exception in a subsequent clause of a "strike" a "lock out," and "epidemics" does not, in my opinion, restrict or affect the meaning of the clause providing for prompt dispatch in delivery. I quite agree with Mathew, L.J. that ingenious arguments founded on such special exemptions savour of subtilty equally foreign to the way in which clauses in charter-parties have been put together and built up, and the manner

in which mercantile instruments are understood by business men. So the case I think would stand if there were no authority on the subject. But it is certainly satisfactory to find that there is a series of decisions, some in this House and others of great weight both in this country and in Scotland, which leave little or no room for argument. It is, I think, established that in order to make a charterer unconditionally liable it is not enough to stipulate that the cargo is to be discharged "with all dispatch" or "as fast as steamer can deliver," or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished. I am, therefore, of opinion that the appeal must be dismissed with costs. Lord Ashbourne has read this opinion, and concurs in it.

Lord DAVEY.—My Lords: Collins, M.R. in his judgment in this case says, "On the learned judge's findings the charterers have done all that they reasonably could do to give discharge to this vessel. That is a finding of fact, and so it then becomes a question of law, aye or no, are the defendants, the charterers here, liable by virtue of the terms of the charter-party, although they have done all that, humanly speaking, was reasonably possible for them to do in order to secure for the vessel reasonable dispatch?" Now, to that question I think that there can be but one answer, when you read the terms of the charter-party, because I think that it would be impossible to come to a conclusion favourable to the argument of the appellant, unless you imported words into the charter-party, and gave it a wholly different complexion from that which the words used by the parties naturally bear. I agree with the reasons which have been given by your Lordships already for coming to that conclusion, and I need not repeat them. Several cases were cited in the course of the argument. I have been through those cases, and I am of opinion that they support the argument of the respondents. I will not discuss them, because they have been very fully and satisfactorily discussed by the Master of the Rolls, and, as I am quite prepared to adopt the reasons for their judgments which were given by the Master of the Rolls and his learned colleagues in the Court of Appeal, I need not trouble your Lordships by saying more than that I concur.

Lord ROBERTSON. — My Lords: I entirely agree.

Lord LINDLEY.—My Lords: I agree, and I cannot usefully add anything.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Stokes* and *Stokes*.

Solicitors for the respondents, *Trinder, Capron*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 19, 20, 24, *and April* 7, 1903.

(Before WILLIAMS, STIRLING, and MATHEW, L.JJ.)

ANGEL *v.* MERCHANTS' MARINE INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance—Marine—Constructive total loss—Ship ashore—Cost of repairs—Value of wreck.

By a policy of marine insurance on a ship the ship was valued at 23,000*l.*, *and it was provided that that sum should be taken as the repaired value in ascertaining whether the vessel was a constructive total loss.*

The ship afterwards ran ashore, but, being temporarily repaired, was brought back to England. The cost of repairs, if the ship had been reinstated, would have been 22,500*l.*

Held, that, in deciding whether or not there had been a constructive total loss, the value of the damaged vessel as she lay on the rocks ought not to be added to the cost of reinstating her.

Dictum in Young *v.* Turing (2 *M. & G.* 593) *disapproved.*

APPEAL by the plaintiff from the judgment of Bigham, J. at the trial of the action without a jury.

The action was brought by a shipowner against underwriters, claiming for a constructive total loss of the insured vessel.

The facts of the case are sufficiently set out in the judgment of Williams, L.J.

March 19, 20, *and* 24.—*Carver*, K.C. and *Lochnis* (*Lewis Noad* with them) for the plaintiff.

J. A. Hamilton, K.C. and *Maurice Hill* for the defendants.

The following cases were cited:

Young v. *Turing*, 2 M. & G. 593;
Benson v. *Chapman*, 6 M. & G. 792; 2 H. L. C. 696;
Moss v. *Smith*, 9 C. B. 94;
Irving v. *Manning*, 1 H. L. C. 287;
Fleming v. *Smith*, 1 H. L. C. 513;
Somes v. *Sugrue*, 4 C. & P. 276;
Grainger v. *Martin*, 4 B. & S. 9; *nom. Martin* v. *Granger*, 8 L. T. Rep. 796;
Rankin v. *Potter*, 29 L. T. Rep. 142; 2 Asp. Mar. Law Cas. 65; L. Rep. 6 H. L. 83;
Stewart v. *Greenock Marine Insurance Company*, 1 Macq. 328;
Scottish Marine Insurance Company of Glasgow v. *Turner*, 1 Macq. 334;
Kaltenbach v. *Mackensie*, 39 L. T. Rep. 215; 4 Asp. Mar. Law Cas. 39; 3 C. P. Div. 467;
Aitchison v. *Lohre*, 41 L. T. Rep. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755;
Sailing Ship Blairmore Company v. *Macredie*, 79 L. T. Rep. 217; 8 Asp. Mar. Law Cas. 429; (1898) A. C. 593;
Beaver Line v. *London and Provincial Marine and General Insurance Company*, 5 Com. Cas. 269;
Wild Rose Steamship Company v. *Jupe*, 19 Times L. Rep. 289.

Cur. adv. vult.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

April 7.—WILLIAMS, L.J. read the following judgment:—This is an appeal from the judgment of Bigham, J. in favour of the defendants in an action claiming as for a constructive total loss on a policy on ship. The ship was wrecked on the coast of Sicily, being driven on the rocks. There was from the first the hope that the ship might be got off, but the plaintiff (the shipowner) gave a notice of abandonment to the underwriters, which they did not accept. The ship was floated and brought to Malta by the operations of the salvage association, acting for the benefit of all concerned, on the terms that they were to receive nothing unless the ship was salved. The cost of these operations was afterwards assessed at 3500*l.* The ship was to a certain extent repaired at Malta with a view to her proceeding under steam to Cardiff for permanent repairs. The underwriters agreed with the master for the navigation by the ship's crew of the ship when repaired from Malta to Cardiff for a sum of 1400*l.* The repairs somehow or other, although certified by surveyors to be sufficient, broke down almost immediately after leaving Malta; the fact being that it was only possible to get repairs of a very temporary nature done at Malta. The ship was nearly lost, but succeeded in getting into Tunis. She was again temporarily repaired there, but was not allowed to proceed to England under her own steam, and was towed to Cardiff. Estimates were obtained at Barry for the repair of the ship, but she was not actually repaired before the trial before Bigham, J. Bigham, J. arrived at the conclusion that 22,559*l.*, less some 200*l.* which the shipowner admitted he could not support, was the proper amount to fix as the cost of repairs. The repaired value of the ship the learned judge took as 23,000*l.*, which by the terms of the policy was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. Bigham, J., in estimating the cost of repairs, did not add anything for the expenses incurred by reason of the accident which compelled the ship to put into Tunis. This accident he attributed to the perils of the sea, and thought that the temporarily repaired ship could have been insured for the voyage to England for a premium of 150*l.*; and it was for this reason that he included nothing in the expenses of repairs for expenses incurred by reason of the accident, and only included the insurance premium. Bigham, J. deducted from the plaintiff's estimate of repairs certain items to which objection was taken by Mr. Griggs, the expert witness called on behalf of the defendants. As to several of these items, I am not sure that I should not have arrived at a different conclusion in fact. I do not, however, think that we ought to review the decision of the learned judge, arrived at after a five days' trial on matters which in a sense are all questions of fact; for I treat estimates based on facts as matters of fact. A different finding on some of these objections by the underwriters would have been sufficient to make the expenses exceed the repaired value. I accept, however, as I have already said, the findings of the learned judge; and I only mention the dispute on these points to show how little the figures relied on as constituting the items of the cost of repairs or the total arrived at thereby can be relied on as factors in a mere arithmetical conclusion; especially in a case in which the learned judge thought, to use his own expression, that it was a very close thing, and so very near a constructive total loss that the underwriters might very well have paid it. The shipowner gave his notice of abandonment immediately after the marine accident. Precise estimates are, of course, impossible; and it seems to me that unless the insured shipowner is to take upon himself risks which ought not to be borne by him (such as the risk whether the ship will be got afloat at all, or, having been got afloat, will arrive at a port for temporary repairs, and ultimately at home for permanent repairs) a large margin ought to be added to the figures of cost of repairs to cover risks of this sort—risks which a prudent uninsured owner would certainly take into consideration in determining whether he should repair or sell.

There is, however, another consideration which it is suggested the prudent uninsured owner would certainly in fact have regarded in determining whether he should repair—I mean the damaged value of the ship; that is, the price which could be got for her as she lay unrepaired, which was, it was said, about 7000*l.* But, unfortunately, this part of the case was not very thoroughly gone into. The plaintiff in the earlier part of the trial seems to have been content to rely upon the estimates of cost of repairs exceeding the 23,000*l.* Then, when it seemed likely that the deductions made by the judge would reduce the repairs below the 23,000*l.*, the claim to add the value of the damaged vessel was put forward and discussed, the judge, however, saying that there was no real evidence of the value. It seems unsatisfactory to have to discuss an important question of marine insurance law in a case in which the facts, perhaps, do not raise the question at all. I do not think that it could be or was denied that the value of the damaged ship must be included in the calculation, if the ship had, in fact, been sold where she was and as she was, and the question, after sale, had been whether the circumstances justified abandonment. But it is said that this item of calculation must be disregarded if there is no such sale. Now, in my judgment, the "prudent uninsured owner" test was already accepted as the proper test at least down to 1873. The recognition of the test in *Irving* v. *Manning*, in the House of Lords (*ubi sup.*), and in *Rankin* v. *Potter*, also in the House of Lords (*ubi sup.*), puts the matter, to my mind, beyond argument. Nor do I think that it is possible to say that *Moss* v. *Smith* (*ubi sup.*), which was cited in *Rankin* v. *Potter*, had then been recognised as substituting for the "prudent uninsured owner" test an arithmetical test turning on the difference between estimated totals. The "prudent uninsured owner" test was, I think, adopted for the very purpose of covering considerations which cannot be embodied in the figures of an arithmetical calculation. I wish to observe that in *Moss* v. *Smith* (*ubi sup.*) there was no approximation of the cost of repairs and repaired value, and that the alleged misdirection was a misdirection with regard to the freight (which was separately insured), inasmuch as the Chief Justice, it was said, omitted to tell the jury that, in determining whether or not there was a total loss of freight, they were to throw out of consideration the value of the ship and to consider only whether a prudent owner, acting with a view

to earning freight, would have executed the necessary repairs either wholly or in part. The court held that there was no misdirection, and it is with reference to this that Maule, J. made the observations which are relied upon as either substituting the "arithmetical" for the "prudent owner" test, or for limiting the measure in applying the prudent owner test to a contrast of the figures of cost of repairs and repaired value. There can be no doubt, to my mind, but that Bramwell and Martin, BB. in delivering their opinions in *Rankin* v. *Potter* (*ubi sup.*) both recognised the value of the damaged ship as an item which was to be taken into consideration in the application of the "prudent uninsured owner" test; and, more than that, recognised the value of the damaged ship as an item going to make up the total of the figures to be contrasted with repaired value. This view has been applied by Phillimore, J. in *Beaver Line* v. *London and Provincial Marine and General Insurance Company* (5 Com. Cas. 269), and by Walton, J. in *Wild Rose Steamship Company* v. *Jupe* (19 Times L. Rep. 289). It is to be observed that in *Rankin* v. *Potter* (*ubi sup.*) the item of value of the damaged ship was essential to the conclusion that there was a constructive total loss. You cannot get the required result without it. It is further to be noted that in *Rankin* v. *Potter* (*ubi sup.*) the ship was not, in fact, sold. It seems to me that, perhaps, the authorities could be reconciled if one took the rule to be that the shipowner could only take into consideration the value of the damaged ship if the cost of repairs approximated the repaired value. If the damage to the ship by the perils of the sea is so extensive that it is clear that the cost of repairs will approximate the repaired value, it would not be reasonably practicable to repair her if a substantial sum could be obtained for her as she is and where she is, seeing that the expense of repairs would be such that, under the circumstances, no man of common sense would incur the outlay. Such a ship, as a matter of business, is, in my opinion, totally lost. Take, however, the case where the damage is slight, and the cost of repairs is small relatively to the value of the ship. The shipowner, as a matter of business, would not take into consideration the necessarily high value of the slightly damaged ship unless, instead of desiring to minimise the loss incurred by the perils of the sea, he regarded the marine accident as affording a market enabling him to sell his ship at a profit. In my judgment, a case in which the cost of repairs and the value of the ship so nearly approximate as they do in the present case would be just a case in which the "prudent owner" test, applied as I have suggested, would do justice, which the mere comparison of figures would fail to do. But there is no case which has recognised this modification in the application of the "prudent owner" test, and one hesitates to introduce such a modification in the rules of law governing so widely extended a business as that of marine insurance under British law, although the application of the "prudent owner" test, as understood by Bramwell and Martin, BB. in their opinions in *Rankin* v. *Potter* (*ubi sup.*), and also by Lord Abinger in *Young* v. *Turing* (*ubi sup.*), might lead to the results pointed out in a note by the editors of the last edition of Arnould on Marine Insurance—Mr. de Hart and Mr. Ralph Simey—following a suggestion by Mr. McArthur in his work on marine insurance. The particular suggestion in the last edition of Arnould's Marine Insurance is that neither on principle nor on authority can the value of the damaged vessel be taken into consideration. The editors' note to sect. 1124 runs thus: "Suppose a vessel comes into port requiring repairs costing 1000*l.*, her damaged value being 10,000*l.*, and her repaired value being 10,500*l.* This, according to the argument derived from *Young* v. *Turing*"—and, I would add, from the opinions of Bramwell and Martin, BB. in *Rankin* v. *Potter*—"would be a case of constructive total loss. But it is submitted that it is absurd to say a vessel is a total loss, whether constructively or otherwise, which is only damaged to the extent of 10 per cent. or less." The contention seems to be that the old test of a "prudent uninsured owner" was adopted at a time when there was no telegraph and the means of communication were difficult, and at a time when there was no salvage association ready to step in to salve the ship and take charge of her until she could reach a port where permanent repairs could be effectively executed, and where, therefore, the cost of the repairs could be measured either by the actual execution of the work or by reliable estimates obtained on invitations to tender. It is said that at the time of the adoption of the "prudent owner" test, the master, through difficulty of communication and inability to secure with any certainty means of repair, was in practice apt to consider seriously the question whether he should sell the materials of the ship, or the ship as she lay, rather than make the attempt to repair. But it is said that nowadays such a case rarely arises, and that when it does the old test can be applied; but that now the conveniences of modern times, telegraphic communication, the salvage associations, and Lloyd's agents everywhere, throw on the master but rarely the old alternative, repair or sell; and that in modern times the shipowner ought to guide his conduct as an insured owner desirous to have regard to the interests of all concerned, and that the damaged ship ought, whenever it is possible, to be taken to the port where permanent repairs can be effected, and the arithmetical test applied with something like precision. Such a rule seems to me too favourable to the underwriter. I think that this contention is open to the criticism that the shipowner at the moment of election, when he has to exercise the option of giving notice of abandonment, has really no precise data upon which to act, and that there must always be a quantity of items, especially the cost of the temporary repairs and the getting of the ship to the ports of temporary and permanent repair, as there were in the present case, which do not admit of precision. I doubt whether under the absolute arithmetical test the underwriter really takes upon himself the whole of the risks of the perils of the sea. I think it was a doubt of this sort which made lawyers of the United States of America adopt the 50 per cent. rule. The final result in this appeal, I think, must be that the judgment of Bigham, J. must be affirmed; first, because I doubt whether in any case we ought to reverse the decision of Bigham, J. on this question of marine insurance law, having regard to the state of the

evidence as to the value of the damaged ship, the manner in which the point was taken at the end of the trial, and the mode in which it was disposed of by the learned judge, and I am not prepared to do so. Secondly, even though my opinion were stronger than it is, I should not like to differ from my brethren on a point which does not properly arise on the evidence. I, therefore, do not differ from the judgment of my brethren that the judgment of Bigham, J. must be affirmed.

STIRLING, L.J.—I agree that in this case we ought to accept the conclusion of fact of Bigham, J. It is therefore to be taken that the value of the ship, when repaired, exceeded the expense of repairs by a sum of about 700*l.* or 750*l.* The learned judge arrived at a smaller figure, but I understand it to have been conceded in argument that some consequential corrections which would have been the result of his determination would have brought it to the figure I have mentioned. It is then contended that the loss ought nevertheless to be treated as a constructive total loss, because the value of the ship as she lay on the rocks exceeded that sum, so that a prudent uninsured shipowner would have sold her rather than repaired her. Bigham, J. rejected that contention, saying that there had not been adduced any evidence as to that value on which he could act. Now, the evidence stood thus: no one was called on behalf of the plaintiff to show what the value of the ship was at the time. Naturally none of the plaintiff's witnesses was cross-examined on the subject, nor has there been any evidence of these matters adduced by the defendants. In truth the plaintiff seems to have launched his case in the expectation that he would be able to satisfy the judge that the cost of repairs would exceed the value of the ship when repaired, and it was only when he failed in satisfying the learned judge on that point that he fell back on this question of the value of the ship, and he now seeks to establish the amount from expressions which occur in the correspondence and in the light of subsequent events. I think there is much to be said in favour of the view taken by Bigham, J. I think mere estimates of value not made at the time ought, in a case of this kind, to be closely scrutinised by the court, and I hesitate to rely on inference with respect to a matter in which direct evidence can be given. I am not, therefore, persuaded that it would be right to overrule the decision of Bigham, J., and this would be sufficient to dispose of the case, so far as I am concerned.

But a question of law has been argued, and unfortunately on it different views are entertained by my brethren, and it may be right, therefore, that I should express the opinion that I have formed. The case of *Young* v. *Turing* (*ubi sup.*) was decided in the year 1841 in the Exchequer Chamber, and Lord Abinger in giving the judgment of the court said: "The Chief Justice has laid down the usual and recognised rule that the jury ought to consider whether, under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel." Then he says: "Now to the value of the repairs must be added her value as she lay in the dock." It is upon that observation that the argument in this case is founded. It is to be observed it is a mere dictum: it was not necessary for the decision of the case, and, so far as appears from the report, did not form the subject of argument before the court. Now, in 1847 there was decided the case of *Irving* v. *Manning* (*ubi sup.*) in the House of Lords, and Patteson, J., who delivered the opinion of the learned judges who advised the House, says: "The course has been in all cases in modern times to consider the loss as total where a prudent owner, uninsured, would not have repaired." And again at a later point he says: "The established mode of putting the question, when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against. If he would not have repaired the vessel, it is deemed to be lost." In 1850 the case was decided of *Moss* v. *Smith* (*ubi sup.*), in which the question was very much considered, and judgments were given which are constantly referred to in subsequent cases. Maule, J. says: "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her—seeing that the expense of repairs would be such that no man of common sense would incur the outlay—the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the courts have adopted is this—if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss." Wilde, C.J. says this: "The underwriter undertakes to indemnify the owner against a loss of freight by perils of the sea. The law has fixed the meaning of this warranty against sea-damage in such distinct terms, that, for many years, every contract of insurance has been made with reference to the known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner uninsured would incur; and that is when the outlay will exceed that which he will get by it—viz., when the ship, after the repairs are executed, will not be worth the sum which has been expended upon her." Now, it seems to me that in that case the court defined, as Maule, J. points out, the standard—the measure of prudence—which the courts have adopted with reference to such a case. In the year 1854 there was published the third edition of Phillips on Marine Insurance, and at sect. 1534 the learned author states the law thus: "In English jurisprudence the right to make an abandonment of the ship is governed by the rule just stated—namely, that the right to abandon on account of the damage and expense merely accrues where, and only where, the ship when recovered or repaired will not be worth the expense necessarily to be incurred for the purpose of recovering or repairing it." Then he adds: "This rule has reference to a case in which the amount merely determines the character of the

loss. Other circumstances may come into consideration in determining the loss to be partial or total." I do not propose to go in any detail through the subsequent cases, but it appears to me that, notwithstanding the observations of Bramwell and Martin, BB. in advising the House of Lords in *Rankin* v. *Potter* (*ubi sup.*), to which my Lord has referred, the weight of authority is in favour of the view which is based on the decision in *Moss* v. *Smith* (*ubi sup.*) and which is expressed in the language which I have just cited from Phillips on Marine Insurance. I should like, however, to refer particularly to the case of *Aitchison* v. *Lohre* (*ubi sup.*), where the question of whether or not there was a constructive total loss was discussed by the House of Lords. Lord Blackburn, in dealing with the point, says: "I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances." He then says: "If such an uninsured owner chose to sell the hull as it lay, his position would be this," and he goes through a calculation by which he arrives at a loss, amounting to 2521*l.*, and then he says: "And if the hull had been so damaged that to repair it would have cost more than the ship would, when repaired, have been worth, the prudent shipowner would have taken this course." Then he adds: "But in fact he not only could, but did repair it." Then he goes into a second calculation in which he ascertains the loss, having reference to the repairs and expenditure necessary for the purpose of repairing, and the value of the ship when repaired, and he arrives at an amount of loss which is smaller than that which he ascertained would have been suffered if a sale had been made. As I understand the figures, the result would have been the same whether the value of the vessel as the ship lay is taken into consideration or not, and therefore it appears to me not to be a decision which guides us in the present case. But the way in which the learned Lord lays down the law in a subsequent passage appears to me to agree with that which was contended for by the respondents to this appeal. He says: "The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not, even then, bound to do so. But if the ship can be practically repaired within the meaning of that phrase, as explained by Maule, J. in *Moss* v. *Smith*, the assured has not the option to treat it as a total loss; and on the figures stated in the special case the respondent here had not that option." It appears to me that the learned Lord there adopts the mode of stating the case which is laid down in the judgments of *Moss* v. *Smith* (*ubi sup.*), and the law as laid down in the same manner, as it seems to me, by Lord Watson in a subsequent case in the House of Lords in *Sailing Ship Blairmore Company* v. *Macredie* (*ubi sup.*). For these reasons I have arrived at the conclusion which I have stated. I only wish to add this, that I do not say that evidence of value in such cases as these can be entirely excluded, and therefore I do not differ from Phillimore, J. and Walton, J. in what they did in the cases before them, because their decisions were only on the admissibility of evidence. It may be that evidence of the value of the ship as a wreck might be material in ascertaining the question of fact whether or not there was a total loss. I agree, therefore, with the judgment that has been given.

MATHEW, L.J. read the following judgment:—The plaintiff sought to establish his right to abandon to the underwriters by evidence that the costs of the repairs of the ship would exceed the repaired value. Bigham, J. decided that the plaintiff had failed, and that there was no constructive total loss. It has not been easy to follow the steps of the learned judge through a mass of evidence and argument submitted to him in the course of a trial that lasted over five days. The vessel was insured by a time policy for 23,000*l.*, and by the terms of the policy the insured value of the ship was to be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel, while covered by the policy, was cast ashore on the coast of Sicily, and upon news of the disaster the assured gave a notice of abandonment which the underwriters declined to accept. With the consent of all concerned salvage operations were undertaken by the salvage association, and the ship was floated and brought to Malta at a cost of 3500*l.* In her damaged condition she was worth about 7000*l.* Under the superintendence of surveyors, who represented the plaintiff and the underwriters, temporary repairs to enable the vessel to be brought home were done at a cost of about 550*l.* The learned judge has found that the repairs were properly done. The underwriters had provided a sum of 1475*l.* to cover the expenses of the voyage home. This sum, added to the value of the damaged ship, could be insured from Malta to a home port for 150*l.* The vessel sailed from Malta, but in a few hours, as it would seem from some peril of the sea, her steering gear gave way, and she was obliged to put into Tunis. Further repairs were found to be necessary, which were done at a cost of 218*l.* A tug was sent out from England to bring the vessel home at a cost of 750*l.* She was brought safely to Barry, and a tender was obtained to cover all necessary repairs. These sums of 218*l.* and 750*l.* would be covered by the insurance from Malta to a home port, and were held by the learned judge not to be charges which the owner would have had to meet. At the trial accounts were put in which had been prepared to show the plaintiff's estimate of the costs of reinstating the ship. The total amounted to the very large sum of 26,222*l.* These figures were reduced by the learned judge to 22,559*l.* In the discussion before us the items allowed on the one hand and struck out on the other were objected to, and we were asked to review the decision of Bigham, J. as to the cost of repairs. But I see no reason to differ from the conclusion that 22,559*l.* was a proper estimate of the outlay necessary to reinstate the ship.

But it was contended for the plaintiff that, upon the assumption that the entire cost of repairs did not exceed the sum of 22,559*l.*, the plaintiff was nevertheless entitled to treat the loss as total. It was argued that the question to be determined was whether or not a prudent uninsured owner would abandon the adventure and sell the wreck as she lay on the rocks. In arriving at a conclusion on this subject,

the owner, it was said, would take into account the value of the damaged vessel, and would certainly sell rather than repair. I am unable to agree with this reasoning. The solution of the question whether there is a constructive total loss may sometimes be helped by considering what a prudent owner would do, where, for instance, a stranded vessel is immediately sold on the ground that salvage operations were difficult and the result uncertain. But it seems to me in such a case as the present, where the actual costs of repairs have been ascertained and are not a matter of estimate, the matter cannot be dealt with on that footing. The question is not what an owner would consider the course most advantageous to himself. What has to be determined is to what extent the ship has been damaged by the perils insured against, and thus to settle whether the loss is partial or total. It is total if the prosecution of the voyage has become commercially impracticable. In recent times, with the readier means of communication open to underwriters, the condition of a stranded ship is rarely left to mere speculation. When notice of abandonment has been given the skilled agents of the underwriters are enabled to visit the vessel, and they can generally form a sound judgment as to whether the ship can be saved. Where there is a fair prospect of reinstatement, salvage operations are undertaken on behalf of the insurers without requiring the owner to incur any expense. In this case the usual course was followed. The salvage operations succeeded, and the underwriters satisfied the learned judge that the loss was partial and not total. They arrived at this result by showing that the cost of rendering the ship as serviceable as she was when insured was less than the repaired value. The argument that the real question was what an imaginary owner would do when his vessel was still on the rocks seems to me not to be open to the plaintiff. Any such general principle would seriously prejudice underwriters, and might impose upon them losses which were not due to the perils insured against. The test applicable here is that sanctioned in the many decisions referred to by counsel for the underwriters from *Moss* v. *Smith* (*ubi sup.*) to *Sailing Ship Blairmore Company* v. *Macredie* (*ubi sup.*). The rule seems to me to have been properly applied by Bigham, J. But it was further urged for the plaintiff that, in determining the question of the right to abandon, the value of the damaged ship should be added to the cost of repairs. With this addition the valuation fixed by the policy would be largely exceeded. The application of this supposed mode of calculation would seem to involve unreasonable results, for, in adjusting the amount the assured could recover under his policy, what is saved from the perils insured against is treated as having been lost. The authority relied upon by the plaintiff's counsel was a dictum of Lord Abinger in his judgment in *Young* v. *Turing* (2 M. & G., at p. 601). It was admitted that the point had not been dealt with in that case, either at Nisi Prius or in the Court of Common Pleas, and the observation of the Chief Baron was not necessary for the decision of the court. Further, that with the exception of the recent judgments at Nisi Prius referred to in the argument, the authority of *Young* v. *Turing* (*ubi sup.*) upon this point had not been judicially approved. It is noticeable that at the trial no evidence was offered to show that average adjusters acted upon any such rule. The subject is discussed unfavourably to the plaintiff's contention in 2 Phillips on Insurance, s. 1534; Carver's Carriage by Sea, 3rd edit., s. 303; and 2 Arnould on Marine Insurance, 7th edit., s. 1124. I am of opinion that the plaintiff's contention fails, and that in determining whether the ship can be repaired the assured is not entitled to add the damaged value of the ship to the cost of repairs.

Appeal dismissed.

Solicitors for the plaintiff, *Downing, Bolam,* and *Co.*, for *Downing* and *Handcock*, Cardiff.

Solicitors for the defendants, *Waltons, Johnson Bubb,* and *Whatton.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, April 8, 1903.

(Before KENNEDY, J.)

AKTIESELSKABET INGLEWOOD *v.* MILLAR'S KARRI AND JARRAH FORESTS LIMITED. (*a*)

Charter-party—Demurrage—Load as customary always afloat—Draught insufficient to complete loading—Obstacles to loading caused by charterers—Lay days.

By a charter-party a ship was to proceed to B. or so near thereto as she could safely get, and there load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agent might direct, a certain cargo.

Owing to her draught the ship could not have loaded fully at the berth at the jetty, but according to the custom of the port she would be moved when partly loaded from the jetty to an anchorage to complete loading.

Held, that the lay days did not begin to run until the ship was at the jetty or anchorage the charterers' agent directed, and that the fact that she could not fully load there made no difference and did not prevent the charterers requiring her to come to the jetty and claiming that the lay days did not commence until she was at the jetty.

If a ship is prevented from going to the loading place which the charterer has a right to name by obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load and would but for such obstacles or engagements begin to load at such place.

COMMERCIAL CAUSE.

The plaintiffs' claim was for demurrage of their ship *Inglewood* against the defendants as charterers.

By a charter-party dated the 20th Nov. 1900 the defendants chartered the plaintiffs' ship to proceed to Bunbury or so near thereto as she might safely get, and there load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agent may direct, a cargo of karri and (or) jarrah timber, and, being loaded, to proceed as ordered to a port in the United Kingdom.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

It was provided by the charter-party as follows:

Twenty-eight weather-working days, Sundays and holidays excepted, are to be allowed . . . for sending the cargo alongside . . . commencing twenty-four hours after written notice has been given of ship being wholly clear of ballast and ready to take in cargo.

The ship arrived at Bunbury, Western Australia, on the 26th May 1901.

She was ready in all respects, and notice was given by the captain on the 27th May, at that time the ship being moored in the outer harbour.

On the 28th May she was ordered by the charterers' agent to the jetty.

All the other material facts and the arguments of counsel appear in his Lordship's judgment.

Carver, K.C. and *Leck* for the plaintiffs.

J. A. Hamilton, K.C. and *Percy C. Morris* for the defendants.

KENNEDY, J. read the following written judgment:—I am of opinion that in construing this charter-party I am bound by the authorities, and especially by the decision of the Court of Appeal in *Tharsis Copper Company* v. *Morel* (65 L. T. Rep. 659; 7 Asp. Mar. Cas. 106; (1891) 2 Q. B. 647), followed by Collins, J. in *Sanders* v. *Jenkins* (1897) 1 Q. B. 93), to hold that under the words stating the shipowner's undertaking—viz., to "load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agents may direct"—the effect is the same as if the jetty or anchorage had been named in the charter-party, so that the twenty-eight lay days, in the absence of special circumstances, would not run until the *Inglewood* had got to the jetty or anchorage. Mr. Carver, for the plaintiffs, contended that they began to run as soon as the *Inglewood* was, according to the master's notice to the charterers given on the 27th May (the day after her arrival at Bunbury), and when she was lying at a mooring buoy in the outer harbour, ready to load. I find myself unable to adopt this view after the decision of the Court of Appeal to which I have referred. I agree with Mr. Carver that the words in the cancelling clause "in all respects ready for loading" would be satisfied by a readiness to load anywhere in the port. But the purview of this clause is different from the purview of the demurrage clause; and, if the charterers possess, as they do here, a right to order the ship to a particular place of loading in the port, I think that I must hold that "ready to take in cargo" in the demurrage clause means ready alongside the ordered place of loading. When the charterers in this case ordered the *Inglewood*, as they did, to load at the jetty, the jetty became the place of loading, as though it had been originally named in the charter-party; and in the absence, as I have said, of special circumstances, the lay days could not commence until the *Inglewood* was ready to take in cargo at that place.

Two grounds for not applying the general rule were relied upon by the plaintiffs. First, that the jetty was not a place at which the *Inglewood* could "take on board all her cargo always afloat." This is true. Owing to her draught when partly loaded she was a ship which must be moved after being partly loaded from the jetty to an anchorage, as in fact she was moved on the 3rd July. But I do not think that this in itself prevented the defendants from requiring her to come to the jetty and claiming that the lay days did not commence till she arrived at the jetty. To load part of the cargo at the jetty at one or more berths there, and part afterwards at the anchorage, was, upon the evidence, a way, though not the most usual way, of loading at Bunbury. The words "load in the customary manner always afloat" have been interpreted by Lord Watson in *Carlton Steamship Company* v. *Castle Mail Packets Company* (78 L. T. Rep. 661; 8 Asp. Mar. Law Cas. 402; (1898) A. C. 486). "These words," he says, "according to their natural meaning, go no further than to impose a qualification of the charterer's right to load, by negativing his right to put cargo on board except at times when the ship is afloat." I know of no authority compelling me to hold, nor do I consider that it would be a reasonable meaning to put upon this charter-party, that the charterer, in order to exercise properly his right to name a place of loading, when the loading and lay days are to commence, must name a place where all the cargo is to be put on board. I see nothing to prevent the charterer from ordering her to be shifted, as her safety in loading or convenience may require, to a better or more convenient berth either at the jetty or at an anchorage, for the further prosecution or the completion of the loading. The lay days here are a fixed number of days, and the shipowner therefore is amply protected, directly the vessel has been, in the first instance, taken to the loading place, so that her lay days commence to run. Directly that event has happened the charterer becomes bound to complete the loading, wherever it is done, within a definite time.

The second circumstance relied upon by the plaintiffs is a different one. If a ship is prevented from going to the loading place, which the charterer has the right to name, by obstacles caused by the charterer or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load, and would, but for such obstacles or engagements, begin to load at that place. This is in substance the proposition deduced, and, in my opinion, rightly deduced, from the cases, by Mr. Carver in his work on Carriage by Sea, 3rd edit., s. 627. The law is stated by Barnes, J. in *Ogmore Steamship Company* v. *Borner and Co.* (6 Com. Cas. 110): "It appears to follow that if the charterers have other vessels which they have to discharge, and have arranged to discharge, in the dock before the vessel which by the charter is to proceed to the dock, and by the practice of the port will not be admitted into the dock while the charterers have the other vessels in the way, the charterers do prevent the shipowners from performing their contract until the charterers have cleared away the impediments." In *Watson* v. *Borner and Co.* (5 Com. Cas. 377) the particular facts were held not to justify the application of the principle; but at p. 379 the existence of the principle is stated by Lord Halsbury, L.C.: "No doubt if the charterers had presented any impediment preventing performance of the shipowners' obligation different considerations might have arisen." In the later case of *Harrowing* v. *Dupré* (7 Com. Cas. 157) my brother Bigham cites Barnes, J.'s statement of the law without expressing any dissent,

whilst holding that the facts of *Harrowing* v. *Dupré* gave no room for the contention which the plaintiffs sought to found upon it. What are the facts in the present case? On the 27th May, when the plaintiffs' captain gave notice of readiness to load, the defendants might have wholly loaded the *Inglewood* by means of lighters where she then lay. Such a course, though the less ordinary, was not an unprecedented method of loading at Bunbury. The defendants' manager at Bunbury says that the only reason why the steam lighter did not lighter cargo to the *Inglewood* in the stream was because he had told the captain to bring the vessel to the jetty. He had a perfect right to exercise the charter-party option in that way. The mere fact that there were no free berths on the east, the only practicable side of the jetty did not disentitle him from so exercising his option, for the charter-party contains no provisions entitling the shipowner to have a "free" or "ready" wharf or berth nominated by the charterer. Nor was there any permanent physical obstruction preventing the ship from getting to the jetty, so as to make the exercising by the charterer of his option as to the place of loading no real exercise of the option at all. But then comes in a consideration which seems to me materially to affect the rights and obligations of the parties. Of the four available berths on the eastern side of the jetty, which it is admitted here was the only side which was practically available for a vessel like the *Inglewood* at that time, three were taken up by the charterers' vessels which the charterers were themselves loading, so that in ordering the *Inglewood* to the jetty he was ordering her not merely to a jetty to which she could not go because other vessels were there, but to which she could not go because other vessels of the charterers were there. But for engagements made by him in relation to those other vessels the jetty would have been open to the *Inglewood*. Further, according to the evidence, there was nothing to prevent the charterer, if he chose, from making room for the *Inglewood* at the jetty by ordering any one of his other vessels at the jetty to complete loading at the anchorage. The evidence showed that vessels do so complete their loading, as, in fact, the *Inglewood* afterwards did on this voyage—and, indeed, vessels beyond a certain draught must do so, as they could not lie afloat at the jetty when fully loaded. I have no evidence of the particular contracts which the charterers had with regard to their other vessels. I cannot presume that they were prevented by the terms of any of the contracts from ordering them to make room for the *Inglewood* and complete their loading at the anchorage. The harbour-master's permission would be required, but there is no suggestion that if it had been asked for it would have been refused. In these circumstances I think that the principle stated by Barnes, J. applies, and that the plaintiffs are entitled to count the lay days as from the 28th May. But if they so commenced the master of the *Inglewood* had no right whatever to refuse to proceed to the jetty at the beginning of June, when the *Gudrun*, one of the vessels at the jetty, was temporarily moved away to the ballast ground. Whatever the uncertainty of the length of the *Gudrun's* absence might be, the master of the *Inglewood* had no right, in my judgment, if his lay days had begun to run, to refuse to give the charterers the opportunity of putting cargo on board the *Inglewood* at the jetty. How much could have been loaded in the time is disputed, but I think that the defendants are justly entitled to a liberal interpretation of the evidence, and I hold that 150 tons might have been loaded. Taking this view, and omitting from the total of lay days days which were not weather-working days and Sundays, but including Saturdays—for I cannot accept the defendants' view that Saturdays should be treated as holidays within the exception clause—I find that there were six days' demurrage, in respect of which the plaintiffs, at the charter-party rate, are entitled to 73*l.* 8*s.* 6*d.*

Judgment accordingly.

Solicitors: *Stokes* and *Stokes*; *James White* and *Leonard*.

May 4 *and* 12, 1903.

(Before BIGHAM, J.)

BOARD OF TRADE *v.* SAILING SHIP GLENPARK. (*a*)

Seaman—Distressed—Wages in excess of expenses—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 193—*Merchant Shipping* (*Mercantile Marine Fund*) *Act* 1898 (61 *&* 62 *Vict. c.* 44), *s.* 4.

A seaman shipwrecked abroad is no less a "distressed seaman" within the meaning of the Merchant Shipping Acts, because the wages due to him and paid to him abroad are in excess of the expenses incurred for his maintenance and passage home.

Production of the account of the expenses mentioned in sect. 193 (3) *of the Merchant Shipping Act* 1894 *and proof of its payment are conclusive evidence of the right of the Board of Trade to recover such expenses.*

ACTION.

The defendants were the registered owners of the *Glenpark*, a British ship within the meaning of the Merchant Shipping Act 1894.

In May 1900 the *Glenpark* left Barry (Cardiff) on a voyage to Cape Town and (or) any ports or places within the limits of 75 degrees north and 60 degrees south latitude, the maximum time to be three years' trading in any rotation and to end in the United Kingdom or continent of Europe between the Elbe and Brest inclusive, at master's option.

On the 29th Jan. 1901 the *Glenpark*, in the course of the voyage left Port Germein, in South Australia, on a voyage to Algoa Bay, her crew consisting of twenty-six hands all told—namely, master, two mates, cook, steward, carpenter, sailmaker, boatswain, five apprentices (one of whom acted as third mate), twelve A.B.s, and one ordinary seaman.

On the 1st Feb. 1901 the *Glenpark* struck on a sunken rock near Wedge Island, in Spencer Gulf, South Australia, and became a total wreck. The crew lost the whole of their effects except the clothes they were wearing, but were saved and taken in the ship's boats to Port Victoria, in South Australia, arriving there on the 2nd Feb. 1901.

The log and agreement with the crew were lost with the vessel.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Between the 2nd and the 4th Feb. 1901 the crew were subsisted at Port Victoria by the Governor of South Australia on behalf of the Crown, acting by the Marine Board of South Australia, at a cost (excluding that incurred in respect of the master) of 13*l.* 1*s.*

On the 4th Feb. 1901 the crew were provided with passages from Port Victoria to Port Adelaide by the same authority at a cost (excluding that incurred in respect of the master) of 20*l.* 16*s.*

The crew on their arrival on the 4th Feb. at Port Adelaide were (except the master) subsisted there by the same authority at a cost of 26*l.* 5*s.*, and were also provided by the same authority with necessary clothing.

On the 6th Feb. 1901 the representatives of the owners of the *Glenpark* at Port Adelaide, in the presence of the superintendent of the Mercantile Marine Board of South Australia paid each member of the crew the balance of wages due to him under the agreement with the crew up to the time the vessel was lost.

The majority of the crew obtained employment at Port Adelaide, but eight members thereof failed to obtain any employment, and were provided with passages to the United Kingdom by the same authority at a cost of 63*l.* 2*s.* 6*d.*

As regards the members of the crew (excluding the master) the total expenses incurred on their behalf by the authority were altogether the sum of 236*l.* 5*s.* 1*d.*

The Board of Trade, on behalf of the Crown, paid the sum of 236*l.* 5*s.* 1*d.* to the authority as money due to them in respect of expenses incurred on account of distressed seamen within the meaning of sect. 193 of the Merchant Shipping Act 1894, and the Board of Trade contended that they were entitled, on behalf of the Crown, to recover the whole of that sum from the defendants under the same section.

The defendants paid to the plaintiffs, and the plaintiffs accepted without prejudice, various sums amounting in all to 136*l.* 6*s.* 2*d.* in respect of the expenses of members of the crew, fourteen in number, and with regard to the expenses of such members the defendants admitted liability, and no question of further payment in reference to such members arose.

As regards these fourteen members of the crew, the wages so paid to them were in every case less than the amount expended on their behalf as hereinbefore mentioned. The sum of 136*l.* 6*s.* 2*d.* was, in fact, greater by 1*l.* 5*s.* 6*d.* than the amount of the expenses, but the difference was for the purpose of this case to be treated as immaterial.

The balance of the total sum of 236*l.* 5*s.* 1*d.*—namely, 99*l.* 18*s.* 11*d.*—had never been paid to the plaintiffs by the defendants in whole or in part, and the plaintiffs now claimed such balance from the defendants in this action.

Such balance represented the amount of expenses incurred on behalf of the eleven remaining members of the crew other than the fourteen members above mentioned, the wages paid to whom as aforesaid were in every case greater than the expenses so incurred.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 193 (1). Where any expenses on account of any such distressed seaman or apprentice as follows—namely: (*a*) Any seaman or apprentice belonging to a British ship who has been discharged or left behind abroad without full compliance on the part of the master with provisions in that behalf in this Act contained. (*b*) A subject of Her Majesty who has been engaged to serve in a ship belonging to the Government or to a subject or citizen of a foreign country either for his maintenance, necessary clothing, conveyance home, or, in case of death, for his burial or otherwise in accordance with this Act, are incurred by or on behalf of the Crown, or are incurred by the government of a foreign country and repaid to that Government by or on behalf of the Crown, those expenses together with the wages, if any, due to the seaman or apprentice, shall be a charge upon the ship, whether British or foreign, to which such distressed seaman or apprentice belonged and shall be a debt to the Crown from the master of the ship or from the owner of the ship for the time being, and also if the ship be a foreign ship from the person, whether principal or agent, who engaged the seaman or apprentice for service in the ship. (2) The debt in addition to any fines which may have been incurred may be recovered by the Board of Trade on behalf of the Crown either by ordinary process of law or in the court and manner in which wages may be recovered by seamen. (3) In any proceeding for such recovery the production of the account (if any) of the expenses furnished in accordance with this Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown.

By the Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 & 62 Vict. c. 44):

Sect. 4. Sect. 193 of the Merchant Shipping Act 1894 (which relates to the recovery of expenses incurred on account of distressed seamen) shall extend to expenses incurred under that Act on account of any distressed seamen within the meaning of that Act except where it is certified in pursuance of sect. 188 of the Act that the cause of a seaman being left behind is desertion or disappearance, and paragraphs (*a*) and (*b*) in sub-sect. 1 of the said sect. 193 shall be repealed.

The *Attorney-General* (Sir R. Finlay, K.C.), The *Solicitor-General* (Sir E. Carson, K.C.), and *H. Sutton* for the Board of Trade.—The question here turns upon the construction of certain sections of the Merchant Shipping Act 1894 as amended by the Act of 1898. Sects. 184 and 185 deal with "destitute" seamen, and they are so described, and are Lascars and coloured seamen. Sects. 186 to 189 are concerned with "leaving seamen abroad." Under sect. 186 it is clear and unambiguous that where the service of a seaman belonging to a British ship terminates abroad he is entitled to his wages and his passage home at the expense of the owners. They referred to sects. 187, 188, and 189. Sect. 189 (7) (*c*) excepts such expenses as the owner or master is by this Act required to pay. That, we submit, refers to sect. 193 and sect. 207. The next group of sections runs from sect. 190 to sect. 194, and deals with "distressed" seamen. Sect. 190 gives the Board of Trade power to make regulations as to the maintenance and relief of distressed seamen. Sect. 191 contains provisions for their maintenance and relief, and by sect. 192 masters of British ships are compelled to take distressed seamen. They referred to sect. 193. The duty of determining whether those persons fall within the description of distressed seamen is cast upon the Board of Trade, and the production of the account of the expenses and proof of the payment of those expenses by the Board of Trade is conclusive.

They referred to sects. 207 and 208. That is the law as it stood in 1894. They referred to

The Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 & 62 Vict. c. 44), s. 4.

Sect. 193 of the Act of 1894 as amended by this section is sufficient to cover this case. It cannot make any difference on this point as to whether a man is a distressed seaman or not, whether his wages have been paid to him. These men were in every sense distressed. They were absolutely destitute, for they had come on shore with nothing except the clothes they wore, and the authorities were bound under the Act to relieve and maintain them. It is clear from the statute that the words "distressed seamen" are used for the purpose of denoting sailors who by reason of shipwreck will have to incur expenditure for their maintenance and return home, and such a seaman does not cease to be distressed because the amount of his wages has been paid to him. He is distressed by the fact that he has to maintain himself in a foreign place, and has to find his way home. The word used here is not "destitute."

Danckwerts, K.C. and *Leslie Scott* for the defendants.—Here the service terminated by the wreck, and consequently under sect. 158 the seaman was entitled to be paid his wages up to date. If the wages are not paid then the seaman can be distressed, and the fact that the seaman is entitled to wages makes no difference, but while he has sufficient money to support himself he cannot be distressed. With regard to sect. 193 (3), the account is only to be evidence, not conclusive evidence. The word "sufficient" was considered in *Barraclough* v. *Greenhaugh* (8 B. & S. 623; L. Rep. 2 Q. B. 612), and it was held that it did not mean "conclusive." They also referred to

Northard v. *Pepper*, 10 L. T. Rep. 782; 17 C. B. N. S. 39;
Reg. v. *Fordham*, L. Rep. 8 Q. B. 501.

The *Solicitor-General* in reply.

BIGHAM, J.—The first question which I have to determine in this case is whether those men who received wages in excess of the expenses incurred on their behalf were "distressed seamen" within the meaning of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60). The defendants say that they were not, upon the ground that the Act was not intended to assist men who are in a position to assist themselves. It is necessary, therefore, to look at the terms of the Act. Part 2 deals with the rights and duties of owners, masters, and crews of seagoing ships registered in the United Kingdom. One subdivision of this part is headed "Distressed Seamen," and it comprises sects. 190 to 193 of the Act inclusive. By sect. 190 the Board of Trade is empowered to make regulations for the relief, maintenance, and sending home of seamen found in distress abroad; and the section enacts that no seaman shall have any right to be relieved, maintained, or sent home except in the cases provided by those regulations. In pursuance of the directions in this section, the Board of Trade has made regulations, and by No. 86 it is declared that the persons to be relieved shall include seafaring persons who, having been engaged in merchant ships, are shipwrecked and found in distress in foreign ports. No relief, however, is to be afforded to shipwrecked seamen who refuse to work their passage home or who refuse to accept reasonable employment (regulation No. 90), nor are shipwrecked seamen who stand by the wreck to salve property to be considered as distressed seamen during the time they are so earning money (regulation No. 95). Thus the regulations mention who are and who are not to receive relief. Then sect. 191 of the Act directs how distressed seamen are to be relieved. The duty of affording the relief is cast upon governors, Consular officers, and others who are named in the section, and who are referred to in the Act as the authorities. This section directs such authority to find a passage home for, and in the meantime to maintain, any seamen who, by reason of having been shipwrecked, are in distress in any place abroad, and enacts that the authority shall be paid, in respect of the expenses incurred, such sums as the Board of Trade may allow. Sect. 193, as amended by sect. 4 of the Merchant Shipping Act 1898 (61 & 62 Vict. c. 44), directs that the amount of such expenses shall be a debt to the Crown from the shipowner and shall be recoverable by the Board of Trade on behalf of the Crown by ordinary process of law. These are all the material provisions, and there is nothing in any of them which in terms excludes from the category of distressed seamen those who, being shipwrecked, happen at the date of the disaster to be entitled to arrears of wages. Nor do I find anything from which I can imply such an intention. In a sense, no doubt, a shipwrecked sailor who happens to have money in his pocket, or a valuable ring on his finger, or a right to arrears of wages is not in so bad a plight as his shipmate who has none of these advantages; but both of them are, in my opinion, "seamen who by reason of having been shipwrecked are in distress" within the meaning of sect. 191 and of regulation No. 86. If the Legislature had intended to exclude from the benefits of the Act men who had means of their own at their command I think it would have said so. In the connection now under consideration the definition of distress is not to be found in the man's slender purse, but in the fact that he has been cast from his ship in a foreign country. I therefore come to the conclusion that all the men mentioned in this case were "distressed seamen" within the meaning of the Act.

Another question was raised during the argument—namely, whether the production of the account of the expenses, together with proof of payment thereof by the Board of Trade, was not of itself conclusive against the defendants. Having regard to the view I take on the first point, it is not necessary for me to decide this question; but I think it better to do so, for I may thereby save difficulty in future cases. By sub-sect. 3 of sect. 193 of the principal Act it is provided that in any proceedings for the recovery of the debt the production of the account (if any) of the expenses furnished in accordance with this Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown. I think "sufficient evidence" here means conclusive evidence, and for these reasons: The authority who makes the payments in the first instance acts in the interest of the shipowner as well as in that of the seamen. This is shown by such regulations

as the 91st, 96th, and 97th, which direct the authority to confine the relief to what is actually necessary. And by sub-sect. 4 of sect. 191 the Board of Trade has a right to revise the account and to disallow in favour of the shipowner such items as it may think fit. The authority abroad and the Board of Trade at home are both to protect the shipowner from any undue burden. With provisions such as these for his protection I do not think the Legislature meant to allow the shipowner to dispute either the propriety of the demand made upon him or its amount. The production of the account and proof of its payment are therefore, in my opinion, meant by sub-sect. 3 of sect. 193 to be conclusive of the right of the Board of Trade to recover.

Judgment for the plaintiffs.

Solicitors: *R. E. Cunliffe; Rowcliffes, Rawle,* and *Co.*, for *Hill, Dickinson,* and *Co.*, Liverpool.

Wednesday, May 13, 1903.

(Before Ridley, J.)

Farrell (app.) *v.* Sunderland Steamship Company Limited (resps.). (*a*)

Revenue—Income tax—Ship owned by company and other persons—Two assessments.

The S. Steamship Company owned the steamship B. *and fifty-nine sixty-fourths of the steamship* G., *the remaining five sixty-fourths being owned by other persons.*

Held, that the company was rightly assessed by two assessments, one in respect of the steamship B. *and the other in respect of the steamship* G., *as the latter was an adventure carried on by them jointly with other persons within the third rule, applying to both the first and second cases under sect.* 100 *of the Income Tax Act* 1842.

Case stated by the Commissioners for the Income Tax Acts on an appeal by the respondents against assessments of 3101*l.* and 4951*l.* made under sched. D for the year ending April 1902, the first of such assessments being in respect of the steamship *Glendochart*, and the second in respect of the steamship *Brookside*.

The steamship *Brookside* was owned entirely by the respondents, and was the only boat owned by them or in which they held any interest from April 1897 to April 1900. During this period the steamship *Glendochart* was owned as follows: One person, twenty-four shares; one person, twenty-one shares; seventeen persons, one share each; one person, two shares; and was managed on behalf of the owners by Messrs. Crosby and Co.

In May 1900 the respondents purchased fifty-nine sixty-fourths in the steamship *Glendochart*, and thereupon became her principal owners and took over her management and kept her accounts.

The average profits of the steamship *Brookside* for 1898, 1899, and 1900 was 4951*l.*, being the assessment for the year 1901-1902.

The profits in respect of the steamship *Glendochart* for the seven and a quarter months ending the 31st Dec. 1900 amounted to 1874*l.*, which would be 3101*l.* for twelve months, which was the amount of the assessment for the year 1901-1902.

The respondents claimed that there should be only one assessment and not two, and that such assessment should be in respect of the business or concern carried on by them, and should be for one year's profits calculated upon the average of the total profits of the respondents during the three years ending the 31st Dec. 1900, arrived at as follows:

	£	s.	d.	£	s.	d.
Profits of steamship *Brookside* for twelve months ending the 31st Dec. 1898				4409	0	0
Ditto for twelve months ending the 31st Dec. 1899				4878	0	0
Ditto for twelve months ending the 31st Dec. 1900	5566	0	0			
Fifty-nine sixty-fourths of 1874*l.* profits of the steamship *Glendochart* for seven and a quarter months ending the 31st Dec. 1900	1726	0	0	7292	0	0
				16,579	0	0
				£5526	6	8

The respondents submitted that if necessary a separate assessment should be made upon the manager of the respondents as representing the arrears of the remaining five sixty-fourths of the steamship *Glendochart* in respect of their profits.

The appellant contended that as the steamship *Glendochart* was not the sole property of the company and was a concern carried on by two or more persons jointly, and so it must be treated as a separate concern and be assessed separately.

The commissioners were of opinion that the fifty-nine sixty-fourths of the steamship *Glendochart*, having come into possession of the respondents in the ordinary way of a business already carried on and, as it were, as a mere extension or expansion of such business, the accounts for taxation ought to be made up as contended by the respondents, and they allowed the appeal.

The question for the court was whether the profits of the steamship *Glendochart* should be assessed as a separate concern or not.

Under the Income Tax Act 1842 (5 & 6 Vict. c. 35), s. 100, the duties under sched. D are to be assessed and charged under the rules there set out, and the first case under that section applies to duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of a trade.

The first rule under the first case states

That the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up. Provided always that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years the computation shall be made for one year on the average of the balance of profits and gains from the period of first setting up the same.

The company's accounts were made up to the 31st Dec. 1900.

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

The third rule of the rules applying to both first and second cases under sect. 100 states that

The computation of duty arising in respect of any trade, manufacture, adventure, or concern, or any profession carried on by two or more persons jointly shall be made and stated jointly and in one sum and separately and distinctly from any other duty chargeable on the same persons or either or any of them, and no separate statement shall be allowed in any case of partnership except for the purpose of the partners claiming an exemption as herein directed or of accounting for separate concerns.

In the first proviso to such third rule it is stated that the joint assessment shall be made in the partnership name, style, firm, or description.

Under the fifth rule of the rules it is stated that

Every statement of profits to be charged under that schedule shall include every source so chargeable on the person delivering the same on his own account, or on account of any other person, and every person shall be chargeable in respect of the whole of such duties in one and the same division by the same commissioners, except in cases where the same person shall be engaged in different partnership or the same person shall be engaged in different concerns relating to trade or manufacture in divers places, in each of which cases a separate assessment shall be made in respect of each concern at the place where such concern, if singly carried on, ought to be charged as herein directed.

Under sects. 40 and 192 of the Income Tax Act 1842 a company is included in the expression "a person" and is chargeable in like manner.

S. A. T. Rowlatt (the *Solicitor-General*, Sir E. Carson, K.C. with him) for the appellant.—The *Glendochart* and the *Brookside* are two separate adventures or concerns in the nature of trade within sect. 100, sched. D, first case, of the Income Tax Act 1842. The *Glendochart* being an adventure or concern carried on by the respondents and other persons jointly, the duty arising in respect thereof is to be computed separately and distinctly from any other duty chargeable on the respondents under the third rule of the first and second cases. These part owners are partners. It was laid down in *Attorney-General* v. *Borrodaile* (1 Price, 148) that the ownership of trading vessels let to freight is a trade or concern in the nature of a trade within the meaning of 46 Geo. 3, c. 65, the words of which statute are very much the same as those in the Income Tax Acts. It was further held in that case that the part owners of such ships are special partners, and the ship's husband or managing part owner is bound to make a joint return of the aggregate profits of the concern to the property tax. The fact that both concerns are carried on by the company and for its benefit is immaterial, and the commissioners were wrong in their determination.

A. A. Roche for the respondents.—The whole business of the company constitutes and consists of a single trade or concern and not of two trades or concerns in respect of the *Brookside* and the *Glendochart*. The appellant here has confused joint ownership and carrying on business jointly. *Attorney-General* v. *Borrodaile* (*sup.*) is not in point here, for the concern is not carried on jointly. The owner of the majority of the shares in a ship may deal with such ship as he pleases, and he alone carries on the concern. The profits derived by the respondents through their shares in the *Glendochart* or their controlling interest in the vessel are profits accruing in respect of a single trade or concern, and not in respect of a separate trade or concern. Therefore but one assessment should be made on the respondents, and that should be computed upon the whole amount of the profits of the respondents.

Rowlatt in reply.

Ridley, J.—I have had some doubt upon this matter. The point taken by Mr. Roche is that the fact that there are five sixty-fourths of the steamship *Glendochart* out of the whole number of shares not within the control of the company is not enough to make the owner or owners of those five sixty-fourths persons carrying on the "adventure" of that ship jointly with the company which owns the fifty-nine sixty-fourths. He says that the words in the third rule under sect. 100 of the Income Tax Act apply only to adventures or concerns or professions carried on by two or more persons jointly, and that in a case like the present the fact that there are persons who may be called sleeping partners, owning a minority of the shares, does not make them persons jointly carrying on the adventure with the company or whoever may own the majority of the shares. I thought that there might be something in the point when it was made—namely, that there might very well be a distinction between the partner who was merely the owner of some sixty-fourth shares of a ship who does nothing but receive his dividends or pay his losses on the one hand and the partner who does take an active share in the management of the adventure and directing the ship where she is to go, when she is to be kept in the dock or in the river, and when she is to be insured and so forth. If it could have been established that that distinction exists, it would then have followed that this decision of the commissioners would be a right one. But I have come to the conclusion that, whatever the consequence may be, *Attorney-General* v. *Borrodaile* (1 Price, 148) is a case precisely in point, and, that being so, I am not able to get over it. It has remained law ever since it was decided, as I believe, without any doubt being thrown upon it. It is quoted in the text-books upon the Income Tax Acts without any words to the effect that doubt has been thrown upon its authority. In that case the Court of Exchequer in the year 1814 decided that on precisely similar words under precisely similar circumstances the ship's husband or managing owner (which would be the company here) is bound to make a joint return of the correct profits of the concern, and they decided that under words which are the same in all material respects as those of the third rule in the Income Tax Act at present in force. Now, if that is the case, if he, as ship's husband or owner, is found by the court to have been bound to make the return on behalf of all the other partners, I do not quite see how the same rule is not to apply here. The Chief Baron in giving his judgment, after having dealt with others, comes to this point. "As to the power of these part owners among one another" (and this is put by way of illustrating the nature of the partnership subsisting between them), "it certainly is clear

that the majority of the owners can send the ship to sea without the consent of the rest; and, if they do so and a loss happens, the others have no claim upon them," and so forth. I think they were dealing with what is precisely the situation here, and that therefore the third rule under sect. 100 of the Income Tax Act must be taken to have application. It may be inconvenient and it may be usual to act otherwise in respect of this particular matter; I should think that it is very probable, but I cannot help saying that I am bound, as it appears to me, by the decision of the Court of Exchequer in *Attorney-General* v. *Borrodaile*. If the two cases could be distinguished, the foundation of what I am saying would disappear, but, taking it to be correct, it seems to me that there must be a return made by the company or the managing owner (whoever he may be) of this steamship *Glendochart* according to the third rule, and that therefore what has been done in putting the fifty-nine sixty-fourths of that steamer for seven and a quarter months in the accounts of the *Brookside* is not a compliance with the Act of Parliament. It is said that the commissioners have as a matter of fact come to the opinion that these fifty-nine sixty-fourths of the *Glendochart* have come into possession of the company in the ordinary way of a business already carried on as a mere extension or expansion of such business, and that therefore the accounts ought to be made up as contended by the company. But although they may have come to that decision as a question of fact, and I am not in a position to overrule it, I think I must in this case look and see what the law is which regulates the return of this ship, and, if it is the third rule that applies, it seems to me to be obvious that whatever the proper conclusion as a matter of fact may be, even if the company have in the ordinary way of its business got these fifty-nine sixty-fourths by way of extension or expansion of such business, it does not matter if the return has to be made according to the third rule. Perhaps that is an inconvenient result, but I do not see how to get out of *Attorney-General* v. *Borrodaile*. I think the words "carried on" might be used in the sense contended for by Mr. Roche but for that case. I can see myself where a person might make a distinction and say that this does not apply because of a sleeping partner, and so forth; but, when one looks at the former decision, it is clear that that covers the facts of this case. Therefore I am of opinion that the Crown is entitled to judgment.

Judgment accordingly.

Solicitors: *The Solicitor of Inland Revenue*; *Botterell* and *Roche*.

Wednesday, April 22, 1903.

(Before BIGHAM, J. and a Special Jury.)

CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPORATION. (a)

Insurance—Marine—Voyage policy—Risk thirty days after arrival—Duration of risk.

Where a ship is insured for a voyage to a given port "and for thirty days in port after arrival, however employed," and the risk is to continue "until she hath there moored at anchor as above in good safety," the thirty days are to be taken as thirty consecutive periods of twenty-four hours each, commencing from the precise time at which the ship arrives and is moored in good safety.

FURTHER CONSIDERATION by Bigham, J. after trial with a special jury.

The claim was for a total loss of the plaintiff's ship, the *Inchcape Rock*, under a policy of insurance which the defendants had underwritten.

The facts are fully set out in the judgment of the learned judge.

The question argued was shortly this: In an insurance in the ordinary Lloyd's form for a voyage to a certain port "and for thirty days in port after arrival, however employed," where the risk is described as running "until she hath there moored at anchor as above in good safety," whether the thirty days are to be construed: (1) Thirty periods of twenty-four hours from the hour the ship is moored in good safety; (2) thirty calendar days from midnight, including the day of her arrival; (3) thirty calendar days commencing at midnight, not including the day of her arrival.

J. A. Hamilton, K.C. and *Leck* for the plaintiffs.—"Day" in law means a calendar day—that is, a day beginning at midnight—and, as the law in computing days takes no notice of a portion of a day, the thirty days cannot be taken to have commenced to run from the midnight preceding her arrival, but from the midnight following it. It has been held that "running days" in a charter-party means calendar days, and not periods of twenty-four hours:

The Katy, 71 L. T. Rep. 709; 7 Asp. Mar. Law Cas. 510; (1895) P. 56.

Counsel also referred to

Re Railway Sleepers Supply Company, 52 L. T. Rep. 731; 29 Ch. Div. 204.

Scrutton, K.C. and *Loehnis* for the defendants.—The meaning of "day" here must be a period of twenty-four hours commencing from the hour on which an uncertain event may happen—namely, the arrival of the ship. Otherwise the actual duration of the insurance would be uncertain:

Mercantile Marine Insurance Company v. *Titherington*, 11 L. T. Rep. 340.

If the expression is to be construed as calendar day, then the day of arrival must be included:

Migotti v. *Colville*, 40 L. T. Rep. 747; 4 C. P. Div. 233.

If it is not, then the ship is not insured on the day of its arrival from the hour it arrives till midnight.

Cur. adv. vult.

April 22.—BIGHAM, J.—In this case the defendants had underwritten the plaintiff's ship *Inchcape Rock*. The risk is described in the body of the policy in writing in the following words: "For a voyage from Portland, Oregon, by any route to Algoa Bay and for thirty days in port after arrival, however employed." The question I have to determine is whether at the time of the loss the thirty days here mentioned had run out; and the answer to the question depends upon the meaning to be attached to the word "days," whether it is to be taken to mean thirty consecutive periods of twenty-four hours or thirty calendar days. The print of the policy is in the ordinary

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at Law.

Lloyd's form, which describes the risk as running until the vessel "hath moored at anchor twenty-four hours in good safety"; but the printed words "twenty-four hours" are struck through with a pen and the words "as above" are written over them, the effect being to incorporate at this point the earlier written words which I have just read. Thus the duration of the risk may be described as extending until thirty days after the vessel's arrival and safe mooring at anchor in the bay. The case was tried before me with a jury; and they found the following facts: First, that the vessel arrived in Algoa Bay at 10 a.m. on the 2nd Aug. 1902; secondly, that she was safely moored at anchor in the bay at 11.30 a.m. on the same day; and, thirdly, that she was totally lost at 4.30 p.m. on the 1st Sept. Thus it will be seen that if the thirty days are to be calculated as periods of twenty-four hours beginning at 11.30 a.m. on the 2nd Aug. the risk had run off at the time of the loss; otherwise if the thirty days are to be taken as meaning thirty clear calendar days. I do not suppose that there could be any doubt about the duration of the risk if the policy had been issued in its original printed form, unaltered and without the written words which I have read. The risk would have lasted until 11.30 a.m. on the 2nd Aug., and from that moment until 11.30 a.m. on the 3rd Aug. It could not have been contended that the first of the twenty-four hours did not begin to run until noon on the 2nd Aug., for the period of time from 11.30 to 12 30 is as much an hour as the period of time from noon to 1 p.m. Why should the expression "thirty days" be read in a different way? No doubt in some cases the word "day" means a period of twenty-four hours starting from midnight and ending at midnight. That is a calendar day—a Monday or a Tuesday. But did the parties to this contract use the word in that sense? I think clearly not. The risk was to be a continuing risk. It was not to stop at 11 30 on the morning of the 2nd Aug. and then to revive at midnight. It was to run continuously from 11.30 a.m. on the 2nd Aug. until the expiration of the thirty days, and no longer. To interpret the contract in the way contended for by the plaintiff would have the effect either of imposing on the defendants a longer risk than they bargained to undertake or of relieving them from liability during the hours of 11.30 a.m. on the 2nd Aug. until midnight. Neither party intended to make such a contract. It follows, therefore, that the thirty days mentioned in the policy must be taken to mean thirty consecutive periods of twenty-four hours beginning at the time of the ship's safe mooring in the bay. After the jury had been discharged another point was taken on behalf of the plaintiff. It was said that the ship was not ready to discharge until 5 p.m. on the 2nd Aug., and that, as upon the authorities a ship cannot be said to be safely moored unless and until she is ready to discharge, the time did not begin to run until 5 p.m. I am, however, quite satisfied, notwithstanding some of the *vivâ voce* evidence, that the ship was an arrived ship within the meaning of the policy by 11.30 a.m., and was then ready to discharge, and this was what the jury meant to find, and did find, in answer to my questions. There must be judgment for the defendants, with costs.

Judgment accordingly.

Solicitors: for the plaintiff, *Botterell* and *Roche*; for the defendants, *Hollams, Sons, Coward,* and *Hawksley*.

May 19, 20, *and* 21, 1903.

(Before KENNEDY, J.)

SEARLE *v.* LUND. (*a*)

Bill of lading—Right to over-carry if discharge cannot be effected without undue detention—Detention caused by shipowner or his agents—Liability.

A bill of lading contained the following clause: "If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns."

Held, that the shipowner was not protected by this clause where the circumstances creating the undue detention were due to the default of the shipowner or his agents or servants.

ACTION brought by the plaintiff against the defendant to recover damages for the breach of a contract contained in a bill of lading.

The *Yarrawonga*, a steamship, belonged to the defendant, and formed one of a line of steamers known as the Blue Anchor Line, regularly running between Australian ports, of which Melbourne is one, Durban, the Cape, Las Palmas, and London.

The plaintiff's goods, consisting of a number of cases of perishable goods and bales of hay fodder, were shipped at Melbourne in Sept. 1901 to be carried from there to Cape Town.

In the bills of lading was the following clause:

If in the opinion of the master discharge cannot be effected without undue detention the steamer shall have liberty to over-carry the cargo to London at merchant's risk and deliver there to consignees or their assigns.

The *Yarrawonga* sailed from Melbourne and arrived off Durban on the 25th Oct., and at that port a wrong delivery of goods took place owing to the want of reasonable care on the part of the defendant, his agents or servants, which caused delay.

Owing to this delay at Durban the *Yarrawonga* did not arrive at Cape Town in time to use the special facilities for discharge which had been provided for her, and the master, being honestly of opinion that there would be undue detention if he waited to discharge the cargo at Cape Town, owing to the congested state of the harbour and the difficulty of getting a berth owing to the war, over-carried the goods to London.

Scrutton, K.C. and *Leck* for the plaintiff.

Hamilton, K.C. and *Loehnis* for the defendant.

KENNEDY, J.—This is a question of construction relating to well-known principles of law, though perhaps not easy to apply in this case, and I do not think I should benefit the parties if I delayed giving judgment, and, moreover, it is a test case which I daresay the parties would like to take a further judgment upon. It is the fact that there would have been no need for undue detention at Cape Town but for what happened at Durban, and is that fact such

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

as would entitle the plaintiff to succeed? If he shows, as he has shown clearly, that but for the want of care, and reasonable care, in my opinion, with regard to the delay at Durban and the cause of it, that vessel might have been discharged without the undue delay at Cape Town, is that sufficient to entitle the plaintiff to judgment? I think it is. In the first place, as to the facts in this case, there is no dispute. There was a delay of two days at Durban, which frustrated the arrangements at Cape Town, and which produced the possibility of the undue delay. If that is so, it is said none the less by the learned counsel for the defendant that that cause is too remote. They contend that the only act or default in the sense of negligence of the owner or his servants which could, as it were, take away the protection of this clause, is something that happened at the Cape, and that it is too remote to say as a cause that if there had not been this unjustifiable delay at Durban, unjustifiable I mean so far as regards the plaintiff, in this case the mischief would not have happened. I have during the argument and since carefully considered that, and I think it is unsound. I agree that by the terms of the bill of lading with this clause the owner has a right (for that is what it is shortly) under certain circumstances to over-carry, but he must not produce those circumstances by the fault of his own agent or servant. He must not do that, it seems to me, and say, "I have produced the circumstance which has caused the undue detention upon which my captain's opinion is to be conclusive." I cannot see myself why anything that happens in the way of negligence or want of reasonable care from the time of the contract of the bill of lading being completed between the parties—that is to say, after the ship sails and the taking of the goods on board—why anything that affects the goods so as to prevent the contract being fulfilled is not one of the circumstances which may be looked at when we find the consequences following from it which are, apart from this special clause, a breach of contract. There can be no doubt that the action is brought for over-carrying these goods. They had a right to over-carry. Under the circumstances have they a right to say we can over-carry, although those circumstances are produced by the fault of our own agents and servants. There is an analogous question, and we are all of us rather afraid of analogies, but there is one thing I might mention tersely. Supposing it had been a clause fixing a date, or suppose it had been a question of reasonable dispatch, a consignee under a contract in a bill of lading has clearly a right to have the voyage performed with reasonable dispatch, having regard to the nature of the carrying vessel. An illustration of that, and, of course, only an illustration is afforded by the case of *Fraser* v. *Telegraphic Construction and Maintenance Company* (27 L. T. Rep. 373; 1 Asp. Mar. Law Cas. 421; L. Rep. 7 Q. B. 566), and the judgment of Cockburn, C.J. and Lord Blackburn in that case, where the vessel being a steam vessel did not use steam as she ought to have done. So, again, here, supposing, which makes the case a little simple (although I do not think in principle it differs), the clause had been in terms that the vessel shall over-carry the goods unless she leaves Cape Town by the 6th Nov., and it was clearly proved that owing to the delay in Durban she could not reach there by the 6th Nov., it cannot be said if it was proved that a want of care on the part of the managers of the voyage whether the ship's agents or master prevented her reaching Cape Town so as to leave it on the 6th, that she had a right to over-carry without an action for damages for not delivering the goods. It seems to me if it had been proved, as it had been, that this happened, it is not too remote. It is not suggested that even the delay in Durban might not under conceivable circumstances have produced the over-carrying. It seems to me, once granted that she has been delayed and prevented from reaching Cape Town at a certain date which affects the number of days she has to stay there, it does not lie in the mouth of the defendant to say that it might have happened that, even if she had come in time, she would have got a berth, or that it might have happened if she did not come in time she would have got a berth. Once show that there is a wrongful act—that is, a breach of contract—which produces a certain result in fact, it does not lie in his mouth to say that in fact things might have produced the same result without a breach of contract. The nearest analogy that I know that strikes one at once—and I do not say it is a perfect analogy—is the way in which the courts have always refused to listen to that argument in cases of deviation, for on proof that the vessel has deviated from the regular straight course, and is lost, it is not an answer to say she might have been lost if she had not deviated and broken her voyage in that respect. It is put by Tindal, C.J.—I am not quoting the words exactly—in the leading case, which I think is *Garrett* v. *Davis*, that it does not lie in the mouth of a wrongdoer where a consequence has followed from conduct which is a breach of contract, to say that the same mischief might have happened had he not done the thing complained of. Under those circumstances it seems to me that where there is the right of over-carrying, the circumstances which occasioned the exercise of that right, must not be produced by the fault, the negligence, and the want of reasonable care in the prosecution of the voyage on the part of the defendant and his agents. I think the plaintiff is entitled to recover. *Judgment for the plaintiff.*

Solicitors: *Mellor, Smith,* and *May*; *Thomas Cooper* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 2, 9, *and* 16, 1903.

(Before Bucknill, J.)

The Manar. (a)

(1) Northern Trust Limited v. Strachan Brothers.

(2) Northern Trust Limited v. Manar Steamship Company Limited.

Practice—Stay of proceedings—Mortgage—Action for declaration of rights to assist action in foreign country—Order XXV., rr. 4, 5.

On default being made under a mortgage the plaintiffs, as mortgagees of the steamship M. took possession of her and chartered her for a

(a) Reported by Christopher Head, Esq., Barrister-at-Law.

voyage to a French port. On arrival the first defendants, who were British subjects, arrested the ship in respect of necessaries which they had supplied and attached the freight, which was payable by certain French consignees. They also made executory in France a judgment obtained by default in the King's Bench Division against the mortgagors (a British company) in England in respect of the same debt. The mortgagees intervened in the proceedings instituted in France and, for the purpose of assisting their case in the French courts, commenced actions in England against the first defendants and against the mortgagors asking for certain declarations of right under Order XXV., r. 5. On a motion by both defendants asking that the actions against them should be dismissed or stayed as being frivolous and vexatious:

Held, that as it had not been shown that the declarations asked for by the mortgagees in the action against the first defendants could not be of use to them in the French court to protect their interests as mortgagees, and that, as there was no sufficient evidence that the action was an improper interference with the proceedings in France, the action should be allowed to proceed.

On a further motion by the liquidator of the defendant company praying that the action against the company should be dismissed or stayed, or in the alternative that the plaintiffs should indemnify him for costs:

Held, that the proceedings ought to be stayed as the mortgagors had not taken any step to dispute the validity of the mortgage held by the mortgagees, and the mortgagees had no right to force the mortgagors to try the issue in the present proceedings.

MOTIONS by the defendants Strachan Brothers, necessaries men, and the Manar Steamship Company, owners of the steamship *Manar*, praying that the actions brought by the Northern Trust Limited, who were mortgagees of the steamship *Manar*, should be stayed or dismissed. The Manar Steamship Company also asked that the defendants should indemnify the liquidator of the company for any costs that might be incurred in respect of the action.

The facts were shortly as follows:—

The Manar Steamship Company Limited was incorporated on the 13th Jan. 1900, and on the 26th June 1900 a registered statutory mortgage of the British ship *Manar* was given by the Manar Steamship Company Limited, the owners of the *Manar*, to the Northern Trust Limited, who were trustees for debenture-holders, to secure the sum of 17,000*l.*

In 1901 Messrs. Strachan Brothers supplied necessaries to the steamship *Manar*, for which they had not been able to obtain payment.

In March 1902 the Manar Steamship Company Limited made default under the mortgage, and the plaintiffs thereupon took possession of the *Manar* and let her on a charter dated the 28th April 1902 from Beaufort, South Carolina, to St. Nazaire, in France.

On the 5th May an extraordinary resolution was passed for the voluntary liquidation of the company, and that liquidation was proceeding.

In June 1902 the *Manar* arrived at St. Nazaire, and the consignees of the cargo took delivery of it, and became liable to pay freight.

Strachan Brothers, the necessaries men, thereupon instituted proceedings in France to recover the sum of 745*l.* due to them in respect of the necessaries they had supplied to the *Manar*, and arrested the *Manar* and caused the freight in the hands of the consignees to be attached.

The Northern Trust Limited also instituted proceedings in France, and on the 17th June the French court at St. Nazaire made an order directing the Northern Trust Limited to give bail to answer the claims made by Strachan Brothers, and directing Strachan Brothers to give bail to meet the claims of the Northern Trust Limited for damages if it should prove that the arrest of the *Manar* and the attachment of the freight by Strachan Brothers was wrongful.

On the 21st June the *Manar* was released, as the Northern Trust Limited had given the bail required by the French court, and on that date judgment by default was obtained in England in the King's Bench Division by Strachan Brothers against the Manar Steamship Company Limited for the amount of their claim for necessaries and costs.

Further proceedings had by this time been instituted in the court at St. Nazaire by the Barry Graving Dock and Engineering Company in respect of a claim for repairs to the *Manar*, and by the master of the vessel for wages and disbursements.

On the 13th Oct., by a judgment of the Civil Tribunal at Paris, the judgment obtained by Strachan Brothers, in the King's Bench Division, was made "executory" in France as against the *Manar* and her freight.

On the 15th Nov. the court at St. Nazaire declared the attachment of the freight by Strachan Brothers to be valid, and on the 18th Nov. the same court made a similar declaration as to the mortgage of the Northern Trust Limited.

On the 2nd Dec. the plaintiffs, the Northern Trust Limited, commenced proceedings in the court at St. Nazaire to have the declaration of the validity of the attachment of the freight by Strachan Brothers set aside, and to have it declared that Strachan Brothers had no rights over the *Manar* on the 10th June 1902, the date on which proceedings were instituted in France. They also instituted proceedings against Strachan Brothers and the consignees of cargo praying for a judgment that all the arrests of freight were invalid, and asking for an order that the consignees of the cargo should pay the freight to them as mortgagees.

Strachan Brothers were served with notice of these proceeding in Newcastle on the 12th Dec. 1902, and entered an appearance to them in France.

On the 20th Jan. 1903 the plaintiff company issued the writs in the present actions.

On the 26th Feb. the plaintiffs closed the register of the *Manar*, selling the vessel to Swedish purchasers as mortgagees in possession.

On the 27th Feb. statements of claim were delivered by the plaintiff company in the present actions claiming a declaration: that throughout the year 1902 they were duly registered first mortgagees of the steamship *Manar*; that the mortgage was a valid one; that they were entitled to the *Manar* as owners, so far as was necessary for making the said ship available as a security

for their mortgage debt, and entitled to the said ship and any bail given for the release of the said ship in priority to the Manar Steamship Company Limited, and Strachan Brothers; that they were entitled as mortgagees to take possession of the *Manar* in March 1902; that upon taking possession of the *Manar* they were entitled to the steamship and to any bail given for the release of the steamship in priority to the Manar Steamship Company Limited and Strachan Brothers; that they were entitled, in priority to the Manar Steamship Company Limited and to Strachan Brothers, to collect and keep all freights earned by the *Manar* while in their possession, and particularly the freight earned by the vessel under the charter party made for the voyage from Beaufort to St. Nazaire in 1902.

On the 30th Jan. 1903 Strachan Brothers issued a summons to have the action against them stayed or dismissed with costs.

On the 4th Feb. the liquidator of the Manar Steamship Company Limited took out a summons praying for the same relief, or alternatively that the action should be stayed until the Northern Trust Limited, the plaintiffs, indemnified the liquidator of the defendant company against all costs.

These summonses were adjourned into court, and came on for hearing on the 2nd March 1903.

During the argument in court affidavits of French lawyers, which had been filed by both the Northern Trust Limited and Strachan Brothers, were read. From these it appeared to be doubtful whether a declaratory judgment such as was sought in these actions could be used in the actions in France, and as to what its effect would be if it was so used.

Order XXV., rr. 4, 5, is as follows:

Rule 4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Rule 5. No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

Robson, K.C. and *Adair Roche* for the defendants Strachan Brothers, in support of the motion—The action against the necessaries men in this country is quite irregular as the bail which represents the ship and the freight is in the power of the French court, which has all the parties, including the mortgagees, before it, and the questions raised in the present action will be determined in the court at St. Nazaire. Sect. 11 of the Admiralty Court Act 1861 (24 Vict. c. 10) no doubt gave this court jurisdiction to deal with claims in respect of a duly registered mortgage, but in this case the court is asked to make a series of declarations about a mortgage with which Strachan Brothers have no concern, and to which they are not parties, and the declaration, if made, will not decide the rights of the parties, for they will be decided in France according to the *lex fori*. The court cannot make a binding declaration in this action within the meaning of Order XXV., r. 5, and the action cannot therefore be sustained under that rule, and as no cause of action is disclosed the action should be stayed or dismissed under rule 4 of the same order. The property charged being out of the jurisdiction, even though the charge be valid, English creditors have a right to enforce any rights given to them by a foreign law in respect of a debt which is enforceable in a foreign country:

Re Maudsley, Sons, and Field, 82 L. T. Rep. 378; (1900) 1 Ch. 602;
Liverpool Marine Credit Company v. *Hunter*, 18 L. T. Rep. 749; L. Rep. 3 Ch. 479.

The court has power to restrain vexatious and oppressive litigation:

McHenry v. *Lewis*, 46 L. T. Rep. 567; 22 Ch. Div 397.

They also referred to

Barraclough v. *Brown*, 76 L. T. Rep. 797; 8 Asp. Mar. Law Cas. 290; (1897) A. C. 615;
Foreign Tribunals Evidence Act 1856 (19 & 20 Vict. c. 113).

Scrutton, K.C. and *Balloch* for the plaintiffs *contra*—The judgment prayed for would assist the plaintiffs in the proceedings in France, for if obtained it could be made "executory" in France, and be used to prove that the ship and freight were the property of the plaintiffs. The onus is on the defendants to show that the action was vexatious:

Hyman v. *Helm*, 49 L. T. Rep. 376; 24 Ch. Div. 531.

The resolution for borrowing the money on the mortgage of the *Manar* was moved by William Dixon, who traded as Strachan Brothers, and consequently knew of the existence of the mortgage when his firm supplied the necessaries. Strachan Brothers have no maritime lien on the ship, and their claim, so far as the ship is concerned, should be postponed to the plaintiffs' mortgage. So far as the freight is concerned the plaintiffs as mortgagees in possession are entitled to the freight, and they are also entitled to the freight as charterers of the ship. The proceedings in France by the necessaries men are an attempt to gain priority over the mortgagees, but, even if they were successful, an English court could refuse to give effect to the decision of a foreign court which refused to recognise a title properly acquired according to the law of this country:

Simpson v. *Fogo*, 8 L. T. Rep. 61; 1 H. & M. 195;
Liverpool Marine Credit Company v. *Hunter* (*ubi sup.*).

H. H. Wright for the liquidator of the Manar Steamship Company.—As to the action of the *Northern Trust Limited* v. *The Manar Steamship Company*, it is submitted the action is a frivolous one, and should be stayed; it is neither a foreclosure action nor an action to enforce a security, for the security has been enforced, and the ship has been sold under the plaintiffs' statutory power, and the purchaser has a good title. The liquidator if he should see fit is entitled to bring an action against the mortgagees for damages for a wrongful sale; and the sale may have been an improper one if the mortgage was a valid one owing to the shareholders of the Manar Steamship Company Limited not having passed the necessary resolution to authorise the directors to borrow money. This question may have to be determined, and the liquidator will then be plain-

tiff, and will select his own time to bring the action. At present the liquidator has neither the money nor the evidence necessary to raise the question, and he cannot be compelled to raise it now. The reasoning in *Brooking* v. *Maudslay* (58 L. T. Rep. 852; 38 Ch. Div. 636) supports this view. There the action was by underwriters to restrain the holders of a policy from proceeding on it; but the court declined to make any declaration with regard to it. Stirling, J. saying (58 L. T. Rep. 855; 38 Ch. Div., at p. 645): "It is difficult to see why the defendants having a claim which they may assert in a court of law at any time within the period fixed by the statutes of limitation should be compelled to try the issue on which the validity of that claim depends in a court of equity, and at another time than that which they may select as the most convenient for themselves." The plaintiffs knew the defendant company was in liquidation when they started their action, and, subject to certain exceptions, the practice is that an action against a company in voluntary liquidation will be stayed:

Walker v. *Banagher Distillery Company*, 33 L. T. Rep. 502; 1 Q. B. Div. 129;
Rose v. *Gardden Ledge Coal Company*, 38 L. T. Rep. 101; 3 Q. B. Div. 235;
Freeman v. *General Publishing Company*, 70 L. T. Rep. 845; (1894) 3 Q. B. 483.

He also referred to

The Wexford, 58 L. T. Rep. 28; 6 Asp. Mar. Law Cas. 244; 13 P. Div. 10;
Austen v. *Collins*, 54 L. T. Rep. 903.

Scrutton, K.C. and *Balloch* for the plaintiffs in the second action.—The liquidator has made no effort to stay the action brought by Strachan Brothers, and the result of Strachan Brothers obtaining that judgment is that they are now trying to satisfy their claim out of property in France which they had arrested as the property of the Manar Steamship Company. The plaintiffs, the mortgagees, have therefore to put themselves in a position to prove to the French court that the ship and the freight belonged to them, and not to the Manar Steamship Company. The liquidator does not expressly deny the validity of the plaintiff's mortgage, but, after permitting the plaintiffs to sell the vessel, leaves it to be inferred that there is some blot on the title of the mortgagees the plaintiffs in this action. If so, they are entitled to perfect their security if they can. The liquidator has no right to endeavour to tie up the property of the mortgagees possibly for years by threats of future action. In the cases cited the liquidator admitted the right of the creditor to prove his debt in the liquidation proceedings, and, on that ground, the action was stayed:

Re Regent's Canal Ironworks Company; *Ex parte Grissell*, 34 L. T. Rep. 310; 3 Ch. Div. 411;
Re David Lloyd and Co., 37 L. T. Rep. 83; 6 Ch. Div. 339;
Buckley on the Companies Acts, 8th edit., p. 297.

Cur. adv. vult.

BUCKNILL, J.—This is an action brought by the plaintiff company claiming a declaration that a certain mortgage made between themselves and the Manar Steamship Company Limited, now in liquidation, was at all times material to this action, and is now a valid mortgage, and that the plaintiff company are entitled to certain freights which have been earned by the said steamship after they, as mortgagees, took possession of her under their security. This application now made to the court is by Strachan Brothers to stay or dismiss the action on the ground that it is oppressive and vexatious. [His Lordship then stated the facts of the case, and proceeded:] Affidavits have been filed by both parties, and they leave the court in doubt as to the procedure of the French courts, and as to the effect of any judgment of this court in the action before the French courts. That being so, I have to ask myself this question: In the circumstances of this case has it been made out to my satisfaction that these proceedings cannot be of any practical utility to the plaintiffs if they succeed, and do they amount to an improper interference with the proceedings of the foreign court, or are they in their nature oppressive or vexatious. On the affidavits which have been read it is not clear what effect a judgment in this action would have on the proceedings in France, and it has not been made out to my satisfaction that the declaration now sought for would not be of practical utility to the plaintiffs or would be an improper interference with the proceedings of the French court. I am not able to say that to ask for such a declaration is either vexatious or oppressive, or an abuse of the process of the court, and the result, therefore, is that the defendants have not made out a sufficient case for a stay of this action, and their application will be dismissed with costs.

In the second motion the plaintiffs claim a declaration similar to that claimed by them in the first, but the circumstances under which the second action is brought are not at all similar. Here the plaintiffs have attacked the Manar Steamship Company, though the steamship company have shown no desire to challenge the validity of the plaintiffs' mortgage or to challenge their right to the freight earned under the charter-party. The liquidator, it is true, states in the affidavit filed by him in this action that the mortgage may be invalid on the ground that the resolution passed by the company authorising the borrowing of the money was informal, and it is possible that some day the company now in liquidation, apparently without funds, and certainly without a desire to litigate, may choose to claim a declaration that the mortgage is an invalid one, and may seek to set it aside. The plaintiffs, the mortgagees, say that this question must be settled now; the liquidator of the defendant company says that he ought not to have his hand forced, and a passage has been read from a judgment of Stirling, J. in *Brooking* v. *Maudslay* (*ubi sup*) which supports that contention. The plaintiffs are in the position of having lent money on a mortgage of the ship; they have taken possession of the ship and chartered her and earned freight. The defendants, the Manar Steamship Company, have been aware of all these proceedings which have been taken by the plaintiffs, and have not been antagonistic to any of them. The defendants, the mortgagors, have not attacked the plaintiffs, and until the plaintiffs were attacked by Strachan Brothers in France the matters between the plaintiffs and the defendant company were at rest. But Strachan Brothers having brought an action against the Manar Steamship Company, to which the defendant company did not appear, the plaintiffs

have chosen to put the law in motion in this action against the Manar Steamship Company for no other purpose that I can see except to get a declaration for use in France in litigation to which the Manar Steamship Company are not parties. Therefore I think the defendants in this case are entitled to say that this action ought not to be brought against them and cannot serve any practical utility. It seems to me to be vexatious, and I direct that the proceedings against the defendants in this action shall be stayed—not dismissed—and the costs of this application shall be paid by the plaintiffs.

Solicitors for the plaintiffs, *King, Wigg,* and *Co.*, agents for *George Armstrong* and *Sons*, Newcastle-on-Tyne.

Solicitors for both defendants, *Pritchard* and *Sons*, agents for *Wilkinson* and *Marshall*, Newcastle-on-Tyne.

Wednesday, April 1, 1903.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE MARGUERITE MOLINOS. (a)

Salvage—Information to subsequent salvors—Lifeboat crew.

Signals for assistance were exhibited by a vessel ashore, and, in response to a telegram sent by the operator at the S. Lighthouse, two tugs proceeded to her assistance. A telegram was also sent by the coxswain of the S. lifeboat, but arrived after that sent from the lighthouse.

In an action for salvage by the coxswain and crew of the lifeboat:

Held, that, although a person who has done no more than give information may be entitled to salvage, yet in fact no services had been rendered, as the tugs had prepared to proceed to the vessel on the receipt of the first telegram.

Held, also, that when a lifeboat crew have gone out for the purposes of saving life, the onus is on them to prove that they have afterwards become entitled to salvage against the property in peril.

ACTIONS for salvage brought by the owners, masters, and crews of the steam tugs *Humber, Terrier,* and *J. W. Jewitt,* and the coxswain and crew of the Spurn lifeboat, against the owners of the French barque *Marguerite Molinos.*

The *Humber* was a paddle tug of 131 tons gross register and 250 horse power effective, manned by a crew of seven hands all told, and of the value of 6000*l.*

The *J. W. Jewitt* was a paddle tug of 97 tons gross register and 240 horse power effective, manned by a crew of five hands all told, and was of the value of 1500*l.*

The *Terrier* was a screw tug of 78 tons gross register and 235 horse power effective, manned by a crew of five hands all told, and was of the value of 3000*l.*

The *Marguerite Molinos* was a French barque of 2005 tons gross register, and at the time was on a voyage from Hull to Swansea in ballast in tow of a tug, and manned by a crew of fifteen hands all told. Her value was 9500*l.*

On the 26th Feb. 1903 she met with heavy weather and had to turn back for shelter, and while making Grimsby Roads the hawser parted during the night and she drifted towards the Trinity Sand, let go her anchor, and brought up about one and a quarter miles N.N.W. of the Spurn Lighthouse. As the tide ebbed she took the ground, and at low water was left high and dry. Signals for the assistance of a tug were exhibited about 7 a.m. and answered from the lighthouse. The signals were also seen from the shore, and an attempt was then made to launch the tender of the lifeboat, but the first attempt failed owing to the heavy sea running, and the coxswain of the lifeboat thereupon telegraphed to Grimsby for the assistance of tugs. Eventually, about 12.30 p.m., the efforts to launch the tender were successful, but as the crew were unable to get to the lifeboat, which is kept afloat at moorings inside Spurn Point, they proceeded on in the tender, and reached the barque about 2 p.m. Five of the crew then went on board, and remained there until she came off, although they were told their services were not wanted. About 2.30 p.m. the *Humber* came up and passed a rope, and the *Marguerite Molinos* then got up her anchor and, while she was doing so, the two other tugs made fast, and as she floated with the tide she was towed to a safe anchorage.

The defendants admitted that salvage services had been rendered by the tugs, but denied that any services had been rendered by the lifeboatmen.

At the trial it appeared that the first intimation that assistance was required was a telegram sent by the operator at the Spurn Lighthouse, and it was in response to this that the tugs prepared to proceed to the vessel.

Aspinall, K.C. and *Lauriston Batten* for the plaintiffs the owners, masters, and crews of the tugs.

A. E. Nelson for the plaintiffs the coxswain and crew of the Spurn lifeboat.—The prompt arrival of the tugs was due to the telegram sent by the coxswain, and the giving of such information is in itself a salvage service:

The Sarah, 37 L. T. Rep. 831; 3 Asp. Mar. Law Cas. 542; 3 P. Div. 39;
The Nile, 33 L. T. Rep. 66; 3 Asp. Mar. Law Cas. 11; L. Rep. 4 A. & E. 449.

In *The Ocean* (2 W. Rob. 91) a vessel which carried an order for a steamer to go out of harbour to a vessel in danger was held entitled to salvage.

Laing, K.C. and *Bateson* for the defendants *contra.*—The telegram was not necessary, as the tugs were already starting in response to a previous message sent from the Spurn Lighthouse. In *The Chiltonford* (*Shipping Gazette*, Feb. 22, 1901), a claim was made for salvage because a telephone message had been sent, but the claim was rejected.

BUCKNILL, J.—These are consolidated actions brought by the tugs *Humber, Terrier,* and *J. W. Jewitt,* and by the coxswain and crew of the Spurn lifeboat, for salvage services alleged to have been rendered to the French barque *Marguerite Molinos* on the 27th Feb. last. As in order of time the lifeboat's case has been taken first, I will deal with that at once. As regards what took place after the lifeboatmen in their tender got alongside the French barque, I accept the story of the master of the barque, and I find as a fact that his story is correct, and that the services of the lifeboatmen were never accepted as salvors. I have further to decide whether the

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

coxswain of the lifeboat is entitled to any salvage by reason of the telegram sent about noon. It was handed in at 12.35, and was signed by Pye, the coxswain of the lifeboat. It ran: "Barque ashore, Trinity Sand, wants assistance." Until the tug owner was called, I was in some difficulty on the question of law; that is to say, I was not at all clear whether that telegram would in the circumstances entitle the coxswain or any other person connected with the lifeboat to hold the position of salvors under the authorities which have been cited. The law is clear that where a person does something, outside his duty, of such a nature as to be the cause of an act done by another which is a salvage act, he may himself hold the position of a salvor, although he has done no more than give information. A messenger from the sea coming in and telling another that a ship is in peril is entitled to be treated as a salvor if, in consequence of his information, the other goes out and renders salvage services to that ship. But each case must depend on its own facts. What are they here? The tug owner, being asked how he came to send out his tugs to the *Marguerite Molinos*, said that he had received a telegram from the coxswain of the lifeboat; but it turned out, on further examination of the tug owner, that he had received a another telegram earlier in the morning, which was from the telegraph clerk at the Spurn Lighthouse, and that the crews of the tugs were already getting ready to start when the second telegram arrived. That second telegram was useless, and I so decide. I cannot, therefore, take into consideration the courageous endeavours of the lifeboat crew, lasting nearly four hours, to launch the tender of the lifeboat. Lifeboatmen must understand that when they have gone out to save life, as members of a lifeboat crew, the onus is on them to prove that they have afterwards become entitled to salvage reward as against the property alleged to be in peril. Here I find that they were not allowed to go on board the *Margerite Molinos* as salvors, but were only as far as the coxswain was concerned invited to come, the others inviting themselves on board, not for the purpose, as the master of the barque thought, of rendering salvage services, but for the purpose of looking round—I am obliged to hold on the facts of the case that the little they afterwards did was not in fact salvage work. They were not salvors. Their suit must therefore fail, and I regret to say that it must be dismissed with costs. As to the three tugs, there is no doubt they are salvors. The ship was on the sands. She had been high and dry. She had received no injury, and she would have floated at the turn of the tide; but she had had very bad weather. It is satisfactory to know how it is that the vessel which was towing her was unable to render assistance. She was a screw vessel, and I gather she drew as much water as the barque; so there was ample reason, though we have not had that explained, why she did not go to the barque's assistance. These tugs got into position, and after ten minutes' towing got her afloat. The weather had been bad; but it was rapidly moderating, and I am advised that the tug *Humber* would have been able to get the vessel off. The master of the *Humber* did not attempt to exaggerate, and I think his evidence was very fairly given; but he had a doubt, and, having a doubt, he erred in the right direction. He said: "I may not be able to get the barque off myself. I will take the services of the other two tugs." The fact is that these three boats are all of them salvors; but I cannot give a heavy award. The tugs were not in any danger. It is not one of those cases where there was bumping or where they were girted. I am not sure if the barque had been there another tide she would have taken any harm. When the weather got down to the force of two, one tug would have been able to get her off; but they must be paid, and the result is that I award 500*l.*—300*l.* to the *Humber* and 200*l.* to the two other tugs, with costs. As the bail demanded—2600*l.*—was exorbitant, I order the salvors to pay the bail fees above 1000*l.*

Solicitors for the plaintiffs, the owners, masters, and crews of the tugs, and the coxswain and crew of the Spurn lifeboat, *Pritchard* and *Sons*, for *A. M. Jackson*, Hull, and *E. S. Wilson* and *Sons*, Hull.

Solicitors for the defendants, the owners of the *Marguerite Molinos*, *Waltons*, *Johnson*, *Bubb*, and *Whatton*.

March 11, 12, *and April* 8, 1903.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE KONING WILLEM I. (*a*)

Collision—Fog — Failure to stop and ascertain position of approaching vessel—Regulations for Preventing Collisions at Sea, art. 16—*Statutory presumption of fault—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 418, *sub-s.* 2, 419, *sub-s.* 4, 424.

A collision occurred in the English Channel, in a dense fog, between the steamship B. *and the Dutch steamship* K. W. I. *Neither vessel stopped her engines on hearing the fog signal of the other forward of the beam. It was admitted by the owners of the* B. *that their vessel was to blame. It was contended by the owners of the* K. W. I. *that, owing to the distance the vessels were apart when the whistle of the* B. *was first heard, the necessity to stop did not arise, as there was then no danger of collision, and that art.* 16 *did not therefore apply.*

Held, that, under the circumstances, there was danger of collision at the time the whistle of the B. *was first heard; that the* K. W. I. *ought to have stopped her engines, and that the fact that she did not do so contributed to the collision.*

Query, *whether the statutory presumption of fault created by sect.* 419 *of the Merchant Shipping Act* 1894 *applies to a foreign vessel outside British territorial jurisdiction, where the Order in Council applying the Collision Regulations to vessels of the country to which she belongs does not apply the provisions of Part* 5 *of the Merchant Shipping Act* 1894.

ACTION for damage by collision brought by the owners of the steamship *Bittern* against the owners of the Dutch steamship *Koning Willem I.*

The collision occurred about 4 a.m. on the 13th April 1902, in the English Channel, about six miles E.N.E. of Dungeness in a dense fog.

The *Bittern* was a steamship of 881 tons gross register, and at the time was on a voyage from

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Manchester to Ghent, with a general cargo on board, and manned by a crew of seventeen hands all told. The *Koning Willem I.* was a steamship of 4446 tons gross register, and was on a voyage from Amsterdam to Southampton, with a general cargo and passengers, and manned by a crew of ninety-six hands all told.

The facts of the case appear sufficiently from the judgment.

The plaintiffs charged the defendants (*inter alia*) with a bad look-out, neglecting to stop their engines when the whistle of the *Bittern* was first heard, and with proceeding at an improper rate of speed under the circumstances. They also charged the defendants with neglecting to comply with arts. 16 and 29 of the Collision Regulations.

The defendants charged the plaintiffs with (*inter alia*) a bad look-out, navigating under the circumstances at an improper rate of speed, and not stopping when the whistle of the *Koning Willem I.* was heard. They also charged them with neglecting to comply with arts. 16 and 29 of the Collision Regulations.

Art. 16 of the Regulations for Preventing Collisions at Sea is as follows:

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The defendants also contended that, as the collision occurred outside the limits of British territorial jurisdiction, the statutory presumption of fault created by sect. 419, sub-sect. 4, of the Merchant Shipping Act 1894 did not apply to their vessel, as she was a Dutch vessel, and although the Government of the Netherlands had signified their willingness that the Collision Regulations should apply to Dutch vessels, and an Order in Council had been made accordingly, the provisions of Part 5 of the Merchant Shipping Act 1894 had not been applied to vessels of that country.

The material sections of the Merchant Shipping Act 1894 are as follows:

Sect. 418 (2). The Collision Regulations, together with the provisions of this part [Part 5] of this Act relating thereto, or otherwise relating to collisions, shall be observed by all foreign ships within British jurisdiction, and in any case arising in a British court concerning matters arising within British jurisdiction foreign ships shall, so far as respects the Collision Regulations and the said provisions of this Act, be treated as if they were British ships.

Sect. 419 (4). Where in the case of a collision it is proved to the court before whom the case is tried that any of the Collision Regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

Sect. 424. Whenever it is made to appear to Her Majesty in Council that the Government of any foreign country is willing that the Collision Regulations, or the provisions of this part of this Act relating thereto, or otherwise relating to collisions, or any of those regulations or provisions should apply to the ships of that country when beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that these regulations and provisions shall, subject to any limitation of time, conditions, and qualifications contained in the order, apply to the ships of the said foreign country, whether within British jurisdiction or not, and that such ships shall, for the purpose of such regulations and provisions, be treated as if they were British ships.

During the trial of the action it was admitted that the *Bittern* was to blame for breach of art. 16 of the regulations.

Laing, K.C. and *Adair Roche* for the plaintiffs, the owners of the *Bittern*.—The *Koning Willem I.* must be found also to blame for not stopping when she heard the whistle of the *Bittern* forward of her beam, and for not stopping and reversing earlier. Art. 16 is imperative, and the provisions of the corresponding article (art. 18) of the regulations of 1884 were always rigidly enforced. See

The Ceto, 62 L. T. Rep. 1; 6 Asp. Mar. Law Cas. 479; 14 App. Cas. 670;
The Lancashire, 69 L. T. Rep. 663; 7 Asp. Mar. Law Cas. 376; (1894) A. C. 1.

In *The Star of New Zealand* (*Shipping Gazette*, Nov. 7, 1899) the vessel had a cargo of dynamite on board which was stowed aft, and it was attempted to show that it would have been dangerous for her to stop on account of the risk to other vessels following astern of her. This plea did not, however, succeed. In *The Rondane* (82 L. T. Rep. 828; 9 Asp. Mar. Law Cas. 106) the rule was strictly enforced. See also

The Bernard Hall, 86 L. T. Rep. 658; 9 Asp. Mar. Law Cas. 300.
The Cathay, 81 L. T. Rep. 391; 9 Asp. Mar. Law Cas. 35;
The Oceanic, 88 L. T. Rep. 303.

Pickford, K.C., *Aspinall*, K.C., and *R. B. D. Acland* for the defendants, the owners of the *Koning Willem I.*—Art. 16 does not apply in this case, because the position of the *Bittern* had been accurately ascertained. The master of the *Koning Willem I.* came to the conclusion, from her whistles, that the *Bittern* was on his starboard bow, as in fact she was, and at such a distance that there was no risk of collision. There must be danger of collision for the necessity to arise for stopping the engines, and the rule cannot apply to every case of a whistle being heard forward of the beam. The vessels were in a position to pass one another safely, and, had it not been for the improper porting of the *Bittern*, the collision would never have occurred. In all the cases cited there was a distinct finding of fact that the position of the approaching vessel had not been ascertained, and, as there was danger of collision, the court held that the rule as to stopping applied. It would have been imprudent for the *Koning Willem I.* to have reversed, as that would have caused her to cant to starboard and towards the *Bittern*. As the *Koning Willem I.* is a foreign vessel, and as, it is submitted, the collision occurred outside British territorial jurisdiction, the presumption of fault created by sect. 419 (*a*) is not binding on her. By sect. 424 there must be an Order in Council making the provisions of Part 5 of the Merchant Shipping Act 1894 apply to vessels of the country to which she belongs, and, although it is true that the Government of the Netherlands has consented to the Collision Regulations applying to vessels of that country, yet there is no evidence that they have consented that the provisions of Part 5 of

the Act should apply to the ships of that country when beyond the limits of British jurisdiction. If, therefore, the court finds the omission to stop did not in fact contribute to the collision, the *Koning Willem I.* cannot be deemed to be in fault. They referred to

The Saxonia, 6 L. T. Rep. 6; Lush. 410;
The Fanny N. Carvill, 32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565; 13 App. Cas. 455, n;
Reg. v. *Keyn* (*The Franconia*), 2 Ex. Div. 63;
The Magnet, 32 L. T. Rep. 129; 2 Asp. Mar. Law Cas. 478; L. Rep 4 A. & E. 417;
Don v. *Lippman*, 5 Cl. & F. 1; 47 R. R. 1;
Marsden's Collisions at Sea, 4th edit., pp. 70 and 210.

Laing, K.C. in reply.—In practice, sect. 419, sub-sect. 4 has always been applied to a foreign vessel, whether within British territorial jurisdiction or out of it. The owners of the *Koning Willem I.* have submitted to the jurisdiction of the court, and are counter-claiming for damages. The words of the section give specific directions to the court before whom the case is tried, and the court is bound to draw inferences of blame. The court is therefore bound to try the case by the *lex fori*, and unless it is satisfied that the circumstances of the case made departure from the regulations necessary, or that the breach could not possibly have contributed to the collision, they must find the defendants' vessel to blame if a breach of the regulations has been committed.

Cur. adv. vult.

April 8.—BUCKNILL, J.—The *Bittern* was bound up Channel. The *Koning Willem I.* was bound down Channel, and a dense fog prevailed. The evidence of the *Bittern* was that her engines were working at dead slow, making a speed of about three knots; that the regulation fog signals were being sounded; that the whistle of what afterwards turned out to be the *Koning Willem I.* was heard ahead, and slightly on the starboard bow, far off, and was answered at once by the *Bittern*, and was heard again, this time apparently on the port bow, about a point and a half, and nearer; that that signal was answered and the helm of the *Bittern* was ported about two and a half points, until her head came to E. ½ S., and then the helm was steadied and the engines still continued working at dead slow; that then the whistle of the *Koning Willem I.* was heard apparently about four and a half points on the port bow, and was answered, and the helm was ported a little more, just as the lights of the *Koning Willem I.* were seen four to five points on the port bow and two ships' lengths away. That short distance indicates the density of the fog. Then the evidence is that the helm was at once hard-a-ported, and an order was given to put the engines full speed ahead as the only possible chance of avoiding a collision; but the *Koning Willem I.* came on at considerable speed, and her stem struck the *Bittern* in the way of the engine room, doing her such damage that she had to be run ashore. The place where the collision occurred was, as I find as a fact, about six miles E.N.E. of Dungeness—that is, outside the territorial limit. The evidence on behalf of the *Koning Willem I.* was that at about 1.30 a.m. she ran into a dense fog, and her engines were put at dead slow, and fog signals were regularly sounded, the vessel being stopped from time to time when other ships' whistles were heard, the position of which was not ascertained; that later on other whistles were heard, and in particular the whistles of two different ships about two or three points on the starboard bow, the positions of which were not then quite ascertained, and which were not ascertained until they were heard a second and a third time, and then they seemed to be broadening on the bow; that a whistle, which turned out to be that of the *Bittern*, was then heard a fourth time and seemed to be coming nearer, and the engines of the *Koning Willem I.* were at once stopped; that the whistle then seemed to be getting nearer ahead, and shortly afterwards the masthead and red lights of the *Bittern* were seen about one and a half points on the starboard bow, and the engines of the *Koning Willem I.* were at once reversed full speed, but the collision was inevitable. I find as a fact that the ships were not port to port, as alleged by the plaintiffs, but that they were shortly before the collision starboard to starboard, as alleged by the *Koning Willem I.*, and I also find as a fact that the helm of the *Koning Willem I.* was not starboarded as alleged. From the time of the *Bittern's* signals being first heard, the helm of the *Koning Willem I.* was not altered, and she was kept on her course, which was about S.W. by W. westerly, magnetic. On the above facts it was admitted that the *Bittern* must be held to blame for disobeying art. 16 of the regulations.

The question remains whether the *Koning Willem I.* is also to blame. The reason given by her master for not stopping his engines when he first heard the whistle of the *Bittern*, or at the second or third whistle, was this—that his ship was going so slow, and the signal seemed to be so far off, that he thought it better to wait until he heard it again, and that so soon as he heard it more ahead—that is, finer on the bow—he stopped his engines immediately. Not having ascertained the position of the *Bittern* when her signals were first heard, in my opinion the engines should have been stopped, apart altogether from art. 16, but certainly in accordance with that article. I think, and the Elder Brethren of the Trinity House who assist me agree, that it was in that weather impossible to have ascertained with any degree of certainty the position of the *Bittern*—that is, the bearing and distance of the *Bittern* from the *Koning Willem I.*—when her whistle was first heard, and the master of the *Koning Willem I.* admits as much himself. I think his duty was, clearly, to have stopped his engines then. With regard to what has been said about signals in a fog, I think I may usefully read part of a paragraph in art. 18 of the Channel Pilot, part 1, 9th edit.: "Sound is conveyed in a very capricious way through the atmosphere. Apart from wind, large areas of silence have been found in different directions and at different distances from the origin of a sound, even in clear weather. Therefore too much confidence should not be felt in hearing a fog signal." Now I will refer to the judgment of the President in the case of *The Bernard Hall* (*ubi sup.*), the language of which I adopt. The learned President said: "The Elder Brethren point out that there would be extreme difficulty in knowing how far off the vessel would be in a fog, and therefore they do not think there was any such ascertainment as to justify the *Holyrood*"—in this case the *Koning*

Willem I.—"in not complying with the clear terms of art. 16, by stopping her engines when she first heard the whistle of the *Bernard Hall;* and that it is impossible to say that it would not have been a material matter if she had done so." Each case must, no doubt, be considered on its own facts; and in this case I hold without doubt that the master of the *Koning Willem I.*, a man of great experience, should have grasped the fact that, as it was impossible for him to locate with any certainty in that dense fog the bearing of the *Bittern* or her distance away, he should have stopped his engines on first hearing her whistle. Instead of that, he waited until he found that the whistles indicated danger, because he heard them drawing ahead, proving that the *Bittern* was crossing his bows. So, in this part of the case, there has been a breach of the second part of art. 16. As has been pointed out to me by the Elder Brethren, if you stop your engines you can hear better than you can when the noise of the engines and propeller is going on. If you stop your engines you lessen the danger and give yourself better information than if you go on with engines moving, as was done in this case; and it may be that if the master of the *Koning Willem I.* had stopped his engines when he first heard the whistles, which he thought were far off, he might have come to the conclusion that the whistles were nearer than he thought they were—and I suspect they were nearer. I think it was negligent navigation on his part not to have stopped his engines when he first heard the whistle of the *Bittern* and to have waited so long as he did. But there is another matter to be considered in connection with the navigation of the *Koning Willem I.* Her engines were not reversed until the *Bittern* came into view about 150 yards off. The reason given by the master of the *Koning Willem I.* is that his way was already almost stopped; but that is a question of fact for my decision, and I find that it is not so. I cannot accept the statement that the engines of the *Koning Willem I.* were stopped five minutes before they were reversed, or that they were reversed for eighty seconds before the collision. The master was asked in cross-examination by counsel for the plaintiffs, "Have you not said before to-day that your engines were reversed three minutes before the collision?" and he said, "Yes, I have said so; but I find now, by experiments made since the collision, that I must have been wrong, and I prefer to say that the engines were reversed for eighty seconds." That looks very much as if he made experiments to see how long it took, when the engines were working, as he calls it, dead slow, to take the way off the ship. He preferred to put it at eighty seconds. The engines were stopped when the *Bittern's* whistle was heard narrowing on the bow more than before, and very shortly before the masthead and red lights came into view. Before they were stopped it is said the engines were working at dead slow. That is a very important question of fact which I have to decide. I am not satisfied on the point. I do not like to say that the master of the *Koning Willem I.* was trying to mislead the court—I do not think he was—but I think he must be mistaken. I have to examine the facts carefully, and I think they lead me to the conclusion that the vessel was not going dead slow when he said she was, and when he probably thought she was. Take, for example, the entry in the engineer's log: "Steamed from 1.20 at slow, because of fog." "At times remained stopped." I know that in ships of this high class the logs and other documents are supposed to be kept with great care, and it is almost impossible to believe that, if the engines had been working at dead slow for so long a time, it would not have been recorded in the log. The log speaks only of "slow" and "stopped." The damage done to the stem of the *Koning Willem I.*, which was driven in 16in. and set over to port indicates, in our opinion, that that vessel had substantial headway. I find as a fact that both vessels had substantial headway upon them, and, from the facts which I have found, I come to the conclusion that the engines of the *Koning Willem I.* had not been worked at slow so long as the master thought they had, and were not reversed anything like eighty seconds before the collision. The position, therefore, is this: The collision was, in the first instance, certainly caused or contributed to by the improper navigation of the *Bittern*—that is admitted; she not only broke art. 16, but her witnesses were not correct when they judged that the *Koning Willem I.* was on the port bow; in other words, the *Bittern* ported across the course of the *Koning Willem I.*, and the *Koning Willem I.* did not starboard across the course of the *Bittern*. The *Koning Willem I.*, in my own opinion, and in that of the Elder Brethren, distinctly contributed to the collision in two ways. First, by her master not stopping her engines when he ought to have stopped them in that dense fog with so many vessels about. Being in doubt, as he was on his own admission, he ought to have stopped his engines; and when he found shortly after, as he did find and as he admitted he found, that the other vessel was porting and that her whistle signals were narrowing on his bow, indicating to him a position of extreme danger—the position being then that a vessel which could only be seen at about 150 yards was porting across his course—he ought not only to have stopped his engines, but to have reversed them. That is not only required by the rules, but is necessary for proper navigation. These findings of fact render it unnecessary for me to consider the point of law which was raised with regard to the application of sect. 419, sub-sect. 4, of the Merchant Shipping Act 1894, and the decree will be that both vessels are to blame.

Solicitors for the plaintiffs, the owners of the *Bittern*, *Thomas Cooper* and *Co.*

Solicitors for the defendants, the owners of the *Koning Willem I.*, *Clarkson, Greenwell*, and *Co.*

April 7 *and* 8, 1903.

(Before BUCKNILL, J., and TRINITY MASTERS.)

THE AUGUST KORFF. (*a*)

Salvage—Services rendered by request—Standing by—Attempt to tow—Principle of making awards.

The steamship A. K. *with a cargo of oil in bulk became disabled in the North Atlantic. In response to signals the steamship* A. *came up, and it was agreed she should try to tow her to Fayal, but after standing by and towing her for two days*

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

she had to give up the attempt, having assisted her a few miles.

Subsequently the Ac. *took her in tow, and towed her* 265 *miles, when, owing to the hawser parting, she lost her during the night.*

The M. *then came up and supplied her with some provisions, and agreed to tow her to F., but, owing to being short of fodder for her cargo of horses, left after having towed her about twelve miles. Eventually the* S. *came up and towed her into F. Harbour, accompanied by the* B. P., *a vessel belonging to the same owners, and which had come up shortly after the* S.

Held, that all the vessels were entitled to be rewarded. The A. *on the authority of* The Benlarig (60 *L. T. Rep.* 238; 6 *Asp. Mar. Law Cas.* 360; 14 *P. Div.* 3) *by way of payment for standing by at request, and for her attempts to tow; the* Ac. *and the* M. *on the principle laid down in* The Atlas (*Lush* 518) *and* The Camellia (50 *L. T. Rep.* 126; 5 *Asp. Mar. Law Cas.* 197; 9 *P. Div.* 27) *for having meritoriously contributed to the ultimate success of the salvage operations; the* S. *for having towed her to a place of safety; and the* B. P. *for standing by. A sum total of* 8550*l.* *awarded.*

CONSOLIDATED actions for salvage by the owners, masters, and crews of the steamships *Albuera, Acacia, Marquette, Snowflake,* and *Burgermeister Petersen* against the owners of the *August Korff,* her cargo and freight.

The *Albuera* was a vessel of 3460 tons gross register, with engines of 1350 horse power indicated, and was on a voyage from Glasgow to Boston with a cargo of coal, manned by a crew of twenty-five hands all told. Her value was 45,000*l.*, and her cargo and freight 4250*l.*—49,250*l.* in all.

The *Acacia* was a vessel of 2885 tons gross register, with engines of 250 horse power nominal, and was on a voyage from Middlesbrough to Philadelphia, with a cargo of railway materials and pig iron, manned by a crew of twenty-five hands all told. Her value was 35,000*l.*, her cargo 11,775*l.*, and freight 1474*l*—48,249*l.* in all.

The *Marquette* was a vessel of 7057 tons gross register, fitted with engines of 770 horse power nominal, and was on a voyage from New York to London with horses, sheep, and a general cargo, manned by a crew of 112 hands all told. Her value was 133,000*l.*, that of her cargo 130,510*l.*, and freight 6323*l.*—269,833*l.* in all.

The *Snowflake* was a tank steamer of 2710 tons gross register, fitted with engines of 247 horse power nominal, and was on a voyage from New York to Hull with a cargo of petroleum in bulk, manned by a crew of thirty hands all told. Her value was 30,000*l.*, that of her cargo 15,8000*l.*, and freight 2640*l.*—48,440*l.* in all.

The *Burgermeister Petersen* was a tank steamer belonging to the defendants of 2788 tons gross register, with engines of 225 nominal horse power, and was on a voyage from New York to Bremerhaven with a cargo of petroleum in bulk, and manned by a crew of thirty-four hands all told. Her value was 22,500*l.*, that of her cargo 16,737*l.*, and freight 2300*l.*—41,537*l.* in all.

The facts of the services rendered by the different vessels appear sufficiently from the judgment.

The *August Korff* was a tank steamer belonging to Hamburg of 4055 tons gross register. She was at the time the services were rendered on a voyage from Philadelphia to Nordenhamn with a cargo of petroleum and naphtha, and manned by a crew of thirty-seven hands all told. Her value in her damaged condition was 27,000*l.*, her cargo 14,578*l.*, and freight at risk 1743*l.*—43,321*l.* in all.

On the 1st Dec. 1902, while in the course of her voyage, and when in latitude 48deg. 19min. N. and longitude 32deg. 26min. W., and about 960 miles from Queenstown, she was struck by a heavy sea which carried away the rudder and part of the stern-post.

Signals of distress were exhibited, and in order to lighten the ship three of the tanks were pumped out, and with her engines and sails she made some progress to the eastward.

On the 2nd Dec. she fell in with a steamship which made fast astern in order to steer her, but gave up the attempt after a short time, and proceeded on her voyage.

The *Albuera* fell in with her on the 5th Dec., and after receiving assistance from the above-named vessels she was eventually towed into Falmouth Harbour, where she arrived on the 23rd Dec.

Aspinall, K.C. and *Bateson* for the owners, masters, and crews of the *Albuera* and *Snowflake.* The *Albuera* stood by and rendered services by request, and was delayed on her voyage, and had her ropes damaged and lost. In *The Cambrian* (76 L. T. Rep. 504; 8 Asp. Mar. Law Cas. 263) it was held that even if no benefit results, a vessel is entitled to be rewarded if she stands by or renders services by request. See also

The Helvetia, 8 Asp. Mar. Law Cas. 264 n.;
The Undaunted, 2 L. T. Rep. 520; Lush. 90;
Kennedy on Salvage, p. 37.

Aspinall, K.C. and *Pritchard* for the owners, master, and crew of the *Marquette.*—The services were of value, as she did tow her some twelve miles, and so enabled her to fall in with the *Snowflake.*

Dawson Miller for the owners, master, and crew of the *Acacia.*

Pickford, K.C. and *Leck* for the owners, master, and crew of the *Burgermeister Petersen.*—The master and crew of the *Burgermeister Petersen* may claim against the cargo and freight:

The Glenfruin, 52 L. T. Rep. 769; 5 Asp. Mar. Law Cas. 413; 10 P. Div. 103;
The Miranda, 27 L. T. Rep. 389; 1 Asp. Mar. Law Cas. 440; L. Rep. 3 A. & E. 561.

They also cited

The Agamemnon, 48 L. T. Rep. 880; 5 Asp. Mar. Law Cas. 92.

Laing, K.C. and *Batten* for the defendants *contra.*—The foundation of salvage is success, and the *Albuera* and the *Marquette* are not therefore entitled to claim salvage:

The Zephyrus, 1 W. Rob. 329;
The Camellia, 50 L. T. Rep. 126; 5 Asp. Mar. Law Cas. 197; 9 P. Div. 27.

In *The Benlarig* (60 L. T. Rep. 238; 6 Asp. Mar. Law Cas. 360; 14 P. Div. 3) the towing vessel was held entitled to a *quantum meruit* for carry-

ing out a contract to attempt to tow. In neither of these cases has any actual engagement or request been proved. They cannot be distinguished from that of *The Dart* (80 L. T. Rep. 23; 8 Asp. Mar. Law Cas. 481), where the salvage action was dismissed on the ground that no material benefit had been rendered to the other vessel.

BUCKNILL, J.—This is a complicated case, in which I have been much assisted by the advice of the Elder Brethren. On the 1st Dec., in bad weather, the *August Korff* broke down in the Atlantic about 1000 miles from Falmouth, her rudder and part of the stern-post carrying away. In all other respects she was seaworthy and tight. Various vessels came to her assistance, and the first of these claiming in the present suit was the *Albuera*, which vessel I find as a fact was, on the 5th Dec., engaged to stand by, and her master undertook that he would, if possible, get the *August Korff* to the Western Islands. The *Albuera* tried from the 5th Dec. to the 7th Dec. and her services were by no means easy. The hawser parted at 12.30 p.m. on the 6th, and at 6.30 p.m. both hawsers carried away. She then stood by till daylight, and ultimately, finding it impossible to do more than she had done, proceeded on her voyage. She attempted to do what she had undertaken to do—that is, that she would do her best to tow to Fayal. Having so contracted and having so attempted, but failed in the attempt, I think the case comes within the language used by Butt, J. in *The Benlarig* (60 L. T. Rep., at p. 240; 6 Asp. Mar. Law Cas., at p. 362; 14 P. Div., at p. 6.) as follows: "I am glad to be able to hold that they are entitled to some payment, because I think it would be very unfortunate in any way to discourage steamers from rendering assistance to vessels in distress." The next ship, the *Acacia*, certainly towed the *August Korff* 220 miles as the crow flies; she was four and a half days so engaged, and it is said that she lost in all seven days, and sustained damage to the extent of 188*l*. The weather was then very bad indeed, and the *Acacia's* rope parted four times, and she herself was obliged to stop at night for the purpose of making some repairs to the engines, which had been strained or temporarily injured by the services, and she then lost sight of the other ship. It is to be remembered that she might have gone on with the service if it had not been for the accident to her engines which caused her to lose sight of the ship. Her salvage award will be what I call a salvage award pure and simple. I only wish to make part of my judgment the language of Sir James Hannen in *The Camellia* (*ubi sup.*) and the language of Dr. Lushington in *The Atlas* (Lush. 518). The effect of both of those judgments is set out in Kennedy on Salvage, at p. 29, in these words: "Whilst, however, the general rule which is illustrated by the above examples is clear, and in the words of Sir James Hannen in a recent case, 'there can be no doubt that services, however meritorious, which do not in any way contribute to the ultimate safety of the ship are not entitled to salvage award,' it is equally clear from several decisions, and indeed it has been expressly ruled by the Privy Council that, when a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share in the reward, although the part they took, standing by itself, would not have produced it." Now, here the services of the *Acacia* did meritoriously contribute to the ultimate success. She towed her on her way 220 miles, and but for her the *August Korff* might never have seen the *Snowflake*. The services were well performed, and only abruptly ended in consequence of the accident to the salving ship; but whilst giving her a salvage award I must do it on a rather different scale from that on which salvage is awarded to the ultimate salvor who really brought the ship into port. The next ship is the *Marquette*, and it is a matter of regret that she was not more fortunate. She is a valuable vessel of 7000 tons, and had a large crew on board, and was accepted by the master of the ship in distress as an efficient but expensive instrument to effect his salvage. Now, the *Marquette* did not tow very much, and, in the difficulty I have felt as to her case, I have asked the Elder Brethren this question: "Do you think that that which the *Marquette* did was a contribution to the ultimate success?" I will assume that she towed the *August Korff* twelve miles—that is to say, she probably towed her a distance which would represent hull down to a ship, and the *Snowflake* to pick her up must have been in sight of her, so that if the *August Korff* had not been where she was when she was picked up—in other words, had she been twelve miles to the westward of that place—the *Snowflake* might never have seen her. The Elder Brethren advise me that the mere fact of towing this vessel for twelve miles was a contribution, and an important contribution, to the ultimate success of the salvage operations. If that is so, then I find myself obliged, under the passage I have just read, to hold that the *Marquette* is entitled to a share in the award. The next case is that of the *Snowflake*. It is admitted that she was a salvor. To her services the salved ship is immediately indebted for being brought safely into port, and she is entitled to get the largest share of the award. Her services were not very difficult, but they were well performed. Then we come to the *Burgermeister Petersen*, and her case introduces what I think is a very pleasant trait in the story of the sea. There is no doubt the master of the salved ship, seeing another ship belonging to his owners coming up, might, if he had chosen, have directed the *Burgermeister Petersen* to get hold of his ship, but with that sort of spirit which, I am sure, prevails amongst sailors, he said: "No, she has got hold of me; she had better do her work, and you had better follow me." That being so, he was doing his duty to his owners in telling the *Burgermeister Petersen* to stand by. She did so, and I have now to consider what is to be given to her owners as against the 7000*l*., the value of the naphtha cargo, the master and crew of the *Burgermeister Petersen* being entitled to recover against ship, cargo, and freight. The awards I make are as follows: The *Albuera* 800*l*., of which her owners will receive 615*l*., her master 60*l*., and her crew 125*l*.; the *Acacia* 2500*l*., 1900*l*. to the owners, 200*l*. to the master, and 400*l*. to the crew; the *Marquette* 800*l*., owners 672*l*., master 40*l*., and crew 88*l*; the *Snowflake* 4000*l*., owners 3040*l*., master 320*l*., and crew 640*l*.; and the owners of the *Burgermeister Petersen* 300*l*., her master and crew 150*l*. The total sum will come to 8550*l*., for which I give judgment, with costs.

Solicitors for the *Albuera*, *Pritchard* and *Sons*, for *Batesons*, *Warr*, and *Wimshurst*, Liverpool.

Solicitors for the *Acacia*, *Downing*, *Bolam*, and *Co.*, for *Bolam* and *Co.*, Sunderland.

Solicitors for the *Marquette*, *Pritchard* and *Sons*.

Solicitors for the *Snowflake*, *Pritchard* and *Sons*, for *Alsop*, *Stevens*, *Hardy*, and *Crooks*, Liverpool.

Solicitors for the *Burgermeister Petersen*, *Piess*, and *Sons*.

Solicitors for the defendants, the owners of the *August Korff*, her cargo and freight, *Thomas Cooper* and *Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Thursday, July 16, 1903.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, and LINDLEY, and Sir ARTHUR WILSON.)

ALGOMA CENTRAL RAILWAY COMPANY *v.* THE KING. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Customs Tariff Act 1897 (60 *&* 61 *Vict. c.* 16)—"*Goods imported into Canada*"—*Ship — Registration — Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60).

A foreign-built ship brought to Canada comes under the head of "goods imported into Canada" within the meaning of the Customs Tariff Act 1897, *and the imposition of a duty upon such ship under the Act prior to registration in Canada is not repugnant to the provisions of the Imperial Merchant Shipping Act* 1894.

Judgment of the court below affirmed.

APPEAL of the suppliants by petition of right against the judgment of the Supreme Court of Canada, given on the 6th May 1902, reversing the judgment of the Exchequer Court of Canada of the 2nd Dec. 1901 with costs.

On the 15th Sept. 1900 the appellants presented in the Exchequer Court of Canada a petition of right asking: (*a*) A declaration that they were entitled on the 23rd Oct. 1899 to obtain from the chief officer of Customs at the port of Sault Ste. Marie a permanent certificate of British registry for the steamship *Minnie M.* free from payment of Customs duties. (*b*) Repayment of the sum of 3500 dollars paid under protest for Customs duties on the said vessel on the 5th May 1900 with interest. (*c*) 7500 dollars damages for detention.

By the statement of defence it was contended on behalf of the respondent that the said payment was properly exacted, and made on the ground that the appellants had imported into Canada, on the 23rd Oct. 1899, the *Minnie M.*, a foreign-built vessel, and had thus become liable, on application for Canadian registry, to pay the said sum of 3500 dollars, the Customs duty imposed by the Customs Tariff Act 1897, item 409, and that in any event the appellants had no right to recover interest.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The case was signed on an agreed statement of facts, which was shortly as follows:

1. The appellants were incorporated by a special Act of the Parliament of Canada (62 & 63 Vict. c. 50) to construct a railway from a point at or near the town of Sault Ste. Marie, in the district of Algoma, on the St. Mary river, to a point on the main line of the Canadian Pacific Railway at or near Dalton station, and thence south-westerly to Michipicoten Harbour upon Lake Superior, with power for the purposes of their undertaking to acquire and run steam and other vessels for cargo and passengers upon any navigable water which their railway might connect with.

2. On the 10th Oct. 1899 the appellants acquired by purchase at Marquette, in the State of Michigan, United States of America, the steamship *Minnie M.*, which had been built in 1884 at Detroit, in the said State of Michigan.

3. On the 16th Oct. 1899 the British Consul at Chicago granted the said vessel a provisional certificate of registry, to continue in force only until the 16th April 1900, or until the said vessel completed her voyage from Chicago to some port, at which there was a British registrar, whichever first happened.

4. On the 23rd Oct. 1899 the said vessel arrived at Sault Ste. Marie, in the Province of Ontario.

5. After the arrival of the said vessel, the appellants applied to the collector of Customs of the said port, who is the registrar of shipping there, for British registry of the said vessel in Canada.

6. The said collector informed the appellants that upon application for such registry the vessel would be chargeable with the duty imposed by item 409 of the Customs Tariff Act 1897, and declined to register the said vessel before such duty was paid.

7. On the 5th May 1900 the appellants paid the said duty, amounting to 3500 dollars, under protest, whereupon the said vessel was registered.

The Customs Tariff Act 1897 provides:

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

4. Subject to the provisions of this Act, and to the requirements of the Customs Act, chapter 32 of the Revised Statutes, as amended, there shall be levied, collected, and paid upon all goods enumerated (or) referred to as not enumerated in schedule A to this Act, the several rates of duties of Customs set forth and described in the said schedule, and set opposite to each item respectively, or charged thereon as not enumerated, when such goods are imported into Canada or taken out of warehouse for consumption therein.

Schedule A.—Goods subject to Duties.

409. Ships and other vessels built in any foreign country, whether steam or sailing vessels, on application for Canadian register on the fair market value of the hull, rigging, machinery, and all appurtenances; on the hull, rigging, and all appurtenances, except machinery, 10 per cent. *ad valorem*; on the boilers, steam engines, and other machinery, 25 per cent. *ad valorem*.

The word "goods" is defined by the Customs Act, R.S.C., c. 32, to mean, unless the context otherwise requires,

Goods, wares, and merchandise or movable effects of any kind, including carriages, horses, cattle, and other animals, except where these latter are manifestly not intended to be included by the said expression.

It is further provided by the Customs Act, s. 2, that

All the expressions and provisions of this Act, or of any other law relating to the Customs, unless the context otherwise requires, shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which this Act or such law was made according to its true intent, meaning, and spirit.

It was contended on behalf of the appellants: (1) That on the true construction of the Customs Tariff Act 1897 (60 & 61 Vict. c. 16 of the Statutes of Canada) no Customs duty had been imposed for which the appellants became liable under the circumstances of the case. (2) That the provisions of the said Customs Tariff Act 1897 and the schedules thereto, if they did purport to impose such duty, conflicted with the statute of the Imperial Parliament, 57 & 58 Vict. c. 60 (the Merchant Shipping Act 1894), and were *ultra vires* and of no effect.

The Merchant Shipping Act 1894 provides as follows:

Sect. 2 (1). Every British ship shall, unless exempted from registry, be registered under this Act. (2) If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship. (3) A ship required by this Act to be registered may be detained until the master of the ship, if so required, produces the certificate of the registry of the ship.

The preliminaries to registry are detailed in sects. 6 to 10, and the Act contains the following material sections:

Sect. 11. As soon as the requirements of this Act preliminary to registry have been complied with the registrar shall enter in the register book the following particulars respecting the ship: (*a*) The name of the ship, and the name of the port to which she belongs; (*b*) the details comprised in the surveyor's certificate; (*c*) the particulars respecting her origin stated in the declaration of ownership; and (*d*) the name and description of her registered owner or owners, and if there are more owners than one the proportions in which they are interested in her.

Sect. 14. On completion of the registry of a ship, the registrar shall grant a certificate of registry comprising the particulars respecting her entered in the register book, with the name of her master.

Sect. 22 (1). If at a port not within Her Majesty's dominions, and not being a port of registry established by Order in Council under this Act, a ship becomes the property of persons qualified to own a British ship, the British consular officer there may grant to her master, on his application, a provisional certificate stating (*a*) the name of the ship; (*b*) the time and place of her purchase, and the names of her purchasers; (*c*) the name of her master; and (*d*) the best particulars respecting her tonnage, build, and description which he is able to obtain; and shall forward a copy of the certificate at the first convenient opportunity to the registrar general of shipping and seamen. (2) Such a provisional certificate shall have the effect of a certificate of registry until the expiration of six months from its date, or until the ship's arrival at a port where there is a registrar (whichever first happens), and on either of those events happening shall cease to have effect.

Application of Part 1 (*i.e.*, as to registry):

Sect. 91. This part of this Act shall apply to the whole of Her Majesty's dominions, and to all places where Her Majesty has jurisdiction.

The case was heard on the 2nd Dec. 1901 before Burbidge, J., who gave judgment for the appellants, ordering that they should recover from the respondent the sum of 3500 dollars with costs, and further ordering that the questions as to interest and damages should be reserved.

Burbidge, J. was of opinion that the provisions of the Customs Tariff Act 1897 were in no way repugnant to those of the Merchant Shipping Act 1894, but that the vessel *Minnie M.* was not liable to the payment of duty under the provisions of the Customs Tariff Act 1897.

The questions of interest and damages raised in consequence of this judgment were argued on the 7th Dec. 1901 before Burbidge, J., who on the 15th Jan. 1902 gave judgment that the suppliants were not entitled to interest or damages.

The respondent appealed against the judgment of the 2nd Dec. 1901 to the Supreme Court of Canada, and the appellants gave notice of cross-appeal on the question of interest.

The appeal was heard on the 27th March 1902 before Taschereau, Sedgwick, Girouard, Davies, and Mills, JJ.

Judgment was given on the 6th May 1902 allowing the appeal, and dismissing the appellants' (the then respondents) action with costs.

Riddell, K.C. (of the Canadian Bar) and *A. D. Maclaren* appeared for the appellants, and contended that on the true construction of the Customs Act (Rev. Stat. Can. c. 32) and the Customs Tariff Act 1897 (60 & 61 Vict. c. 16) no duty was imposed upon the vessel; or if the Acts purported to impose such duty they were inoperative and invalid, as being inconsistent with and repugnant to the Imperial Merchant Shipping Act 1894 (57 & 58 Vict. c. 60). They referred to

Oriental Bank v. *Wright*, 43 L. T. Rep. 177; 5 App. Cas. 842;
Cox v. *Rabbits*, 38 L. T. Rep. 430; 3 App. Cas. 473;
Partington v. *Attorney-General*, 21 L. T. Rep. 370; L. Rep. 4 H. L. 100;
Canada Sugar Refining Company v. *The Queen*, 79 L. T. Rep. 146; (1898) A. C. 735;
Reg. v. *College of Physicians*, 44 Up. Can. Rep. 564.

And on the question of interest to

London, Chatham, and Dover Railway Company v. *South-Eastern Railway Company*, 69 L. T. Rep. 637; (1893) A. C. 429;
Arnott v. *Redfern*, 3 Bing. 353;
Caledonian Railway Company v. *Carmichael*, L. Rep. 2 H. L. Sc. 56;
Marsh v. *Jones*, 60 L. T. Rep. 610; 40 Ch. Div. 563.

Re Gosman, 45 L. T. Rep. 267; 17 Ch. Div. 771, which was relied on in the court below, is distinguishable. See also

Pryce v. *Monmouth Railway Company*, 40 L. T. Rep. 630; 4 App. Cas. 197.

The *Solicitor-General for Canada* (Carroll, K.C.), *Newcombe*, K.C. (of the Colonial Bar), and *Loehnis*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships' judgment was delivered by

Lord MACNAGHTEN.—In this case their Lordships think it sufficient to express their concurrence in the judgments of the learned judges of the Supreme Court of Canada, to which, in their opinion, it is not possible usefully to add anything. A foreign-built ship was bought by the appellant company in the United States, and

brought to Canada. An application was made for registration. When that application was made duty was claimed on the ship as coming under the head of "goods" imported into Canada. It is difficult to see on what ground that claim could be resisted. By sect. 4 of the Customs Tariff Act 1897 duties are imposed on the goods enumerated in sched. A. Sched. A. is headed: "Goods subject to duties"; and item 409 in the schedule is in these words: "Ships and other vessels built in any foreign country, whether steam or sailing vessels, on application for Canadian register, on the fair market value of the hull, rigging, machinery, and all appurtenances." Several difficulties have been suggested. In the first place, it is said that ships are not "goods." It is not necessary to refer to or discuss the language of the Canadian Customs Act, because the Customs Tariff Act 1897 itself places "ships in the schedule or list of 'goods' subject to duty." Secondly, it was argued that ships could not be "imported" into a country. It is not easy to understand that argument; this ship was brought into Canada. Nothing more can be required to satisfy the word "imported." In the next place, a difficulty was suggested with regard to the words "application for Canadian register" in item 409, the contention being that there had been no such application. Their Lordships agree with the Supreme Court in thinking that, as there was no such thing as an independent Canadian register in existence, the words must necessarily mean application for British register in Canada. Lastly, it was urged that the enactment in question is repugnant to the provisions of the Imperial Merchant Shipping Act 1894 (57 & 58 Vict. c. 60). Their Lordships are unable to see any repugnancy. The duty is a duty imposed on goods imported, and it is to be collected at the time when the application for registration is made; but payment of the duty is not made a condition of registration. Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed. The appellant must pay the costs of it.

Solicitors for the appellants, *Linklater, Addison, Brown,* and *Jones.*

Solicitors for the respondent, *Charles Russell* and *Co.*

July 9 *and* 15, 1903.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, and LINDLEY.)

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* KINGSTON. (*a*)

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Australia—Customs Act 1901, *ss.* 127, 192 *—Ship's stores in bond—Seals broken beyond limit of jurisdiction—Penalties.*

By the Australian Customs Act 1901 (*Act No.* 6 *of* 1901) *ships bringing into Australian ports dutiable articles carried as ships' stores are not liable to pay duty on such stores if they are sealed up by a revenue officer on arrival at the first port in Australia, and not used until after the departure of the ship from her last port of departure in Australia. A penalty is imposed for entering any port in Australia with such seal broken. Where the seal had been broken, and the stores used, by order of the master of a ship during a voyage between two ports in Australia, but on the high seas beyond the limit of Australian territorial jurisdiction:*

Held (*affirming the judgment of the court below*), *that the master was liable to the penalty imposed by the Act. Such enactment is not* ultra vires.

APPEAL from an order of the Supreme Court of Victoria, dated the 9th Dec. 1901, entering judgment for the plaintiff in an action to recover penalties for offences under sect. 192 and sects. 127 and 128 of the Customs Act 1901 (Act No. 6 of 1901) of the Commonwealth of Australia.

The action was brought in the name of the respondent, the Minister for Trade and Customs of the Commonwealth, suing in the court of the State pursuant to sect. 245 of the Act.

The judgment of the court was delivered on questions of law raised by the pleadings, all the facts in the plaintiff's statement of claim being admitted.

By the Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12) the Commonwealth was established and its Constitution contained in sect. 9 of the Act took effect on the 1st Jan. 1901. By the Constitution, chap. 1, part 5, s. 51, the Parliament of the Commonwealth is empowered, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth with respect to (*inter alia*) (1) trade and commerce with other countries and (2) taxation. By chap. 4, s. 86, on the establishment of the Commonwealth the collection and control of duties of customs and excise passed to the Executive Government of the Commonwealth, and by sects. 88 and 90 uniform duties of customs were to be imposed within two years after such establishment, and thereupon the power of the Parliament to impose customs and excise duties was to become exclusive.

By the Customs Act 1901 of the Commonwealth Parliament the administration, control, and management of customs duties is provided for and their collection secured and enforced (*inter alia*) by penalties. By sect. 31 all goods on board any ship within the limits of any port in Australia are under the control of the Department of Trade and Customs, whose officers have power to board and search any ship and to secure and seal up goods (sects. 186, 187, 190). All goods subject to customs control may be entered (*inter alia*) for home consumption (sects. 36, 68), and customs duties are to be paid on goods when so entered (sect. 132). By the Customs Tariff 1902 uniform duties are imposed and their collection under the tariff proposals validated as from the 8th Oct. 1901.

The questions in the present case were raised with respect to duties on ships' stores. Inasmuch as Australian vessels paid duty on dutiable articles carried as ships' stores when coasting between ports of the Commonwealth and oversea vessels were at liberty to compete and did compete with them in the coasting trade, the laws of the Commonwealth placed both classes of vessels on the same footing by requiring that duty should be paid on dutiable stores brought by vessels arriving from oversea at a port of the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Commonwealth if and so far as such stores were available for consumption on board the vessel before her departure from her last port of call in the Commonwealth, and that stores not so available should be sealed up until such departure.

The Customs Act of 1901 (after providing by sect. 191 that no fastening, seal, &c., placed by a customs officer on any goods or on any door, &c., in any ship shall be opened, broken, &c., except by authority while the goods intended to be secured remain subject to customs control) proceeds by sect. 192 to further enact as follows:

No fastening, lock, mark, or seal placed by an officer upon any goods or upon any door, hatchway, opening, or place for the purpose of securing any stores upon any ship which has arrived in any port from parts beyond the seas and which is bound to any other port within the Commonwealth shall be opened, altered, broken, or erased except by authority, and if any ship enters any port with any such fastening, lock, mark, or seal opened, altered, broken, or erased contrary to this section the master shall be guilty of an offence against this Act. Penalty: One hundred pounds.

Sects. 127 and 128 of the Act of 1901 are as follows:

Sect. 127. Ships' stores, whether shipped in parts beyond the seas or in the Commonwealth, unless entered for home consumption or except as prescribed, shall only be used by the passengers and crew and for the service of the ship and after the departure of such ship from her last port of departure in the Commonwealth.

Sect. 128. No ships' stores shall be used contrary to the last preceding section or shall be unshipped except by permission of the collector. Penalty: Fifty pounds.

The statement of claim in this action delivered on the 22nd Nov. 1901 contained the following allegations, all of which were admitted:

(1) The British merchant ship *Oceana* arrived in the port of Sydney within the Commonwealth from parts beyond the sea on or about the 3rd Nov. 1901 having on board goods being ship's stores meant for consumption on board.

(2) That after the arrival of the ship within the Commonwealth goods being ship's stores meant for consumption on board were shipped within the Commonwealth.

(3) That before the departure of the ship from the port of Sydney the stores referred to were secured on board by the proper officer of customs fastening down or securing the hatchways, doors, or other openings into the holds and lock-ups and lazarettes containing such stores and by placing customs seals on the same.

(4) That the stores referred to were not at any time entered for home consumption or otherwise made available under the laws of the Commonwealth for consumption within the Commonwealth or before the departure of the ship from the last port of departure in the Commonwealth.

(5) That subsequent to the 15th Nov. 1901 the ship left the port of Sydney for Melbourne in the State of Victoria, another port within the Commonwealth, having on board the stores secured and sealed as aforesaid.

(6) That on her voyage between the above ports when the ship was on the high seas and at a distance of more than three miles from land the master caused the doors, hatchways, and openings of the holds, lock-ups, and lazarettes aforesaid to be opened and the customs seals securing the same to be broken.

(7) That between the above ports on her voyage and afterwards during the ship's stay in the port of Melbourne the stores aforesaid were by direction of the master used by the passengers and crew and for the service of the ship.

(8) That the ship arrived from Sydney at the port of Melbourne on her voyage on or about the 18th Nov. 1901 having the seals placed on the doors, hatchways, and openings by the proper officer of customs at the port of Sydney as hereinbefore stated broken without the authority of an officer of customs.

The plaintiff's claim was (*a*) for 100*l.* penalty in respect of the offence created by the ship's entering the port of Melbourne with the seals aforesaid broken; and (*b*) 50*l.* penalty for the use of stores while the ship was within territorial waters or in the port of Melbourne.

The defence delivered on the 26th Nov. 1901 raised the following points of law—viz.:

That section 192 (or alternatively so much as purports to impose the penalty in the case of a ship whose seals have been broken more than ten miles from land) and sections 127 and 128 of the said Act of 1901 are respectively *ultra vires* of the Parliament under the Commonwealth of Australia Constitution Act and void.

That the Act of 1901 imposes no penalty for the use of ships' stores within territorial waters or in the port of Melbourne.

That on the proper construction of the Act the penalties had not been incurred.

By an order of Hood, J. dated the same day the questions of law raised by the pleadings were with the consent of the parties referred for argument before the full court.

The questions of law came on for argument before the full court (Williams, Holroyd, and Hood, JJ.) on the 3rd, 4th, and 5th Dec. 1901, and on the 9th Dec. the court gave judgment deciding the said questions in favour of the plaintiff, and (the parties consenting) entered judgment for the plaintiff for 5*l.* penalty in respect of the offence (*a*) and 2*l.* 10*s.* penalty in respect of the offence (*b*) with costs.

Sir *R. Reid*, K.C., *Haldane*, K.C., and *Rowlatt*, for the appellants, contended that the Commonwealth of Australia had no power to make laws governing British ships on the high seas, and if that is the proper construction of sect. 192 it is *ultra vires*; but the preferable construction is to limit the operation of sect. 192 to acts done within the jurisdiction of the Commonwealth. They cited

Ray v. *M'Mackin*, 1 Vict. C. L. Rep. 274;
McLeod v. *Attorney-General of New South Wales*, 65 L. T. Rep. 321; (1891) A. C. 455.

Asquith, K.C. and *Vaughan Hawkins*, for the respondent, argued that the legislation was not *ultra vires*, and on the true construction of the sections the offence had been committed and penalties incurred. There are similar provisions in the English Customs Laws Consolidation Act 1876 (39 & 40 Vict. c. 36), s. 135. See also

The Annapolis, Lush. 295; 1 Mar. Law Cas. O.S. 69; 30 L. J. 201, P. D. & Ad.

[They were stopped by their Lordships.]

Sir *R. Reid*, K.C. did not reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 15.—Their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury).—The action which gives rise to this appeal was brought by the Minister of State for Trade and Customs of the Commonwealth of Australia against one Charles Gadd, the master of the

British merchant ship *Oceana*, belonging to the appellant company, for penalties under two sections of the Act No. 6 of 1901 of the Commonwealth of Australia, being the Customs Act 1901. The facts are not in dispute, and are set out in the statement of claim and admitted by the defence. The *Oceana* had on her arrival in the port of Sydney goods liable to duty, and, after her arrival, more goods were shipped on board. Upon none of the goods in question were duties paid, although all of them were liable to duty, but by the arrangement contemplated and in pursuance of the Customs Act in question, the goods were secured on board the *Oceana* by the customs officer by placing customs seals upon parts of the ship in which they were stored. After the ship left the port of Sydney for Melbourne, and while on the voyage, the defendant caused the receptacles for these goods to be opened and the customs seals to be broken. During the voyage, and afterwards during the ship's stay in the port of Melbourne, the stores were used by the passengers and crew and for the service of the ship. The ship arrived from Sydney at the port of Melbourne having the seals broken without the authority of an officer of the customs. The plaintiff's claim was for 100*l.* by reason of the ship's entering the port of Melbourne with the seals broken; and for 50*l.* for using the stores while the ship was within territorial waters or in the port of Melbourne. The sections under which the action was brought were the 127th and 192nd. Sect. 127 is in these words: "Use of ships' stores.—127. Ships' stores, whether shipped in parts beyond the seas or in the Commonwealth, unless entered for home consumption or except as prescribed, shall only be used by the passengers and crew and for the service of the ship and after the departure of such ship from her last port of departure in the Commonwealth." The language just quoted prohibits the use of ships' stores by the passengers and crew or for the service of the ship unless duty is paid for them, or until the ship has departed from her last port of departure in the Commonwealth. So far as this section is concerned the meaning is obvious enough. All goods being liable to duty upon being imported, ships' stores, which are treated as being privileged from the payment of duty, are only to be used by the passengers and crew of the ship, and even then not until after the departure of the ship from her last port of departure in the Commonwealth. It is difficult to see what objection can be made to the authority to inflict the penalty of 50*l.* which is claimed in respect of the use of stores while the ship was within the territorial waters or in the port of Melbourne, in respect of which use alone the penalty is alleged by the statement of claim to have been incurred.

But the plaintiff claimed 100*l.* in respect of the offence created by sect. 192. That section is in these words: "192. No fastening, lock, mark, or seal placed by an officer upon any goods or upon any door, hatchway, opening, or place for the purpose of securing any stores upon any ship which has arrived in any port from parts beyond the seas and which is bound to any other port within the Commonwealth shall be opened, altered, broken, or erased except by authority, and if any ship enters any port with any such fastening, lock, mark, or seal opened, altered, broken, or erased contrary to this section, the master shall be guilty of an offence against this Act. Penalty: One hundred pounds." The objection urged appears to be that because the breaking of the seals took place on the high seas and outside the jurisdiction of the Australian Commonwealth, sect. 192 was beyond the power of the Australian Commonwealth to enact if applied to such a case as that now under debate. Their Lordships think that the objection is founded on a misapprehension of what the section enacts. The section assumes the lawful imposition of the customs seals for the purpose of exempting from duty goods upon which the Commonwealth might have exacted import duties. But in ease of trade and commerce, and as a regulation for navigation, subjects all of which are within the competence of the Commonwealth Legislature, the shipowner is permitted to have on board in Australian ports goods so sealed up that they cannot be used while the seals remain unbroken. This is a privilege accorded to the shipowner who might be compelled to pay duties in respect of all goods on board his ship. The offence created by sect. 192 is the composite act of breaking the seals and coming into an Australian port with the seals broken. When the arrangement referred to has been permitted to the shipowner for the purpose of exempting him from paying duty, it is immaterial where the act of breaking the seals takes place. When he comes back into an Australian port with the seals broken, the offence is complete. As Hood, J. points out, the ship is, by arrangement, converted into a bond so that the stores cannot lawfully be used till the final departure of the ship. As has been pointed out by counsel, the legislation proceeds on precisely the same lines as sect. 135 of the Imperial Customs Laws Consolidation Act 1876, and under that section, if a foreign ship were to take goods so sealed from one bonded warehouse in the United Kingdom to another, although in the course of her voyage she might go outside the territorial limits of the United Kingdom, the very same question might be raised, and upon her arrival at any other port in the United Kingdom the master would undoubtedly, in their Lordships' opinion, be liable to the penalties created by that section. For these reasons their Lordships will humbly recommend to His Majesty to dismiss this appeal. The appellants must pay the costs of it.

Solicitors for the appellants, *Freshfields*.

Solicitors for the respondent, *Light* and *Galbraith*.

Supreme Court of Judicature.

COURT OF APPEAL.

July 8 *and* 9, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

OLIVER *v.* NAUTILUS STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Employer and workman — Injury—Ship—Compensation — Option — Receipts "without prejudice"—Workmen's Compensation Act 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-sect.* 1, *s.* 6.

The plaintiff, a workman who had been injured through the negligence of one of the defendants' servants, signed a receipt for a payment by the agent of an insurance (company with whom the plaintiff's employers had effected insurance) "on account of compensation which may be or become due to me under the Workmen's Compensation Act 1897."

Subsequently the plaintiff informed the agent that he could only accept further payments "without prejudice."

He then accepted a payment and signed a receipt as before.

Ultimately he commenced an action against the defendants claiming damages for personal injuries.

Held, that the plaintiff had not exercised the option given to him by sect. 6 *of the Workmen's Compensation Act* 1897.

Decision of Jelf, J. reversed.

THE plaintiff, who was an engine fitter, entered the service of John Rodgers and Co. Limited, ship repairers, of Cardiff, on the 16th Nov. 1901.

He was on that day directed with others by Thomas Howells, the foreman of John Rodgers and Co. Limited, to go on board the steamship *Elm Branch*, owned by the defendants, the Nautilus Steam Shipping Company Limited, which was then lying in the Roath Basin, Cardiff, undergoing certain repairs at the hands of John Rodgers and Co. Limited.

On the morning of the 26th Nov. 1901 the plaintiff was at work on the vessel attending to some pipes and connections under the supervision of Thomas Howells and James Powell, the chargeman of John Rodgers and Co. Limited.

Before starting, however, he inquired of Thomas Howells whether everything was safe and in order, and Thomas Howells, in the presence of the plaintiff's assistant, answered in the affirmative.

The plaintiff and his assistant then proceeded to the tank where they were to work and commenced to work.

Suddenly, and without warning to the plaintiff, Lewis Price, the shore donkey man in the employ of the defendants, started the donkey engine for his own purpose and in the performance of his duties.

The exhaust pipe of the donkey engine being at the time disconnected, the exhaust steam found its egress at the nearest open joint or disconnection, which was at the spot where the plaintiff was then working, with the result that the steam suddenly came out with full force upon the plaintiff, who was very severely scalded.

The plaintiff had to be removed to the Cardiff Infirmary, where it was found that his injuries were of a serious nature, and he remained there from that day until the early part of the following year.

At the time of the accident Thomas Howells and James Powell were standing in the engine room, when they heard shouts to stop the donkey engine, and they immediately did so.

No one in the employ of John Rodgers and Co. Limited had occasion to use the donkey engine.

Lewis Price during the time that he was on the vessel was in the employ of the defendants and was paid by them, and was at all times under the supervision of the ship's engineer and liable to obey his orders.

The plaintiff held a first class marine engineer's certificate, and his wages when engaged with John Rodgers and Co. Limited were 2*l.* 1*s.* per week.

On the 2nd Dec. 1901 the plaintiff wrote to his employers acquainting them that he had met with an accident while in their employ and describing its nature.

On the 8th Jan. 1902 an agent of the British Employers' Mutual Indemnity Association Limited, with whom John Rodgers and Co. Limited had effected insurance against accidents to workmen in their employ, visited the plaintiff at the infirmary to ascertain his condition.

On the 15th Jan. the agent called again and paid the plaintiff the sum of 4*l.* 13*s.* 4*d.*, being at the rate of 1*l.* a week for four weeks and four days up to the 11th Jan., at the same time handing to the plaintiff for his signature a form of receipt, stating that the sum had been received from his employers per the insurance company "on account of compensation which may be or become due to me under the Workmen's Compensation Act 1897 in respect of the accident which occurred to me on the 26th day of Nov. 1901." The plaintiff thereupon signed the receipt.

A few days afterwards the delegate for South Wales of the Amalgamated Society of Engineers, a trade union of which the plaintiff was a member, called upon the plaintiff, and cautioned him against accepting any future payments unless he stipulated that he did so "without prejudice."

Accordingly when the insurance agent next called, on the 22nd Jan., and tendered the plaintiff 1*l.* as a payment for the week from the 11th to the 18th Jan., the plaintiff informed him that he could only accept that and any further payments "without prejudice," to which the agent neither assented nor dissented, but said that he would make a note of the fact, which he thereupon did in his notebook.

The plaintiff then accepted the 1*l.* and signed a receipt as before, though the receipt did not itself contain the words "without prejudice."

On the 1st April the plaintiff left the infirmary.

Weekly payments of 1*l.* continued to be made to the plaintiff upon similar receipts until the 29th May, when he refused to accept any further payments at all; and on the 5th June he commenced this action against the defendants, claiming damages for personal injuries.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

The action came on for trial before Jelf, J. sitting without a jury at Cardiff, the damages being agreed at 375*l.* in the event of the learned judge finding in favour of the plaintiff.

On the 31st July 1902 the following judgment was delivered:—

JELF, J.—This case, tried before me on the first day of the assizes, raises a difficult and important question under the Workmen's Compensation Act 1897. The case was admirably argued by counsel on both sides, and my mind has fluctuated considerably in the course of the argument, and also in dealing with the matter since. But I have come to a definite conclusion which I do not think likely to change on further consideration. Therefore I think it better to give my decision at once, so that the defeated party may, if desirous, go to the Court of Appeal. The plaintiff, a workman in the employ of certain contractors—namely, Messrs. John Rodgers and Co. Limited—sustained serious injury while engaged in work for them on board the steamship *Elm Branch*, belonging to the defendants, caused by negligence of the defendants' servants. The liability of the defendants was admitted, and damages were contingently agreed upon at 375*l.*, subject to the defence raised in the sixth paragraph of the statement of defence. That defence was that the action was barred by sect. 6 of the Workmen's Compensation Act 1897, the plaintiff having elected to proceed against his employers for compensation under that Act. The 6th section is as follows: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed either at law against that person to recover damages or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person." The gist of that section is that, where both remedies are open, the workman may, at his option, proceed at common law against the person liable for damages, or against his employer for compensation under the Workmen's Compensation Act 1897; but not against both. Further, if the course is taken of proceeding against the employer for compensation under the Act, then the employer can claim as against the person liable at common law by way of indemnity, so that the sole question in this case is: Has the plaintiff proceeded against his employers under the Act within the meaning of sect. 6, and so determined his election and debarred himself from bringing the present action? The accident occurred on the 26th Nov. 1901, and a notice, which is a condition precedent under sect. 2 to proceeding under the Act, dated the 2nd Dec. 1901, was sent by the plaintiff to his employers, having been dictated by him to a cousin. This is the notice: [His Lordship read it, and continued:] The plaintiff admitted, and I find as a fact, that when he gave that notice he knew of the existence of the Workmen's Compensation Act 1897, and he knew that in order to get compensation under it notice of the accident must be given to his employers. And in sending that notice he meant to put himself right in that way. Afterwards, on Wednesday, the 8th Jan. 1902, an agent of the British Employers' Mutual Indemnity Association Limited, with whom Messrs. John Rodgers and Co. Limited are insured against workmen's risks, and to whom notice had been handed by Messrs. John Rodgers and Co. Limited, visited the plaintiff in the hospital, and informed him that the directors of the association had considered his case and that he would come in a few days and pay him the money due to him up to a certain date. On the next Wednesday, the 15th Jan., the agent came again and paid the plaintiff 4*l.* 13*s.* 4*d.*, which works out at four weeks and four days' pay at 1*l.* per week, calculated from a fortnight after the accident—that fortnight being the time exempted by the Act up to the previous Saturday, the 11th Jan. This was equivalent to 50 per cent. of the wages which the plaintiff had been earning, and the maximum sum per week which he could obtain under the Act. The agent brought the plaintiff a form of receipt, which was signed by plaintiff in the following terms: [His Lordship read it, and continued:] I find as a fact that, though the plaintiff was low and ill at the time, he understood that sum to be, and he intended to take it, as payment under the Act, and as all that was due at that date in accordance with the terms of the receipt. On the 26th Jan. he received, in like manner, 1*l.* for the week due up to the 18th Jan. and signed a similar receipt for that sum. On that occasion, however, I find as a fact that the plaintiff, having been so advised by the local delegate of his trade union, gave the agent to understand that he took the money "without prejudice." The agent did not acquiesce in, or dissent from, this, but made a note of the fact and informed the insurance company thereof. The plaintiff, however, kept the money and received the 1*l.* per week weekly in like manner up to and including the 1*l.* due on the 29th May, signing similar receipts each time. I find also, as a fact, that the insurance company intended to pay the compensation under the Act, and that the plaintiff intended to take it under the Act; but that the plaintiff tried, after the first occasion when he got the 4*l.* 13*s.* 4*d.*, to keep open any other remedy if he could. In my opinion, however, this would be an abortive attempt to contract himself out of the provisions of the Act, and, moreover, he had taken the first sum of 4*l.* 13*s.* 4*d.* without even making this attempt. In the meantime, in February, the insurance company had sent their doctor to examine the plaintiff, and the plaintiff raised no objection to such examination. This fact may have a bearing on the question of whether there was any proceeding under the Act, inasmuch as the workman is, by the terms of the Act, obliged to submit himself to the doctor of the employer if sent to examine him. Ultimately, after receiving in all 23*l.* 14*s.* 3*d.*, the plaintiff, on the 29th May, said that he had been advised not to take any more money and declined the 1*l.* tendered, and thenceforward no payments have been made. Then this action was brought by the plaintiff against the defendants on the 5th June. There was no evidence that any claim for compensation in writing or verbally was in fact made by the plaintiff to his employers or to the insurance company, who would be subrogated to their rights.

Under these circumstances I have to decide whether the plaintiff had, by reason of the facts

above stated, exercised his option and proceeded against his employers under the Act. The main object of sect. 6 is obviously to prevent the workman from trying to avail himself of both remedies, and it would be unjust to allow him to do so, because (1) he would be or might be getting paid twice over; and (2) the employers or the insurance company (subject to the employers' rights) could recover from the person liable at common law the amount obtained from them under this statute, so that the persons liable at common law would have to pay twice over. If, therefore, this is the effect of what the plaintiff has been trying to do, it would be against the spirit and the intention of the Act. Would it also be against the letter of the Act? In answering this question the observations of Lord Halsbury in *Powell* v. *Main Colliery Company Limited* (24 C. C. C. Rep. 412; 83 L. T. Rep. 85; (1900) A. C. 366) must be taken into account. Those observations go to show that the scheme of the Act is intentionally non-technical, and the substance of what is done is to be regarded in this light. Apart from other legal decisions, I should be inclined to hold that the plaintiff had exercised his option, and had proceeded against his employers within the meaning of sect. 6, though he had made no formal claim, and indeed no claim at all. The acceptance of the sums and the terms of the receipt seem to me to show that, unnecessary forms being waived on both sides, the plaintiff did elect to take his remedy against his employers under the Act. This view is greatly strengthened by the recent Scotch case of *Ryan* (or *Little*) v. *MacLellan* (2 Fraser's Sco. Sess. Cas., 5th series, 387; 37 Sc. L. Rep. 287). That case arose under another section of the Act, namely, the 1st section, sub-sect. (2) (*b*), and that section is providing for an option between the two modes of proceeding against the same person—the employer. The section runs thus: "(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Then comes sub-sect. (2): "Provided that . . . (*b*) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." It will be seen, therefore, that the decision upon that section is *in pari materiâ* with the question which I have to deal with under the 6th section. Indeed, in some respects, as has been pointed out in the argument, the words in this sub-sect. (2) (*b*) are more difficult words to get over than the words in the 6th section, because the words are that the workman may at his option claim compensation under this Act, and the case shows that in the opinion of the Scotch judges who tried that case there was a claim for compensation under the Act, although that was done in no formal way at all, and it was no claim under the Act at all, and the matter was worked out upon payments and receipts almost precisely in the same way as it was worked out in this case. I think that I ought to call attention to some of the words in that judgment. I take them from Fraser, and I think perhaps that this is the part of the judgment that puts most clearly the view to which I am calling attention. Lord M'Laren says (at p. 389 of 2 Fraser's Sco. Sess. Cas., 5th series): "It is perfectly plain that compensation under the Workmen's Compensation Act 1897 and compensation under the Workmen's Liability Act are mutually exclusive. If a workman accepts compensation under the one, he necessarily waives his rights under the other. Now, in so far as appears from evidence in writing, the pursuer has accepted payments under the Workmen's Compensation Act, and so it would appear that he had elected to take compensation under that Act." The words are not quite the same in the receipts in the present case. In the Scotch case some of the receipts were in full satisfaction, and some were on account of compensation. I am not able to make any distinction in my own mind as to the value of that authority on that ground, although I am not bound to follow this case. Although a Scotch case, I adopt the reasoning in it because it entirely accords with my view and contention of the purport of the Act. It seems to me that, in the absence of authorities obliging me to hold the contrary, I have a clear guide as to the course which I ought to pursue in this case by the very learned judges in that case. I must, however, deal with the cases which have been cited and relied upon by the other side. The principal difficulty arises from the case of *Rendall* v. *Hill's Dry Dock Company* (82 L. T. Rep. 521; (1900) 2 Q. B. 245), which was decided in May 1900 by the Court of Appeal. There the receipts were in the same form as in the present case, but there were these distinctions: There was no notice of the accident at all as there was in the present case, and there was no submission to the employers' doctor which I think there was in this case. The decision was that there was no evidence of an agreement such as would stop the employers from taking the objection that the request for arbitration was out of time. The case of *Rendall* v. *Hill's Dry Dock Company* (*ubi sup.*) is therefore to be distinguished not only on the ground of the notice—that is to say, the absence of the notice—and the absence of the submission in that case, but also as having been decided *alio intuitu*. The receipt might well afford no evidence of an agreement by the employers to give up what Smith, L.J., the late Master of the Rolls, calls one of the two lonely provisions in favour of the masters, and yet might afford some evidence of an exercise of option by the workman to proceed under the Act. Then it is not to be forgotten that that case of *Rendall* v. *Hill's Dry Dock Company* (*ubi sup.*) was decided before the light had been obtained from the decision in the case of *Powell* v. *Main Colliery Company Limited* (*ubi sup.*) in the House of Lords, and from the very strong observations of the learned Lords in that case upon the non-

technical character of the Act and the necessity to look to substance rather than to form. The defendants' counsel called attention to the case of *Wright* v. *John Bagnall and Sons Limited* (82 L. T. Rep. 346; (1900) 2 Q. B. 240), decided by the Court of Appeal in April 1900, a month before *Rendall's* case (*ubi sup.*), on the same question as in *Rendall's* case. But the facts in the present case are more like *Rendall's* case than *Wright* v. *John Bagnall and Sons Limited* (*ubi sup.*), so that I do not think for my purposes that the latter case is very important. Then, of course, the plaintiff relies a good deal on the case of *Powell* v. *Main Colliery Company Limited* (*ubi sup.*) upon another part of the case than that which is relied upon by the defendants. The plaintiff's counsel used that case to show that the proceedings were initiated by a notice of claim, and that what precedes a notice of claim is not, therefore, part of the proceedings. It must be remembered that the attempt was to make out that there had been no proceedings taken at a stage for the statute to run, and that notice of claim even was not the commencement. Really all that the House of Lords held was that that was a wrong contention, and that the notice of claim was an initiation of the proceedings. They were not negatively deciding that nothing else could be a taking of proceedings; and I do not think they had before them the idea whether or not as between the parties that act was a sort of operation of law, and, by the application of facts to that law, might not amount to taking of proceedings. There are, no doubt, expressions by some of the learned Lords in that case seeming to point to the initiation of the proceedings as being the notice of claim, but there was none in this particular case that I am now deciding. At the same time, I think that the great trend of the case is to show that you have to look to the question whether in substance the workman has exercised the option of going under the Act or not. The only case cited under sect. 6 itself is the case of *Parry* v. *Clements* (49 W. R. 669; 17 Times L. Rep. 525), which was decided in May 1901 by Ridley, J. The facts there are clearly distinguishable from the present, as the employers in that case, as is expressly stated in the report, voluntarily continued paying the wages; that is to say, the employers did what some employers do with old workmen—they went on, without any reference to legal liability at all, paying wages that might stop at any time. There would be no obligation to continue paying, and at any rate it could not be said to be a proceeding under the Act. There was a case of *Field* v. *Longden and Sons* (85 L. T. Rep. 571; (1902) 1 K. B. 47) cited by the defendants' counsel in order to emphasise the consideration that the adjustment of compensation without hostile litigation is contemplated by the Act. I have no doubt, and it is probably the fact, that a great number of these cases are very wisely dealt with between employer and employed without having recourse to law at all, or to any sort of litigation, and, indeed, very often without having recourse to lawyers at all. I cannot help thinking that that is to a considerable extent the intention of the Act of Parliament. But when you look at the judgment of Lord Brampton in the case of *Powell* v. *Main Colliery Company Limited* (*ubi sup.*) you will see that he goes so far as to suggest that the initiation of the proceedings might be by the employers themselves. He says (at p. 381 of (1900) A. C.): "I equally disregard all the arguments as to alleged hardships which would be inflicted upon employers by admitting the possibility that threatened proceedings may vexatiously be allowed to hang too long over their heads, and I may add I am not satisfied that employers may not themselves initiate the proceedings by arbitration if they desire to do so; but this House is not called upon to decide that question to-day." I only cite that passage to show that in the opinion of Lord Brampton it was quite open to argument that the proceedings might be begun by the employers themselves, and therefore quite irrespective of a claim by the employed. Then there is the Irish case of *Beckley* v. *Scott and Co.* (K. B. Div. Ireland, Jan. 23, 1902), to which I have been referred. The only report I have is in the *Labour Gazette*, published by the Board of Trade, and I have taken it, by agreement of the parties, as a correct statement of what was decided. The decision in that case was supported in the court above (1902) 2 Ir. Rep. 504). It will be observed that the point, which makes it, in my opinion, of no assistance to us here, was that there the ground on which the claim purported to be made under the Workmen's Compensation Act 1897 failed because the workman had not been long enough in the employment of the firm to be entitled to compensation under the Act; in other words, that it was not a case under the Act at all.

It is the essence of these decisions that the man should have alternative remedies, and should be allowed to choose; and if he chooses one, that he shall not have the other. If he chooses what he thinks is his remedy, but which is not really a remedy at all by law, he clearly is not shut out from exercising his ordinary common law right of going against the person who is really liable to him. What he has done thinking he has got a cause under a particular Act of Parliament and failed is quite a different thing from the exercise of an option where he has got the two remedies. Therefore I do not think that the Irish case really assists us at all. My mind has been exercised to some extent over the question whether the plaintiff in this case, if I am right in giving judgment for the defendant, falls, so to speak, between two stools; whether he has lost the right to go back to his former line of proceeding under the Act and obtain compensation, and go on obtaining compensation which was paid to him regularly for a great number of weeks—viz., 1*l.* a week—the maximum amount from his employer. I think that that is a very doubtful matter. The learned counsel on both sides differ as to it, and I do not think that it is necessary for me to go into it. I think that it is extremely doubtful whether he could or not. The Scotch case seems to point to the possibility of going back, and I do not think that it is necessary to go into the question of whether there is an agreement sufficiently certain to enable a registration of the agreement to be made, or to go, indeed, into any of the details of the matter. I must leave it as an uncertain question whether or not the plaintiff is shut out from going back upon the lines which he was formerly following. What I desire to say is this, that if he is shut

out it is his own act. And I do not think that I ought to allow a man by a sort of appeal *ad misericordium* to be enabled to do that which, in my opinion, is in the teeth of the Act of Parliament, which makes it necessary for him to exercise an option, and to adhere to that option when he has exercised it. If he chooses to follow the example of the dog in the fable, who dropped the substance and grasped at the shadow, it is a matter in which he has been ill-advised, and he must take the consequences. Also I cannot help feeling, as some little satisfaction in this case, that it is obvious, from what came out in the course of the examination of the witness, that in what he has been doing he has been advised by the secretary of his trade union, and in all probability there is an indemnity, or, at any rate, this is taken up as a test case in some way or another, and I must leave a hard case—if it is a hard case—without troubling myself thereby to make bad law. Under these circumstances I have come to the conclusion that the defendants are entitled to judgment upon the ground that the plaintiff has within the meaning of the 6th section of the Act exercised his option to go against his employers for compensation, and is therefore debarred from going also at common law against the persons who have by negligence rendered themselves liable to the plaintiff for the damages which might be recovered against them. I therefore give judgment for the defendants; but I wish to say this, that I do so, of course, with a full recognition of the importance and difficulty of the case, and with every desire to facilitate the consideration of the matter by the Court of Appeal. I think it is possible that if an application were made, seeing that this may be a far-reaching decision, the Court of Appeal might accelerate the hearing of an appeal, if it is desired to appeal, and if I can be of any use in helping that I shall be very happy. At present all I can do is to give judgment for the defendants, and I think I ought, if it is desired, to stay execution as to costs for a reasonable time, say a fortnight or a month, and, if within that time notice of appeal is given, until the hearing of the appeal.

From that decision the plaintiff now appealed.

S. T. Evans, K.C. (with him *John Sankey*) for the appellant.—The claim in the present case arose under sect. 2, sub-sect. 1, of the Workmen's Compensation Act 1897. It is a claim which is admitted to be a just one against strangers, the defendants here. They were not affected by the Workmen's Compensation Act 1897. That Act deals with workmen on the one hand and employers on the other. The Legislature apprehended that, if something was not done to protect persons liable at common law, workmen might be able to get compensation from two different sources. Sect. 6 was therefore inserted in the statute. Reading that section in the way in which the House of Lords did in *Powell* v. *Main Colliery Company Limited* (*ubi sup.*), the workman has not the right to obtain compensation against his employers and the strangers likewise. He may at any time before having his award exercise his option, and proceed at common law against the strangers for damages. But the statute makes it impossible for the workman to have his compensation twice over. In the present case it is an employee of strangers—the defendants—who has been guilty of negligence; and those strangers must show that they have been rendered free of their common law liability. All that has to be seen is that the workman does not get his compensation twice over. But so long as the award is not made, the workman can turn round and proceed against the strangers. You cannot eliminate from this case that right, for his option has not been exercised which will preclude him for ever from suing the defendants. The following are the cases which bear on the point:

Randall (or *Rendall*) v. *Hill's Dry Dock Company*, 24 C. C. C. Rep. 383; 82 L. T. Rep. 521; (1900) 2 Q. B. 245;
Wright v. *John Bagnall and Sons Limited*, 24 C. C. C. Rep. 346; 82 L. T. Rep. 346; (1900) 2 Q. B. 240;
Perry v. *Clements*, 49 W. R. 669; 17 Times L. Rep. 525;
Tong v. *Great Northern Railway Company*, 18 Times L. Rep. 566;
Field v. *Longden and Sons*, 85 L. T. Rep. 571; (1902) 1 K. B. 47;
Ryan (or *Little*) v. *MacLellan*, 2 Fraser's Sco. Sess. Cas., 5th series, 387;
Beckley v. *Scott and Co.*, (1902) 2 Ir. Rep. 504;
Thompson and Sons v. *North-Eastern Marine Engineering Company Limited*, *ante*, p. 93; 88 L. T. Rep. 239; (1903) 1 K. B. 428.

Abel Thomas, K.C. (with him *A. Parsons*) for the respondents.—There is a broad distinction between the present case and *Randall* (or *Rendall*) v. *Hill's Dry Dock Company* (*ubi sup.*). A workman cannot exercise any option unless he has two remedies—one against his employer and another against a stranger. But it is an option only which he has; he cannot proceed against both. The workman must stand upon his option, and the claim does not depend upon any agreement between him and his employers. The case of *Randall* (or *Rendall*) v. *Hill's Dry Dock Company* (*ubi sup.*) was decided upon something in sect. 6 of the Workmen's Compensation Act 1897 which has not to be decided here. That case was therefore determined upon quite a different principle than has to be considered in the present case. The case of *Wright* v. *John Bagnall and Sons Limited* (*ubi sup.*) turned also upon a point quite immaterial to the question which the court has now to decide. The real and only question is whether the workman in the present case did in fact exercise an option. He has no remedy against both his employers and the strangers; he must not proceed against both. The only case actually in point here is *Ryan* (or *Little*) v. *MacLellan* (*ubi sup.*), and that, I submit, much assists my contention. I say, therefore, that Jelf, J. was right in finding that the workman had exercised his option. He referred also to

Ellen v. *Great Northern Railway Company*, 49 W. R. 395.

S. T. Evans, K.C. in reply.—The only cases referred to in the judgment in *Ellen* v. *Great Northern Railway Company* (*ubi sup.*) were

Prosser v *Lancashire and Yorkshire Accident Insurance Company*, 6 Times L. Rep. 285;
Rideal v. *Great Western Railway Company*, 1 F. & F. 706.

The case of *Ryan* (or *Little*) v. *MacLellan* (*ubi sup.*) was very different from the present in all its

particulars. There is nothing here to show an election or the exercise of an option. Whatever "exercise of an option" may mean—the words are not in the statute—the workman in the present case never did exercise his option. There is no evidence to prove that at the time of the accident there was any negligence on the part of the strangers; and this shows that the workman could not have been exercising his option when he accepted compensation from his employers through the insurance company, instead of proceeding at once against the defendants.

VAUGHAN WILLIAMS, L.J.—In this case the plaintiff sues the Nautilus Steam Shipping Company Limited upon the ground that he has been injured under circumstances which throw upon the defendants *primâ facie* a legal liability in respect of the injury which he has sustained. It is not in dispute that that is true. The defendants who are under this *primâ facie* liability rely for their defence upon the 6th section of the Workmen's Compensation Act 1897. I will read that section in a moment, but I want to say beforehand that the Workmen's Compensation Act 1897 is not a very easy Act of Parliament to construe. It is an Act of Parliament as to which I think I may properly say that the difficulties of construction are so great that it is not desirable that in any case judges should decide more than is absolutely necessary for the decision of the particular case before them. However, I do not propose to do so myself if I can help it. Now, sect. 6 says this: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." I pause for a moment to remark that we have that here, because the defendants, the Nautilus Steam Shipping Company Limited, are persons other than the employer liable to pay damages in respect thereof. The section goes on to provide: "The workman may, at his option, proceed either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person." Now, "the said other person" in the present case are the defendants. They come here and they say that the plaintiff has proceeded "against his employer for compensation under this Act"; that he has not only proceeded "against his employer for compensation under this Act," but that he has succeeded in obtaining payment of compensation under this Act; and that, under those circumstances, by the very terms of the 6th section of the Act of Parliament, the workman cannot now bring an action against the other person legally liable to pay damages, because he has proceeded against his employer, and has received compensation from the employer under the Workmen's Compensation Act 1897. I do not understand Mr. Evans to argue that, if it was true to say in this case that a workman had received from his employer compensation under the Workmen's Compensation Act 1897, as such, he could afterwards sue the "other person." I do not think he contends so; but, whether he does so or not, I say that in my judgment if that had happened it is perfectly plain, whichever view you may take of the 6th section, that a workman who has received compensation from the employer under the Workmen's Compensation Act 1897 cannot afterwards sue that other person. Therefore really the sole question in this case is: Has Mr. Oliver received compensation from his employer under the Workmen's Compensation Act 1897? Mr. Evans addressed to us an argument which, I think, was based upon *Rendall* v. *Hill's Dry Dock Company* (*ubi sup.*). He says that in that case it was held—there being a receipt in the identical form of the receipt in the present case—that the plaintiff who had received moneys much as this plaintiff has received moneys had not thereby commenced proceedings so as to exempt himself from the operation of the limitation which is provided by sect. 2, sub-sect. 1. That is the section which says "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury." He said to us that, because the Court of Appeal held in the case of *Rendall* v. *Hill's Dry Dock Company* (*ubi sup.*) that the payment and the presence of the receipt in the same form as the receipt in this case was not held to be a claim for compensation within the six months so as to oust the operation of the statutory limitation, therefore we ought to hold in the present case that there has been no claim under the Act of 1897, and no payment under such a claim. I can only say that I do not agree with that argument. It must be remembered that, at the time when that case was decided, it was supposed—following the law as laid down by the Court of Appeal in *Powell* v. *Main Colliery Company Limited* (24 C. C. C. Rep. 412; 83 L. T. Rep. 85; (1900) A. C. 366) that the claim for compensation which must be made within the six months was a claim which must be made by a step in legal proceedings, such as filing a claim for arbitration in the County Court. Therefore I shall not trouble any more about that case, because I really do not think that it affects the question which we have to decide here at all. The only question, as I have already said, which we have to decide here is whether or not there has been money paid and received under the Workmen's Compensation Act 1897 by the employer to the workman. I should have been inclined to say if it had not been for the evidence about the receipt being "without prejudice"—which was expressed by the workman upon the occasion of receiving the second payment, and which, moreover, was noted by the agent who made that payment in his book—that the action against the person other than the employer could not possibly have been brought, having regard to the terms of sect. 6 of the Act of 1897. I think that that which was said by the workman in the hospital about "without prejudice" and accepted by the agent paying the money makes all the difference. Mr. Abel Thomas, who always is willing in any case which he argues to meet the real difficulty in the case, most frankly accepted the proposition that if there had been no first payment made without

being subject to this expression of "without prejudice," he really could not have supported his case here. He accepted the position that the result of the expression "without prejudice" was that which was described by the learned judge in the court below. He says in his judgment: "I find also as a fact that the insurance company intended to pay the compensation under the Act, and that the plaintiff intended to take it under the Act; but that the plaintiff tried, after the first occasion when he got the 4*l.* 13*s.* 4*d.*, to keep open any other remedy if he could." If that was so, Mr. Abel Thomas was perfectly right in saying that, having regard to all those payments which were made under the reservation of "without prejudice," it could not be said that those payments were payments which prevented the plaintiff suing the "other person" mentioned in the 6th section of the Act, because those payments were made without prejudice (as the learned judge in the court below says) to any other remedy which the plaintiff might have. And I should go further myself and say: "Altogether without prejudice in any respect." Here there was an agent who was standing in the shoes of the employer, and who might be expected to act in the same way that an employer, taking an interest in his workmen, might be expected to act—that is to say, come to the man lying in a state of suffering, as he then was, and say: "You are entitled under the Act of Parliament, if you claim compensation, to receive each week a sum of money bearing the statutory proportion to your wage. Here it is, take it, and take it without prejudice; which means leaving you exactly in the same position as if you had not taken it, and not binding you to retain the money in any way if you, upon rising from your sick bed, should think it better not to accept this money from me, your employer, under the Workmen's Compensation Act 1897, but elect to take the remedy against the other person who has the legal liability described in the 6th section of the Act." Now, having said that, it seems to me that the only difficulty which remains is the difficulty which arises in respect of the first payment—that is, the payment which was made up on the 15th Jan. 1902. That was not made subject to any such reservation as "without prejudice." The real question is, Ought we to treat the first payment as having been made subject to the same condition as the later payments? I think we ought. My reason for that is this: After all, a receipt does not in itself create any estoppel of any sort or kind. You may take all the circumstances surrounding it into consideration and ask yourself the question what really was intended by the parties when the receipt was given and taken. One must not forget—although I am not going to quarrel with Jelf, J.'s findings—that the plaintiff understood what he was doing when he gave the receipt—understood, that is to say, that he was receiving a payment of compensation under the Workmen's Compensation Act 1897. I do not think that it would be a fair inference to draw that the plaintiff at that moment was in such a state of bodily health and mind that really he could make no election as to what would be the best course to pursue. To my mind, you cannot have a stronger piece of evidence that this is true as to the state of things upon the 15th Jan. 1902 than the evidence of the acts of the agent of the insurance company. What does the agent mean when, upon the next occasion, the next week, he accepted, as he clearly did accept, the receipt which was given subject to the qualification of "without prejudice"? He accepted it upon that occasion, and he accepted it upon all subsequent occasions until the month of May 1902, when the plaintiff refused to receive any more payments. What did the agent think it all meant when he accepted that qualification or that reservation? Did he really think, and did he ask the learned judge who tried the case, and does he ask us now to say—or do those who really rely upon his evidence ask us to say—that when this reservation was given and accepted by him it did not matter whether the plaintiff made a reservation or whether he did not make a reservation, because he had already committed himself by the first receipt and the first acceptance; and that it was idle for him to think of reserving any other remedy that he might have because he had already precluded himself from any further option by the first payment which was made, and in respect of which he was content to give a receipt? I do not think that the agent would be willing to have that view taken of his conduct. My own view is that by quietly accepting that reservation or qualification "without prejudice," which he entered in his book and communicated to his principals without making any protest or objection to it to the plaintiff, he agreed really that the qualification was to override the whole of the receipts. Once you have got it that that qualification is to override all the receipts, it seems to me that there is an end of the defence set up by the defendants here. It may be perfectly true to say that where there is a receipt which without any qualification acknowledges the receipt of money under the Workmen's Compensation Act 1897, there has been a claim or a proceeding within the meaning of sect. 6. But, in my judgment, that cannot properly be said where the payment in question is not an unqualified receipt of the money, but a receipt given by a sick man who, at the moment of giving the receipt, expressly makes the acknowledgment of the receipt subject to the qualification of "without prejudice." In my judgment, this is sufficient to dispose of the case. I think that, under those circumstances, the plaintiff was entitled to bring his action; and, as the damages have been agreed, I think that we ought to allow this appeal and reverse the decision of Jelf, J., and enter judgment for the plaintiff for 375*l.* I only have to add that I have tried not to express any opinion, or give any judgment, upon any points other than those necessary for the decision of the present case, beyond saying that if there is a payment and a receipt of money under the Workmen's Compensation Act 1897, and that receipt is in no way qualified, I think that that is sufficient to bring the case within the operation of sect. 6, and put the workman in a position of a man who has proceeded against his employer for compensation and recovered it. I express no opinion whatsoever upon the numerous points which have been very properly raised in the discussion of this case before us.

ROMER, L.J.—I have come to the same conclusion. To my mind, the question upon which the present appeal turns is simply whether the plaintiff before he commenced this action had

exercised the option given to him by sect. 6 of the Workmen's Compensation Act 1897 by proceeding against his employers so as to preclude him, by virtue of that section, from now suing the defendants. The learned judge in the court below came to the conclusion that the plaintiff had exercised the option in the sense that I have mentioned. But this, to my mind, is chiefly because the learned judge drew certain inferences from the facts of the case which were really not much in dispute. It is quite open to us, in my opinion, to differ from the learned judge upon the conclusion of fact which he has come to in this case. This is not like a case where a judge has seen the witnesses and has had to decide a question of fact that depended upon which side the witnesses were speaking the truth, where there was a direct conflict of evidence. Where there is a direct conflict of evidence on the main issue of fact, and the judge has seen the witnesses and declared that he believes one side and not the other, naturally enough the Court of Appeal would not like to differ from the judge in such a case as that. That is, to my mind, wholly distinct from the present case. I think that this case is one, as I have said, where the learned judge has proceeded upon certain inferences which he has drawn from the facts, and from which facts it is as well open for us to draw inferences as the learned judge in the court below. I think, therefore, that I am at liberty to decide this question of fact for myself upon the evidence; and, looking at the evidence, I come to the conclusion that it would not be right for us to hold that the plaintiff had precluded himself by what he did from now suing the defendants. In the first place, let me point out that under sect. 6 of the Workmen's Compensation Act 1897 it cannot, I think, be said that a workman must necessarily be held to have exercised the option given to him by that section as against his employers, or as against the stranger liable, because he has taken some proceedings either at law against the stranger or under the Act against his employers. Whether the proceedings would in fact be such as to bind the workman must depend upon the circumstances of each case, including a consideration of what has resulted from the proceedings, and whether or not any injury will result if the proceedings are held not to irrevocably bind the workman. Further, I should like for myself to say that, in dealing with any particular case, I should try and look at it as a matter of substance, and decide it on the substance rather than on matters of form. I will further add that, as at present advised, though it is not necessary for me to express a final opinion for the determination of this case, I am disposed to think that proceedings should not be held to irrevocably bind the workman unless those proceedings have resulted in some compensation as such having been paid to and received by the workman so as to bind the parties. With those observations, I proceed to deal with the facts of the present case. The workman, after he was injured, sent in a notice of injury. That was a proceeding taken, and properly taken, by him by way of caution, and certainly was an innocent act, and one that would not bind him in any way so far as concerns the point involved in this appeal. Now, until I come to deal with the question of certain payments that have been made to him, beyond sending that notice of injury it seems that the workman did absolutely nothing in this case; he did not make a formal claim; he sent in no notice of claim. The fact that a doctor subsequently visited him I only mention in passing, because it appears to me that it really has no materiality in it. I therefore proceed at once to the question of the payments that were made to the workman. To my mind, it is most material to see how those payments were made and in what respect they were paid, and how they were received by the workman. They were paid in this wise: The workman was lying seriously ill. I take it that, although seriously ill and in great pain, he understood sufficiently to know what was passing. An agent comes from the insurance company—who have indemnified the employers and therefore are the persons really bound to pay if the employers are liable—and offers to make a certain payment, something like a weekly payment, to the workman and takes a receipt. That receipt has been so often read that I need not repeat it. It purports to be a receipt of a sum on account of compensation which might be or become due to the workman under the Workmen's Compensation Act 1897. I will take it that the workman knew what was in that receipt, and that he knew that he had a claim, or might make a claim, under the Workmen's Compensation Act 1897. But when the receipt is considered this is at any rate clear, that it in nowise bound the employers to any recognition of liability on their part. It left everything open to them except—although I need not decide the question—that it is possible after the receipt had been given it might be implied, as between the parties, that a claim was supposed to have been made by the workman under the Act. But the payments were not made, as I have already pointed out, as admitting any liability on the part of the employers; nor can the payments be taken, therefore, as against the workman, to have been received by him irrevocably or as having been made on an admission, as between the parties, of liability on the one part and receipt in respect of an admitted right by the workman on the other. It seems to me to have left, even on the form of the receipt, the position of the parties in an intermediate state. Neither party, it appears to me, was absolutely bound by the payments, nor by the form of the receipt. But the matter does not stand there. After the first payment had been made, the agent of the insurance company comes again to make a further weekly payment. In the meantime, between the first payment and the second, the plaintiff is informed by an officer of his trade union that payments ought to be received by him expressly "without prejudice," and, accordingly, the next payment and all the subsequent payments are made to the workman on the terms that they are received by the workman expressly "without prejudice." I infer from the officer of the trade union having come to the workman, and from the evidence in this case, that between the first payment and the second the plaintiff had been informed of what he was previously ignorant, that he might have a claim against the defendants, and not necessarily a claim against the employers at all under the Workmen's Compensation Act 1897. At any rate, this is clear, that the second payment and all subsequent payments were made to and received by the workman expressly without prejudice. It is noticeable that no objection was

made on behalf of the agent for the insurance company to the payments being made and received on that footing. It appears to me that under those circumstances we ought not to consider the first payment to be left standing, as it were, by itself as an isolated and fatal fact, but that we must look to see what subsequently took place. I think that the second payment and subsequent payments made expressly without prejudice show under the circumstances that the parties must have treated the first payment as being held, as between the parties, not to have irrevocably bound the workman, but to be taken also, for the purpose I am now considering, as being likewise without prejudice. It is admitted before us that for the purpose of this appeal the plaintiff cannot be said to have been at all prejudiced or affected by any of the payments after the first. But it is said, and the learned judge in the court below has so decided, that because of that one payment made, and that one without anything expressly being said by the workman at the time of payment—notwithstanding the form of the receipt and notwithstanding the other circumstances—hat that first payment and retainer of the money irrevocably bound the workman, and made it impossible for him, notwithstanding all the circumstances thereafter, to say that the defendants remain liable to him, as they undoubtedly were liable, at common law. I think that under the circumstances we ought not to agree with the learned judge in that conclusion. It seems to me that, looking at the substance of this case, justice requires that we should hold that the workman has not irrevocably bound himself by what he has done; and that he has not exercised his option under sect. 6 in such a manner as to enable the defendants to say in this case that they are free from all liability to the plaintiff under the common law. I need only say in conclusion that, in my opinion, the case of *Ryan* (or *Little*) v. *MacLellan* (2 Fraser's Sco. Sess. Cas., 5th series, 387) is perfectly distinct from the present case. In fact, if the judgments of the learned judges who decided that case are looked at, it will be seen that they base their decision on grounds which emphasise the distinction between that case and the present. They found there, as a matter of fact, the payments were made to and received by the workman as payments due in respect of an admitted liability, and as a satisfaction *pro tanto*, as they went on, of the liability under the Workman's Compensation Act 1897. The circumstances of that case are quite distinct from the present; and, as I have said, the very reasons on which that case was based show, to my mind, that, if the learned judges had had to decide the present case, they would have decided it in the way in which we are doing. At any rate, it forms no authority against the views I am now expressing. I agree, therefore, that this appeal ought to succeed.

STIRLING, L.J.—I am entirely of the same opinion. I respectfully differ from Jelf, J. on this point. I think, as my brethren do, that he has attached too little importance to the fact that all the payments after the first were made without prejudice. I do not differ from him or question any of his findings of fact as they stand. But I think, in the conclusion at which he has arrived, he neglected to give the weight which is attributable to that circumstance. And I agree with the view which my brethren have taken of the case, having regard to the fact that the payments subsequent to the first were so made. I wish, however, to say for myself that I have great difficulty in seeing how Jelf, J.'s decision is reconcilable with the decision in *Rendall* v. *Hill's Dry Dock Company* (*ubi sup.*), which was cited by Mr. Evans. That case must be read in connection with the case which preceded it of *Wright* v. *John Bagnall and Sons Limited* (*ubi sup.*). I understand *Wright* v. *John Bagnall and Sons Limited* to be a decision that, where an agreement is arrived at between the employer and the servant, there is a statutory liability on the part of the employer to pay compensation under the Workmen's Compensation Act 1897; but that if the parties leave the amount of compensation to be settled afterwards by a judge or arbitrator the employer will not be allowed to set up the defence that no claim was made within six months of the accident. That I understand to be in accordance with the decision in the Scotch case of *Ryan* (or *Little*) v. *MacLellan* (*ubi sup.*), which has been referred to. That being the state of things in *Wriyht* v. *John Bagnall and Sons Limited* (*ubi sup.*), the case of *Rendall* v. *Hill's Dry Dock Company* (*ubi sup.*) occurred shortly afterwards. There what took place was this: There was apparently no notice of the injury sent under the Act; nor was there any formal claim put forward. But payments were made by an insurance company on behalf of the employers and receipts were taken precisely in the same form as are found to have been taken in the present case. In that state of things the County Court judge before whom the case came held that a claim for compensation under the Workmen's Compensation Act 1897 did not mean only an application for arbitration. He further held that if, having regard to the defence of the appellants, it was open to them to object that the weekly receipts signed by the respondent were not claims for compensation, such receipts were either claims for compensation or were evidence that a claim had been made; and that the appellants, by taking such receipts and paying the weekly sums therein mentioned, either waived a claim for compensation or were estopped from taking their objection. He held, therefore, that the employers were not entitled to set up the objection that no claim had been made within the six months. I think that it is quite true, as has been pointed out by my Lord, that at that time the decision in *Powell* v. *Main Colliery Company Limited* (24 C. C. C. Rep. 412; 83 L. T. Rep. 85; (1900) A. C. 366) in the Court of Appeal was standing, and the case was decided with reference to that decision. But it does not seem to me that that exhausts the case, because Smith, L.J., who delivered the judgment of the court, after referring to the receipt, says (at p. 249 of (1900) 2 Q. B.): "Do these circumstances show a waiver of the six months' limitation, or amount to an estoppel against setting up that defence? Clearly they do not." Then, after referring to the case of *Wright* v. *John Bagnall and Sons Limited* (*ubi sup.*), he says: "What was the *ratio decidendi* in that case? There the claim for compensation had not been made within six months of the accident, and the County Court judge held, as my brother Collins says, that the parties had agreed that there was a

statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the court to have the amount determined. My brother Williams seems also, during the argument, to have said what was exactly to the same effect. Where is there any evidence in the present case that the parties agreed that there was a liability on the part of the employers to pay compensation? I can see no evidence of any such agreement." The evidence before the court in that case was exactly similar to the evidence which occurs here. And it seems to me that that case constitutes a great difficulty in the way of upholding Jelf, J.'s decision in the present case. I desire to abstain from expressing any opinion as to what might be held to be the true meaning of the word "proceed" in the 6th section of the Workmen's Compensation Act 1897, only saying that it seems to me that great weight should be attached to the judgments which have been delivered in the Irish case of *Beckley* v. *Scott and Co.* (1902) 2 Ir. Rep. 504).

Appeal allowed.

Solicitors for the appellant, *Riddell, Vaizey,* and *Smith,* agents for *Harry Williams,* Neath.

Solicitors for the respondents, *Botterell* and *Roche.*

July 9 *and* 10, 1903.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

THE CAYO BONITO. (a)

Collision — Compulsory pilotage in the London district—Ship carrying passengers—Meaning of "trader"—6 Geo. 4, c. 125, s. 59—Order in Council of the 18th Feb. 1854—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 353, 379—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 603, 622.

The Order in Council of the 18th Feb. 1854 *extending the exemptions from compulsory pilotage contained in sect.* 59 *of* 6 *Geo.* 4, *c.* 125, *has not been repealed by any of the provisions of subsequent Merchant Shipping Acts, and applies to ships or vessels trading to ports between Boulogne (inclusive) and the Baltic, whether carrying passengers or not.*

In order to entitle a vessel to the exemptions contained in the Order in Council it is not necessary that she should be a "constant" trader. It is not necessary, in order to constitute a "constant" trader, that a vessel should be exclusively engaged in trading to ports between Boulogne (inclusive) and the Baltic.

Judgment of Barnes J. affirmed.

APPEAL by the defendants in a collision action brought by the owners of the steamship *British Prince* against the owners of the steamship *Cayo Bonito.*

A report of the case below will be found in 86 L. T. Rep. 867; 9 Asp. Mar. Law Cas. 308; (1902) P. 216.

The *British Prince,* a steamship of 7326 tons gross register, was at the time on a voyage from New York to London and Antwerp with a general cargo, cattle, horses, and cattlemen.

The *Cayo Bonito,* a steamship of 3427 tons gross register, belonging to the Cuban Steamship Company, was on a voyage from London to Coatzacoalcos, *viâ* Antwerp, Havana, and Vera Cruz, with a part general cargo, and carrying one passenger.

The collision occurred about 10.15 p.m. on the 8th Feb. 1902, in the Thames estuary, near the Black Deep Lightship. Both vessels were in charge of pilots at the time of the collision.

The Pilotage Acts and Orders in Council dealing with the question are as follows:—

Sect. 1 of 5 Geo. 2, c. 20:

From and after the twenty-fourth day of June in the year of our Lord one thousand seven hundred and thirty-two, if any person shall take upon himself the charge of any ship or vessel as pilot down the river of Thames or through the North Channel to or by Orfordness, or round the Long Sand Head into the Downs, or down the South Channel into the Downs, or from or by Orfordness up the North Channel, or the river Thames, or the river of Medway, other than such person as shall be licensed and authorised to act as a pilot by the said Master, Wardens, and Assistants [of the Corporation of the Trinity House] for the time being . . . every person so offending, and being thereof lawfully convicted . . . shall for every such offence forfeit the sum of twenty pounds: Provided, that nothing in this Act contained shall extend or be construed to extend to the obliging of any master or owner of any ship in the coal trade, or other coasting trade, to employ or make use of any pilot.

Sect. 2 of 48 Geo. 3, c. 104, provides:

That from and after the first day of October one thousand eight hundred and eight, it shall be lawful . . . for the Corporation of the Trinity House of Deptford Strond and they are hereby required to appoint and license under their common seal fit and competent persons, duly skilled, as pilots for the purpose of conducting all ships and vessels sailing, navigating, and passing up and down or upon the rivers of Thames and Medway, and all and every the said channels, creeks, and docks thereof or therein, or leading or adjoining thereto, as well as between Orfordness and London Bridge, as from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel from the Isle of Wight up to London Bridge, which vessels shall be conducted and piloted by such pilots so appointed and licensed, by no other pilots or persons whomsoever, except pilots appointed by the Society or Fellowship of the Trinity House of Dover, Deal, and the isle of Thanet (commonly called Cinque Port pilots), so far as such pilots are hereby authorised to pilot ships and vessels from the westward up to London Bridge, and from London Bridge downwards to the westward; that is to say, from any port or place between the Isle of Wight and the said bridge, according to the provisions in that behalf hereinafter contained, and also save and except, as well all colliers, as also all ships and vessels trading to Norway and to the Cattegat and Baltic, and likewise round the North Cape and into the White Sea, and save and except all constant trades inwards from the ports between Boulogne inclusive, and the Baltic, such ships and vessels having British registers, and coming up or going down the North Channel by Orfordness, but not otherwise; and likewise save and except all coasting vessels and all Irish traders using the navigation of the river of Thames as coasters.

The material part of sect. 2 of 52 Geo. 3, c. 39, is as follows:

Save and except as well all colliers and also all ships and vessels trading to Norway, and to the Cattegat and Baltic, and likewise round the North Cape and into the White Sea; and save and except all constant traders inwards from the ports between Boulogne inclusive and

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

the Baltic, such ships and vessels having British registers, and coming up the North Channel by Orfordness, and not otherwise; and likewise save and except all coasting vessels, and all Irish traders using the navigation of the river Thames as coasters.

Sect. 59 of 6 Geo. 4, c. 125, is as follows:

Provided always and be it further enacted, that for and notwithstanding anything in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers and coming up either by the North Channel but not otherwise), or of any Irish trader, using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burden of sixty tons, or having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel.

By sect. 1 of 16 & 17 Vict. c. 129, so much of 6 Geo. 4, c. 125, as related to the Cinque Port pilots was repealed, and the Trinity House and Cinque Ports pilots were amalgamated.

The material part of sect. 21 of 16 & 17 Vict. c. 129 is as follows:

And whereas it is expedient to give facilities for amending the system of pilotage . . . Be it enacted that it shall be lawful for every pilotage authority, by regulation or by-law made with the consent of Her Majesty in Council, from time to time to do all or any of the following things in relation to pilots and pilotage within their respective districts — viz.: To exempt the masters of any ships or vessels, or of any classes of ships or vessels, from being compelled to employ pilots, and to annex any terms or conditions to such exemptions, and from time to time to revoke and alter any exemptions so made, and to revise and extend any exemptions now existing by virtue of any Act of Parliament or charter, upon such terms and conditions and in such manner as such authority, with such consent as aforesaid, may think fit.

Order in Council, 18th Feb. 1854. Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of the 59th section of the Act 6 Geo. 4, c. 125, submitted by the Corporation of Trinity House for the consideration of Her Majesty in Council, pursuant to the provisions of the 21st section of the Act 16 & 17 Vict. c. 127:

The masters of the undermentioned ships and vessels shall, subject to the provisions contained in the 59th section of the Act of Parliament, 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage—viz.: Of ships and vessels trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, when coming up by the south channels. Of ships and vessels trading to ports between (Boulogne) (inclusive) and the Baltic on their outward passages, and when coming up by the south channels. Of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits nor anchoring therein.

Sects. 3, 353, and 379 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) are as follows:

Sect. 3. This Act shall come into operation on the first day of May 1855.

Sect. 353. Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall continue in force.

Sect. 379. The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district and in the Trinity House outport districts; that is to say . . . (3) Ships trading to Boulogne or to any place in Europe north of Boulogne.

The material part of the Order in Council of the 21st Dec. 1871 is as follows:

And whereas the Trinity House of Deptford Strond, being the pilotage authority for the said districts, hath submitted for the consideration of Her Majesty in Council the following by-law (that is to say): That all ships trading from any port or place in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port or place in Europe north and east of Brest, or to the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from Brest, or from any port or place in Europe north and east of Brest, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man to any port or place in Great Britain within either of the said districts, when not carrying passengers, shall be exempted from compulsory pilotage within such districts. Now therefore Her Majesty . . . is pleased to declare her consent to the same.

Sects. 603 (1) and 625 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) are as follows:

Sect. 603 (1). Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force.

Sect. 625. The following ships when not carrying passengers shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts (that is to say): (3) Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man. (4) Ships trading from the port of Brest, or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain within the said London or Trinity House outport district.

The Merchant Shipping (Exemption from Pilotage) Act 1897 is as follows:

Sect. 1. As and from, &c., sect. 603 of the Merchant Shipping Act 1894, so far as it continues the exemptions granted by sect. 59 of the Act passed in the sixth year of King George the Fourth, chapter 125, and extended by the Order in Council of the 18th Feb. 1854, and the said Order in Council shall cease to operate in the case

of vessels on voyages between any port in Sweden or Norway and the port of London.

At the trial of the action before Barnes, J. and Trinity Masters, the learned judge came to the conclusion that the collision was solely caused by the negligence of the pilot in charge of the *Cayo Bonito*. On further argument of the question whether the pilot was or was not compulsorily in charge at the time of the collision, he held that the Order in Council of the 18th Feb. 1854, which extended the exemptions from compulsory pilotage contained in sect. 59 of the General Pilotage Act (6 Geo. 4, c. 125), applied only to ships and vessels "constantly" trading between Boulogne and the Baltic inclusive, and that under the circumstances the *Cayo Bonito* was a "constant" trader between the ports of London and Antwerp, as the words "ship or vessel trading" were descriptive of the vessel, and not merely of the particular voyage. He therefore held that the *Cayo Bonito* was not at the time of the collision compulsorily in charge of a pilot, and found her alone to blame.

The defendants appealed.

Asquith, K.C. (*Laing*, K.C. and *Balloch* with him) for the appellants.—*Primâ facie* pilotage is compulsory in the Thames estuary: (sect. 603 of the Merchant Shipping Act 1894). The Order in Council of the 18th Feb. 1854 is no longer in force. This could not be argued in the court below in view of the decision in *Reg.* v. *Stanton* (8 E. & B. 445). Dr. Lushington also felt he was bound by it in *The Earl of Auckland* (5 L. T. Rep. 558; 1 Mar. Law Cas. O. S. 117; Lush. 387; 15 Moo. P. C. C. 304). Sect. 59 of the General Pilotage Act (6 Geo. 4, c. 125) applies to British ships only. By the Act of 1853 (16 & 17 Vict. c. 129) the Trinity House and the Cinque Ports were amalgamated. Then came the Order in Council of the 18th Feb. 1854, which provided for the exemption of vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south channels, and then followed the Merchant Shipping Act 1854, which did not by sect. 3 come into force until the 1st May 1855. Sect. 379 of that Act repealed all previous legislation *quoad* the Trinity House districts, and it provides for the exemption of certain vessels, except when carrying passengers. It would be absurd that in one and the same statute there should be a provision that one class of vessel should not be exempted and also a provision re-enacting the previous Acts and Orders in Council which expressly exempt the same class of vessels. This is the logical consequence of the respondents' contention that, although these Acts have been repealed, the Order in Council is still in force. Sects. 330, 331, 353, 360, 368, 376-479 of the Merchant Shipping Act 1854 formed a complete code for the Trinity House districts. It is submitted that the decision in *Reg.* v. *Stanton* (*ubi sup.*) is wrong. The decision was distinguished in *The Temora* (1 L. T. Rep. 418; Lush. 17). In deciding whether or not a vessel is a "constant trader," the terminus of the voyage must be looked at—*e.g.*, whether it is the United Kingdom, or a port within the area mentioned in the Act. See

Courtney v. *Cole*, 57 L. T. Rep. 409; 6 Asp. Mar. Law Cas. 169; 19 Q. B. Div. 447;
The Rutland, 76 L. T. Rep. 662; 8 Asp. Mar. Law Cas. 270; (1897) A. C. 333.

Sect. 625 of the Merchant Shipping Act 1894 corresponds with sect. 397 of the Act of 1854, except that it embodies the provisions of the Order in Council of the 21st Dec. 1871 by extending the western limit from Boulogne to the port of Brest. He also referred to

The Vesta, 46 L. T. Rep. 492; 4 Asp. Mar. Law Cas. 515; 7 P. Div. 240.

Aspinall, K.C. and *Dawson Miller* for the respondents *contra*.—If the Act of 6 Geo. 4 and the Order in Council of the 18th Feb. 1854 are still alive, then the *Cayo Bonito* was a ship trading to a port between Boulogne and the Baltic. The intention of the Legislature in the Act of 1894 was to leave the law as it was before, and to re-enact the sections of the Act of 1854 and the Orders in Council as interpreted judicially in *The Earl of Auckland* (*ubi sup.*). It gives the sanction of the Legislature to the decision of the Privy Council. Part 10 of the Act of 1894 keeps alive all the old exemptions from compulsory pilotage. The Pilotage Act of 1897 (60 & 61 Vict. c. 61) removes the exemptions in the case of vessels on voyages between Sweden and Norway and London, but it expressly affirms the exemptions under the Act of 6 Geo. 4 and the Orders in Council. The *Cayo Bonito* was in fact a "constant trader" between London and Antwerp, but Barnes, J. was wrong in saying that it is necessary the trading should be "constant" in order that a vessel should be exempt. Trading is used in the sense of being engaged in a commercial adventure, and one must look at the particular act of trading and the intention of the owner:

The Rutland (*ubi sup.*).

If this were not so, when could a new vessel be said to become a "constant trader"? It would be absurd to say that if she was put on a regular line trading between certain ports that she was not a "constant trader" simply because she had not made the voyage before.

Asquith, K.C. in reply.

COLLINS, M.R.—This is an appeal from the decision of Barnes, J., who has held in the case of a collision between the *British Prince* and the *Cayo Bonito* that the *Cayo Bonito* was in charge of a pilot, and that the collision was entirely due to the negligence of the pilot; and that raises a question whether or not pilotage was compulsory. If pilotage was compulsory, the owners are not liable; and, therefore, the question which was argued before Barnes, J., and which is raised again in this appeal, is whether or not it was compulsory. The learned judge, after very careful consideration, and very elaborate examination of the statutes and authorities bearing on the matter, has come to the conclusion that pilotage was not compulsory, and therefore finds that the owners are liable for the consequences of the collision. Now, the case, on the face of it, turns apparently on an examination of the authorities. Barnes, J.'s judgment, which was one of very great elaboration, has been narrowed down for us by the very able and concise arguments which have been addressed to us on both sides in this case, and I do not propose, therefore, for my part, to enter upon a discussion of the many points upon which he, with great advantage and assistance to the court, embarked.

There is no doubt whatever that *primâ facie* pilotage is compulsory in these waters. That, as was pointed out by Barnes, J., is expressly provided by the Merchant Shipping Act 1894, s. 603, subject to any alteration made by the Board of Trade or any pilotage authority in pursuance of powers conferred upon them. That section provided that "The employment of pilots shall continue to be compulsory in any district where it was compulsory immediately before the commencement of this Act." That brings us to the question whether it was or was not compulsory under the circumstances of this case. I do not think I need go behind the Act of 6 Geo. 4, which was a consolidating Act. Barnes, J. went back to an Act before, but it is not necessary for my purpose to go behind the 59th section of 6 Geo. 4, c. 125. Now the vessel in question was upon a voyage which is described in Barnes, J.'s judgment in this way. She was a vessel of 3427 tons gross register, and at the time of the collision was on a voyage from London to Antwerp, and then from Antwerp to Goatzacoalcos in Mexico, with about 800 tons of cargo and one passenger, and it was in the course of the voyage from London to Antwerp that the collision between her and the *British Prince* took place. Now I get to the provisions of the 59th section of 6 Geo. 4, c. 125, and it is in these words: [His Lordship then read the material part of the section.] After that statute there was another of 1853, and it was in pursuance of that Act, 16 & 17 Vict. c. 129, s. 21, that the Order in Council was made. That Act was one enabling the proper authority, by Order in Council, to enlarge the exemptions at that time existing, and accordingly the Order in Council of the 18th Feb. 1854 was made consolidating the regulations for the exemptions from compulsory pilotage then existing under the provisions of sect. 59 of 6 Geo. 4, and that order contained two paragraphs. First, there is the exemption from compulsory pilotage of ships and vessels trading to Norway and the Cattegat or Baltic, or round the North Cape, or into the White Sea, when going up by the south channels. This is an exemption including the south as well as the north channels. The second paragraph extended the exemption to ships and vessels trading to ports between Boulogne inclusive and the Baltic on their outward passages, and when coming up by the south channels. Thus were added outward to inward, and south to north channels, and that is the joint result of the statute and the Order in Council. If that exemption exists still, notwithstanding the subsequent legislation, it would cover the case of a vessel which could bring itself within its terms. In this case, subject to questions of fact, the contention is that the voyage was one within the meaning of the terms "vessel trading between Boulogne inclusive and the Baltic" on her outward passage. Now, this vessel was undoubtedly engaged in a passage from London to Antwerp. She proposed to do a great deal more when she got to Antwerp, but the question is whether the exemptions included such a voyage under such conditions as we have here—whether this vessel has brought herself within the terms of it.

Now, first of all, has that exemption granted by the Act that I have read and the Order in Council been preserved, or has it been annulled? The argument for the appellants here is that the subsequent statute—the Merchant Shipping Act 1854—did, in point of fact, abolish that exemption and substitute other enactments in its place. Now that argument, I think, would have been a very powerful one if it had not, as it has, in my opinion, been precluded by authority. It is strongly argued that the exemption is in terms preserved in the 353rd section of the Merchant Shipping Act 1854 in these terms: [His Lordship then read the section.] That *primâ facie* contains certain exemptions from compulsory pilotage, and it is headed by the words "Compulsory Pilotage: General." But that is followed by another reference, which is headed "Compulsory Pilotage: Trinity House," and Mr. Asquith, in a very able argument, has pointed out that the 379th section of that statute included, in fact in terms, the very same provisions that are contained in the 59th section of the earlier Act constituting the exemptions; that they are re-enacted, but re-enacted with a difference, and the section limits the exemptions to the cases of ships not carrying passengers, whereas the former exemption in the earlier statute did not contain that condition. He puts to us a very powerful argument as to whether you can in one and the same statute have a provision which puts vessels carrying passengers outside the exemption, and a subsequent provision which re-enacts the provisions then existing. That is a strong argument, and one very well worthy of consideration if it had not already been discussed and decided, as it seems to me, first of all in the case of *Reg.* v. *Stanton* (*ubi sup.*), which decided that the two were not incompatible, and that the earlier provision of exemption did continue to exist in a vessel that was carrying passengers. That decision was adopted and followed in the case of *The Earl of Auckland* (*ubi sup.*), and was affirmed on appeal by the Privy Council. That was as far back as 1862, and even if that decision of the Privy Council, being, as it was then, the final court of appeal having jurisdiction in Admiralty matters, is not in the strictest sense binding upon us, yet after this interval of time, it being the decision of the very highest authority at that time, I do not think we should be at liberty to depart from it. It is not necessary absolutely to decide whether it is formally and technically binding on us in the same sense as a decision of the House of Lords would be, though my impression is that it is. When the position is that the law is declared by the highest tribunal more than forty years ago, and has been acted upon since, I do not think we should be justified in departing from it. But it does not rest there. The later statute of 1897 has, I think, practically put its imprimatur upon the view taken in those cases—adopted the view that the earlier exemptions and those in the Order in Council are in existence, and treats them as still in existence, though to a certain extent modified in the latter Act. Accordingly I think that with regard to the main part of the argument, the authorities, followed by the Legislature, have decided against Mr. Asquith's contention; that is to say, that notwithstanding subsequent legislation the earlier exemptions and the exemptions of the Order in Council based upon the 59th section of the Act of 1854 still exist. With regard to the question,

partly of fact and partly of law, whether this particular ship comes within the exemption or not, Mr. Asquith, in arguing to the contrary, is obliged to contend that the exemption does not extend to the case unless the ship can be described as a "constant trader," and he says that the exemption referring to that condition was not applicable in this case, because this particular vessel had only made one voyage, and she was beginning the second at the time when she was in collision, and therefore it cannot be contended that such a vessel was a "constant trader." He also raises other points—whether, for instance, she was a trader at all in the sense of the exemption; but that is the main point. That rests upon this: You find in the 59th section of 6 Geo. 4, c. 125, these words: [His Lordship then read the material part of the Act.] Now, it is said that that provision in favour of the constant trader is really the same provision which was adopted, with certain enlargements, in the Order in Council; that in the two paragraphs of the order ships and vessels constantly trading is meant; and that that meaning is to be imported into the words of this Order in Council, although the words are not in terms expressed in it; and that contention is based on the authority of the case of *The Vesta* (*ubi sup.*), decided by Sir Robert Phillimore in the Admiralty Court. But that case was not decided in respect of these very words, but on the question whether or not foreign vessels were to be considered as embraced in the term "ships or vessels"; and Sir Robert Phillimore held that in the words "ships or vessels" foreign vessels ought not to be included, because they were expressly excluded by sect. 59 of the statute, and the Order in Council could not be taken by simply omitting the words to have the effect sought to be given to it. It seems to me that there is a good deal to be said in favour of the view that the real meaning is analogous; but I think myself that we are not bound to apply it here, because this is really a different case. The case before Sir Robert Phillimore was certainly a case carrying much larger consequences than are likely to follow upon the decision of such a case as this. It was a matter of large policy whether foreign vessels should or should not be embraced within the order extending the earlier section, and by a special enactment referring to British vessels. It was thought that to extend the decision of the Legislature in that particular direction simply because it had used the words "ships or vessels," without confining them to British vessels, would be a large and impolitic extension, and ought not to be implied without more solid grounds. I do not think that the grounds which weighed with Sir Robert Phillimore apply in such a case as this. Whether that be so or not, Barnes, J. has found in this case that if "constant trader" was a condition, that condition has been fulfilled, because, he says—and I agree with him—that you must not measure the question whether the vessel is a constant trader by the particular facts of one particular voyage of that vessel. Take the case of a line of vessels trading constantly between London and New York. A new vessel is put on for the first time. You cannot say that that vessel is not a constant trader simply because it has not made the voyage before. It seems to me clear, as the learned judge has found, that you must look to what is the purpose for which this vessel was put on, and how it is going to trade. Possibly it is put on as an instrument for carrying on the same trade then being carried on by other vessels; and if you find there is a line established trading with Antwerp, and a particular vessel was put on and has made one voyage to and from Antwerp, it seems to me that the inference in respect to that is that it is a constant trader, and is intended to be a constant trader, within the meaning of these words.

That brings me to the last point, and that is whether a vessel which, like this, has gathered its cargo somewhere, say in the East, comes with that cargo to London, and there discharges the greater part of it, and then goes on from London—taking in no cargo from London, but taking what remained of her cargo to Antwerp—whether that can be said to be a vessel trading between London and Antwerp? I think there is a good deal to be said for the contention that a vessel cannot be said to be trading when it does not take any part—does not carry on—any trade between London and Antwerp. In this particular case the ship was taking cargo, but not cargo loaded in London for Antwerp; its object was to deliver the residue of the cargo taken on board at some remote point on the voyage. The argument raised here has been concluded by authority. The very point was raised in the common law courts and decided in the first place by Lord Coleridge and Smith, J., as he then was, in *Courtney* v. *Cole* (*ubi sup.*). It was afterwards raised in another case, *The Rutland* (*ubi sup.*), before Barnes, J., and ultimately went to the House of Lords, and there, in a case practically indistinguishable from this, it was held that the fact that the vessel was not taking cargo out did not affect the question. In point of fact, the result of the two cases seems to be that when a vessel sails out on a particular adventure from London or elsewhere to distant ports, she is then, within the meaning of the words, trading with such ports. The only other point is, Does the fact that the voyage to one of these ports is only, as it were, a step in a very much longer cruise make any difference? It seems to me that the authorities cover that as well as the other matter, and that the only question which we have to consider is whether she was on a trading adventure to one of the ports in the exemption. It seems to me she was, and therefore on all the points made the admirable judgment of Barnes, J. in this case was right, and must be upheld.

MATHEW, L.J.—I am of the same opinion. The first and most important point made by Mr. Asquith was that of exemption. That has been settled by the authorities which have been quoted by the Master of the Rolls. With reference to the question of fact, it seems to me there was abundant evidence here to justify the conclusion that this vessel was constantly trading, if it were necessary that that should be determined. I am of opinion that "constant" trading is not necessary, and that trading alone is sufficient here to exempt the vessel from compulsory pilotage. This vessel was commencing her career, and it is said that it cannot be successfully contended that she was trading. But the facts established are these: The vessel was assigned to a line of steamers, her business was to take cargoes from a

home port to another, and then continue her voyage. It seems to me absurd to insist that she must acquire the character of a "constant" trader by frequent voyages. It is quite enough that she was intended by her owners to continue in a certain line. That is established here, and the conclusion of the learned judge is perfectly correct. I agree that this appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. The first and main point raised in the case, respecting the Order in Council, was decided not only by the Court of Queen's Bench, but by the Privy Council, in *The Earl of Auckland* (*ubi sup.*). Now it may be that the decision of the Privy Council has not quite the same effect in an Admiralty appeal as a decision of the House of Lords; but the jurisdiction of the Privy Council in Admiralty appeals is, by sect. 18, sub-sect. 5, of the Judicature Act of 1873, transferred to this Court of Appeal, and, putting it at the lowest, it seems to me that a decision of the Privy Council in a matter of this kind should be treated by us with at least the same amount of respect as a decision of the Exchequer Chamber would be in a Revenue appeal. Whether it is technically and absolutely binding on this court or not, it would be very wrong, after a lapse of forty years, for this court to reverse a decision of the Privy Council on a statute of this kind. But it really does not rest there. I can see no answer whatever to the argument founded upon the statute of 1897. I think the declaration therein contained makes it plain that the Legislature regarded the exemptions under the statute of George IV., extended by the Order in Council, as in force at the date of the passing of this Act. That seems to me to be clear. Therefore I think that the main point of Mr. Asquith's argument fails. The second point is, What is trading? That has been decided by the House of Lords in the cases cited. The third point is as to whether the word "constant" ought to be incorporated in the Order in Council from the statute of George IV.? It does not really arise here, for on the facts I agree with what has been said by the Master of the Rolls and Mathew, L.J. that we have here what amounts to constant trading. But, further than that, I entirely share the view of Barnes, J. that there is no ground for importing the word "constant" into the Order in Council. The Order in Council was made in pursuance of an Act expressly authorising the extension of the exemptions, and there is no reason whatever for holding that it did not extend the exemptions by omitting the word "constant" found in the earlier Act.

Solicitors for the appellants, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the respondents, *Thomas Cooper* and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool.

Wednesday, July 15, 1903.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

THE TORBRYAN. (a)

Charter-party—Damage to cargo—Negligence of stevedores—Exception clause—Proper interpretation of words.

Goods were shipped under a charter-party, a clause of which protected the shipowners from liability for "the act of God . . . and all other accidents excepted, even though caused by negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owners in the management or navigation of the vessel, or otherwise."

Held (affirming the judgment of Phillimore, J.), that the shipowners were not liable for damage done to the goods due to the negligence of the stevedores by the improper use of hooks and slings in the discharge of the cargo, as such loss was an "accident" within the meaning of the clause.

APPEAL by the plaintiffs from a judgment of Phillimore, J.

The case is reported 87 L. T. Rep. 656; 9 Asp. Mar. Law Cas. 358; (1903) P. 35.

The appellants were owners of cargo, and claimed damages for short delivery and in respect of damage done to the cargo.

By a charter-party, dated the 30th Jan. 1902, the appellants shipped 8000 bags of sugar at Dunkirk for London by the respondents' steamship *Torbryan*. The sugar was shipped in bags, and after the cargo had been discharged it was found that seven of the bags were missing, seven others had been damaged by coal dust, and several more had been torn and a portion of the contents lost, partly owing to their striking the deck or hatch-coamings as they were being discharged, and partly owing to the stevedores having used hooks. The appellants claimed 178*l.* 14*s.* 4*d.* in all for the damage done and loss of the contents of the bags. They alleged that during the discharge complaints were made about the negligence of the stevedores.

The respondents admitted that the bags were shipped apparently in good order and condition, and that the number and weights were correct, and paid into court 12*l.* 12*s.* 4*d.* in respect of the bags lost, and those damaged by coal dust.

At the trial of the action they contended that the damage to the remainder was caused by the bags being too thin and weak, and also by the negligent stowage of them by the defendants' agents or servants at Dunkirk, in consequence of which the various marks got mixed up together, and rendered the discharge very difficult. They also contended that they were protected by the exceptions in the charter-party, which were as follows:

The act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates, or robbers, strikes, arrests or restraint of princes, rulers, and people, collisions, straudings, and all other accidents excepted, even though caused by negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owners in the management of the vessel, or otherwise.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Phillimore, J. held that the case was governed by the exceptions in the charter-party, and gave judgment for the defendants accordingly, except as to the money paid into court.

The plaintiffs appealed.

Scrutton, K.C. and *Balloch* for the appellants.—We do not propose to argue the point raised in the court below that the words "or otherwise" referred to the navigation of the ship. There was satisfactory evidence that the stevedores, who were the defendants' servants, were negligent, and persisted in using hooks for discharging the cargo, although they were forbidden to do so. Complaints were made about this, and also as to the carelessness of the men in hitting the coamings while discharging, and so injuring some of the bags. If the cargo was discharged in this way, it was obvious that the result would be that damage would be done. It cannot therefore be said that it arose through "accident." The damage was inevitable. See

Pandorf v. *Hamilton*, 57 L. T. Rep. 726; 6 Asp. Mar. Law Cas. 212; 12 App. Cas. 518.

They also referred to

Fenwick v. *Schmalz*, 18 L. T. Rep. 27; 3 Asp. Mar. Law Cas. 64; L. Rep. 3 C. P. 313.

Carson, K.C. and *A. E. Nelson* for the respondents *contra*.—The loss is covered by the words "all other accidents," Whatever may have been the cause of the loss it was not intentional; it was none the less an accident because it was caused by negligence. They referred to

Baerselman v. *Bailey*, 72 L. T. Rep. 677; 8 Asp. Mar. Law Cas. 4; (1895) 2 Q. B. 301;
Norman v. *Binnington*, 63 L. T. Rep. 108; 6 Asp. Mar. Law Cas. 528; 25 Q. B. Div. 475;
The Cressington, 64 L. T. Rep. 329; 7 Asp. Mar. Law Cas. 27; (1891) P. 152;
Blackburn v. *Liverpool, Brazil, and River Plate Steamship Company*, 85 L. T. Rep. 783; 9 Asp. Mar. Law Cas. 263; (1902) 1 K. B. 290;
The Xantho, 57 L. T. Rep. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503.

Balloch in reply.—The words "other accidents" must refer to accidents *ejusdem generis* with collisions and stranding. In *The Cressington* (*ubi sup.*) and *Blackburn* v. *Liverpool, &c., Steamship Company* (*ubi sup.*) the damage resulted from negligence clearly not anticipated in either case. Here the damage to the cargo was the necessary consequence of the use of the hooks in discharging it.

COLLINS, M.R.—The point in this case is whether the defendant, the shipowner, is protected by a clause in the charter-party, a common clause to this effect: [His Lordship then read the clause.] What happened was that in the process of unloading the stevedores' men were said to have used, and have been proved to have used, in a very reckless manner, the hooks called the can hooks for the purpose of discharging the sugar in the bags. If these hooks are used recklessly it is exceedingly probable that either the bags or the hooks will give way, and a considerable amount of damage may be done to the cargo by the use of these hooks. As to other parts of it they would seem to have been only the ordinary accidents of unloading—that is to say, in lifting the bags out of the hold until they are in a position for passing over the rail on to the wharf. There is evidence of remonstrance made by the cargo-owners, and also by persons representing the stevedores, and that notwithstanding that remonstrance the men continued to use these hooks, and so damage was done to the cargo. Now, the point is whether damage arising in that way by the negligence of these men was damage covered by this clause. After hearing the matter argued, I agree with the learned judge in the court below that it does come within the clause. It does come within the heading "all other accidents excepted." One has to arrive at the meaning of the word "accidents" here, as in every other case, by looking at the contract between the parties, and so ascertain what in these provisions are meant to be exceptions. In this case we have to deal with the contract between the shipowner and the cargo-owner, by which it is provided that the shipowner is to be excused from accidents caused by negligence, and looking at it from that standpoint it is an accident to him, a fortuitous and unexpected occurrence, that the persons employed in unloading the cargo should resort to such reckless means, and, even though it is something more than recklessness, nevertheless I think it might, notwithstanding, be an accident. In that view it seems to me the judgment of the learned judge is right.

MATHEW, L.J.—I am of the same opinion. It is clear to me that the right way to look at this clause is to look at it as the language of the shipowner and of the charterer. From that point of view it is quite clear that the words are used in their popular sense. The exceptions named run: "Act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates, or robbers, strikes, arrests or restraints of princes, rulers, and people, collisions, strandings, and all other accidents excepted." They are all acts which are to be treated as accidents. Now, an ingenious attempt is made to get rid of the word "accident" in connection with the earlier perils enumerated. It was said there was a semi-colon, and that the words "collisions, strandings, and all other accidents excepted" applied only to cases of that description—that the word "excepted" comes at the end of that paragraph, and applies only to accidents so caused. That is made more clear by the words that follow: "Even though caused by negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owners in the management or navigation of the vessel, or otherwise." I am perfectly of opinion that this clause protects the shipowner, and I can hardly see how the argument on the other side that where negligence is shown, whatever followed was an inevitable consequence, and that it could not be regarded as an accident. That is not the interpretation I put on the position of the parties as to what has been excepted. The case to me appears clear. The appeal, therefore, must be dismissed.

COZENS-HARDY, L.J. concurred.

Solicitors for the appellants, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the respondents, *Lowless* and *Co.*

Tuesday, July 21, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

CUNARD STEAMSHIP COMPANY LIMITED *v.* MARTEN. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance, Marine—Policy—Construction—Suing and labouring clause—Insurance against shipowners' liability owing to omission of negligence clause in contract of affreightment—Applicability of suing and labouring clause.

Shipowners who had entered into a contract of affreightment which contained no negligence clause exempting them from liability for loss arising through the negligence of their servants, effected with an underwriter a policy of insurance on their ship to cover their liability of any kind to the owners of the cargo up to a certain specified amount owing to the omission of the negligence clause in the contract. The policy was an ordinary printed form of Lloyd's policy, and contained a suing and labouring clause entitling the assured to sue and labour for the defence and recovery of the goods and ship. During the insured voyage the vessel stranded owing to the negligence of the shipowners' servants and part of the cargo was lost, and the shipowners became liable in respect thereof. The shipowners incurred expenses in saving the cargo which was saved and in trying to save the cargo which was lost, and in attempting to tow the vessel off the rocks; and they sought to recover these expenses from the underwriter, not as a direct loss under the policy, but under the suing and labouring clause in the policy as being suing and labouring expenses.

Held, that the suing and labouring clause in the policy had no application to the subject-matter of the insurance, and did not form any part of the insurance; and that therefore the shipowners could not recover under that clause the expenses so incurred by them.

Decision of Walton, J. (87 *L. T. Rep.* 400; 9 Asp. Mar. Law Cas. 342; (1902) 2 K. B. 624) *affirmed.*

THIS action was brought by the Cunard Steamship Company Limited, as the owners of the steamship *Carinthia*, against the defendant, who was one of the subscribers to a policy of marine insurance effected on behalf of the plaintiffs.

By the policy, which was dated the 9th May 1900 the plaintiffs were insured against perils of the seas from New Orleans to ports in South Africa on the plaintiffs' steamship *Carinthia*:

To cover shipowners' liability of any kind to owners of mules and (or) cargo up to 20,000*l.*, owing to the omission of the negligence clause in contract and (or) charter-party and (or) bill of lading.

The policy was an ordinary Lloyd's printed form of policy with special clauses added, and it contained a suing and labouring clause in the following form:

In case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof without prejudice to this insurance.

In a special clause on a slip gummed to the policy the plaintiffs were given "all liberties as per contract of affreightment and (or) charter-party and (or) bill or bills of lading new or old, including negligence clause."

The defendant subscribed this policy for 1000*l.*

The *Carinthia* had been chartered by the Government in April 1900 for the purpose of carrying mules from New Orleans to South Africa.

The terms of the contract of affreightment were contained in a letter of the 5th April 1900 from the Admiralty Director of Transports to the plaintiffs, and by the terms of the contract the *Carinthia* was to carry some 1500 mules in consideration of the freight and on the terms therein specified.

The contract of carriage contained no negligence clause exempting the plaintiffs from liability for loss arising from the negligence of their servants, the shipowners' liability to the Admiralty being that of common carriers.

In these circumstances the plaintiffs insured themselves by the policy against all liability which might result to them by reason of the omission of the negligence clause in the contract of affreightment.

The *Carinthia* sailed from New Orleans for Cape Town on the 11th May 1900 with the mules on board.

On the 15th May, owing to the negligence of the master, she stranded at Cape Gravois, in the island of Hayti, and was wrecked, and a large number of the mules were lost, and considerable expenses incurred in saving those which were saved and in trying to save those which were lost, and in attempting to tow the vessel off the rocks.

The plaintiff thereby incurred a liability to the Admiralty.

The plaintiffs in their points of claim alleged that by reason of the stranding of the vessel many mules were totally lost, and the plaintiffs were under liability in respect of the same and in respect of increased freight paid on the mules saved, which were sent on in another vessel, but that the extent of the liability had not yet been ascertained, and that, to reduce or avert a loss which would be recoverable under the policy, the plaintiffs incurred expenses under the suing and labouring clause in the policy to the amount of 7744*l.*; and the plaintiffs claimed in this action only in respect of those suing and labouring expenses.

The defendant's proportion of these expenses on his insurance of 1000*l.* was 387*l.* 4*s.* 2*d.*, and that was the sum which the plaintiffs now claimed.

The defendant in his defence admitted that the vessel was stranded during the insured voyage owing to the negligent navigation of the plaintiffs' servants, and he alleged that the policy sued on was expressed to be upon shipowner's liability to owners of mules owing to the omission of the negligence clause in the contract of carriage; that the sue and labour clause in the printed form of policy had no application to such a subject-matter of insurance, and was not part of the contract. Alternatively, the defendant alleged that if the sue and labour clause applied, none of the expenses claimed had been incurred within the meaning of the clause

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

by the plaintiffs, their factors and assigns, in averting from the subject-matter insured loss by perils insured against as alleged or at all. In the further alternative the defendant alleged that if he under the policy sued on was liable for sue and labour expenses, the expenses claimed therein were incurred by the plaintiffs to avert the whole of their possible liabilities to the owners of the mules and (or) cargo which far exceeded the liability covered by the policy.

On the 11th and 12th July 1902 the action came on for trial before Walton, J., sitting without a jury, when his Lordship reserved judgment.

On the 11th Aug. 1902 the learned judge delivered a written judgment in which he decided (87 L. T. Rep. 400; 9 Asp. Mar. Law Cas. 342; (1902) 2 K. B. 624) that the suing and labouring clause was inapplicable to the subject-matter of the insurance actually effected, and formed no part of the contract; and that the plaintiffs were therefore not entitled to recover the expenses incurred by them.

From that decision the plaintiffs now appealed.

Pickford, K.C. and *Loehnis* for the appellants. —Owing to the negligence of the plaintiffs' servants, the plaintiffs have incurred liability to the Admiralty in respect of the loss of the mules. The plaintiffs' claim in this action is confined to a claim under the suing and labouring clause in the printed form of the policy in respect of expenses incurred by them to avert or reduce the amount of the loss, and they are entitled to recover under that clause. The policy ought to be construed as a contract on the part of the underwriters by which they agreed to indemnify the shipowners against any liability up to 20,000*l.* which the shipowners might incur to the owners of the mules owing to the omission of the negligence clause in the contract of affreightment; so that, if the loss does not exceed 20,000*l.*, they are entitled to recover the whole loss, but if it exceeds 20,000*l.* then they are entitled to recover 20,000*l.* Here the liability of the shipowners to the Admiralty arose owing to the omission of the negligence clause in their contract with the Admiralty, and upon the construction of the policy the suing and labouring clause is applicable, and the underwriters are bound to indemnify the plaintiffs. They referred to

Xenos v. *Fox*, 19 L. T. Rep. 84; 3 Mar. Law Cas. O. S. 146; L. Rep. 3 C. P. 630; affirmed on appeal, L. Rep. 4 C. P. 665;

Paterson v. *Harris*, 1 B. & S. 337, at p. 354;

Kidstone v. *Empire Marine Insurance Company Limited*, 15 L. T. Rep. 12; 2 Mar. Law Cas. O. S. 400, 468; L. Rep. 1 C. P. 535; on appeal, 16 L. T. Rep. 119; L. Rep. 2 C. P. 357.

Carver, K.C. and *F. D. Mackinnon* for the respondent were not called upon to argue.

WILLIAMS, L.J.—I am of opinion that the judgment of Walton, J. is right, and that this appeal must fail. Now, I start with one common proposition in this case and that is this, that everyone is agreed that, whatever was the subject-matter of this policy, it is quite plain that the mules were not. Nobody says that they were. Each side agrees in that. Then we look to see what was the subject-matter of this policy. The policy was effected to cover shipowners' liability of any kind to owners of mules and (or) cargo up to 20,000*l.* owing to the omission of the negligence clause in contract, and (or) charter-party, and (or) bill of lading. That is a proposition which is common to both sides. I do not understand the appellants here to say for one moment that they can recover the expenses which were incurred in salving these mules as a direct loss under this policy. It is because they feel the impossibility of doing that that they are obliged to have recourse to the suing and labouring clause. Now, that being so, let us see how the matter stands. The suing and labouring clause runs thus: [His Lordship read it, and continued:] As was pointed out by Walton, J. in his judgment, *primâ facie* those words "said goods and merchandises" have no application to the subject-matter of this policy. It cannot be contended that they have. Then it is said that although these words do not directly apply, and that although the mules were not the subject-matter of this policy, yet if you salve the mules you really avert a liability to the owner of the mules; and that as that is so, the suing and labouring clause does apply. That is the argument that really has been chiefly urged upon us both by Mr. Pickford and Mr. Loehnis. I do not myself think that one ought thus to strain the words of this policy in this case to make them apply to this subject-matter. My own view is that the parties really never could have intended it. In this particular case the value of the goods (the mules) was 40,000*l.* and the amount insured to cover this liability was 20,000*l.* In case the expenses thus incurred had amounted to the whole 20,000*l.*, the assured would have been entitled, if this argument is right, to recover in respect of the whole of that loss although his insurance was an insurance for only half the value of the mules. Really, although in this case both sides are agreed that this is not an insurance on the mules, we are being invited to apply the suing and labouring clause just as if it was. I think that it is unnecessary to go any further into the matter. I can only say that I adopt in full the reasoning of Walton, J., and feel that he has put the case in a way that it is quite impossible for me to improve upon.

ROMER, L.J.—I also do not see my way to differ in this case from Walton, J. The point involved is a very short one, and I can state my reasons for my opinion very shortly too. It is admitted on behalf of the appellants, and it is part of their case, that this policy of insurance is not one upon mules or goods or ship at all. It is what it purports to be, solely an insurance to cover shipowner's liability of any kind, mules or cargo up to 20,000*l.*, owing to the omission of the negligence clause. Now, that is the only subject-matter of insurance, and it is inserted in a policy which in the printed part applies to a policy of insurance on ship and goods and cargo. Naturally enough you find that most (if not all) of the printed matter has little or no application to the precise risk insured against. But it is said that one of the printed clauses can be extracted as it were from the others and made applicable, and that clause is what is commonly called the "suing and labouring clause." How does it run? [His Lordship read it and continued:] The clause refers to "said goods and merchandises and ship" because, as I have pointed out, the form of this policy is confined to a policy of insurance on the ship and on the goods. Therefore this refers

to "the said goods and merchandises and ship." Admittedly to my mind this is a policy of insurance not on any goods or merchandises or ship at all. Of course, I should apply that clause, if I could do so reasonably, to the present case. But it appears to me, putting it shortly, that I cannot reasonably apply it to any such case even if you take the words immediately before the express statement of what was insured. If you treat those as a definition of the risk insured against still less, or at least not a bit better, are you able to apply the suing and labouring clause to such a subject-matter of insurance. I need scarcely point out that I think those very words that I have read are, like the rest of the printed portions of this policy, not intended to apply at all. As I have already said, I should apply the suing and labouring clause, if I could do so reasonably, to the subject-matter of this policy of insurance; but, in my opinion, I cannot reasonably apply it. It never was intended to apply to any such subject of insurance; it was intended to apply on the very face of it, to my mind, to an insurance on "goods, merchandises, and ship."

STIRLING, L.J.—I agree. I cannot usefully add anything to what was said by the learned judge in the court below, and to what has been said by my learned brethren here.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle,* and *Co.*, agents for *Hill, Dickinson, Dickinson, Hill,* and *Roberts*, Liverpool.

Solicitors for the respondent, *Parker, Garrett, Holman,* and *Howden.*

July 21 *and* 23, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

DE HART *v.* COMPANIA ANONIMA DE SEGUROS "AURORA." (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance — Marine — "General average payable according to foreign statement"—Jettison of deck cargo—Foreign law—Special contract.

By a policy of insurance effected by the plaintiff on his ship with the defendants, who were underwriters, it was provided: "General average payable according to foreign statement if so made up."

The ship being chartered to third persons for carriage of timber, it was provided by the charter-party that the ship might carry a deck load of timber, and that "In case of average . . . jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average."

In the course of a voyage to Antwerp it became necessary for the common safety to jettison part of the deck cargo; and, upon the average statement being made up there, this was included in general average.

Apart from any special provision in the charter-party, the jettison of deck cargo and the freight thereon would not by Belgian law be the subject of general average; but that law recognises any special provision as to what shall be the subject of general average.

Held, that as the statement had in fact been made up at Antwerp, the proper place for making it up, and the charter-party imported no terms of a special and unusual character such as could not reasonably have been contemplated by the parties to the policy of insurance, the defendants were bound by the statement, and were therefore liable to indemnify the plaintiff against the contribution that had to be made up by the ship in general average relating to the loss on the jettison of the deck cargo.

Harris *v.* Scaramanga (26 *L. T. Rep.* 797; 1 *Asp. Mar. Law Cas.* 339; *L. Rep.* 7 *C. P.* 481) *considered and applied.*

Decision of Kennedy, J. (87 *L. T. Rep.* 716; 9 *Asp. Mar. Law Cas.* 345; (1903) 1 *K. B.* 109) *affirmed.*

THIS action was tried upon the following joint admissions of fact made for the purpose of the action only:—

The plaintiff effected with the defendants two policies of insurance, each for 500*l.*, dated the 31st Aug. 1900 and the 28th Sept. 1900 respectively, on the steamship *Henriette H.* for twelve months, the former from the 28th Aug. 1900 to the 28th Aug. 1901, and the latter from the 7th Sept. 1900 to the 6th Sept. 1901 inclusive.

Each of the policies contained the clause:

General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with contract of affreightment,

and (attached to the policy) the Institute Time Clauses 1900, which include the following clause —viz.:

General average and salvage charges payable according to foreign statement or per York-Antwerp Rules if in accordance with the contract of affreightment.

By a charter-party dated the 11th Oct. 1900, made between the plaintiff and Messrs. Baars, Dunwody, and Co., it was agreed that the *Henriette H.* should carry a cargo of pinewood, including a deck load (if required by the master), from Pensacola to Antwerp.

It is the regular and usual course of trading for vessels from Gulf timber ports to carry deck loads of timber to Continental ports.

Clause 11 of the charter-party was as follows:

In case of average the same to be settled according to York-Antwerp Rules 1890, excepting that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average.

The *Henriette H.* sailed from Pensacola on the 29th Nov. 1900, carrying a deck load, and on the voyage she suffered damage, and it became necessary for the safety of the ship and her cargo, in consequence of perils insured against, to jettison part of the deck load.

The remainder of the cargo was delivered at Antwerp.

If the defendants were liable to pay to the plaintiff on the policies a proportionate part of the ship's proportion of the loss on the jettison of the part of the deck cargo, the plaintiff was entitled to be paid by them the sum of 53*l.* 11*s.*

If the defendants were not liable in respect of the loss, the plaintiff was only entitled to be paid by them 30*l.* 8*s.* 1*d.*, which latter sum the defendants were and had always been ready and willing to pay to the plaintiff in full satisfaction of the plaintiff's claim.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

It was not contended that the general average statement made at Antwerp, and which included the deck cargo jettisoned and the freight thereon, was contrary to the law of Belgium, but by mutual admissions it was agreed that the average statement was made, and that by it the deck cargo jettisoned and the freight thereon were, as required by the contract of affreightment, treated as general average, although apart from the conditions in the charter-party such loss would not have been so treated; also that by Belgian law, apart from any special provision in the contract, the jettison of the deck cargo and the freight thereon would not be the subject of general average.

The following is a translation of the material articles of the Belgian Code of Maritime Commerce:

Art. 100. Failing special agreements between all parties concerned, average losses are settled according to the following regulations.

Art. 109. Goods carried on the ship's upper deck contribute if saved. If they are jettisoned or damaged by jettisoning, the owner has no claim to contribution. He can only make use of his rights against the master.

Art. 118. The statement of losses and damages is made up by experts (average staters) in the place where the ship is discharged at the instigation of the commander. The experts are nominated by the Tribunal of Commerce if the discharge takes place in a Belgian port.

Art. 119. The specialists nominated in accordance with the preceding article apportion the losses and damages. The apportionment becomes legally binding on approval by the Tribunal.

On the 31st Oct. 1902 the action came on for trial before Kennedy, J. without a jury in Middlesex, when his Lordship decided (87 L. T. Rep. 716; 9 Asp. Mar. Law Cas. 345; (1903) 1 K. B. 109) that the proper construction was that the defendants were bound to pay according to the foreign statement, if the foreign law recognised as a constituent of general average the terms of the contract between the parties; and that the defendants were, therefore, bound to recognise the foreign statement if made up according to foreign law. His Lordship accordingly gave judgment for the plaintiff.

From that decision the defendants now appealed.

J. A. Hamilton, K.C. and *J. R. Atkin* for the appellants.—In the various cases where the words "general average as per foreign statement" have been used, the general average statement made up abroad has been made up in accordance with the general law of the foreign country. The foreign law was that which dominated the general average. In *Mavro* v. *Ocean Marine Insurance Company* (32 L. T. Rep. 743; 2 Asp. Mar. Law Cas. 590; L. Rep. 10 C. P. 414) the statement of the foreign adjuster was made at Constantinople, by the law of which port the adjustment ought to be made according to the law of France. And the construction put upon the words "general average as per foreign statement" was that the adjustment was not intended to be conclusive unless made in conformity with the foreign law. In that case Blackburn, J. said: "I construe the words 'general average as per foreign statement' to mean that general average in the policy shall include such losses as the French law regards as intentional sacrifices made for the benefit of the whole adventure, not only such losses as a foreign average adjuster shall actually state." And Cockburn, C.J. said that what is general average is to be determined by the law of the foreign place to which the ship is bound. In the case of *Hendricks* v. *Australasian Insurance Company* (30 L. T. Rep. 419; 2 Asp. Mar. Law Cas. 44; L. Rep. 9 C. P. 460) Lord Coleridge, C.J. and Brett, J. treated *Harris* v. *Scaramanga* (26 L. T. Rep. 797; 1 Asp. Mar. Law Cas. 339; L. Rep. 7 C. P. 481) as having decided that "upon such a policy English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made." See also *The Brigella* (69 L. T. Rep. 834; 7 Asp. Mar. Law Cas. 337; (1893) P. 189, at p. 199), where Barnes, J. discussed the decision in *Harris* v. *Scaramanga* (*ubi sup.*). The general law of the land in accordance with which the foreign statement is to be binding upon the defendants in the present case is the Belgian code, the provisions of which they have the means of ascertaining. But special provisions contained in a contract to which the defendants were not parties ought not to be coupled to the Belgian code. They did not intend to leave it in the power of the plaintiff to enlarge their liability. They referred also to

Dickenson v. *Jardine*, 18 L. T. Rep. 717; 3 Mar, Law Cas. O. S. 126; L. Rep. 3 C. P. 639;
Montgomery and Co. v. *Indemnity Mutual Marine Assurance Company Limited*, 86 L. T. Rep. 462; 9 Asp. Mar. Law Cas. 289; (1902) 1 K. B. 734.

[WILLIAMS, L.J. referred to *The Mary Thomas* (71 L. T. Rep. 104; 7 Asp. Mar. Law Cas. 495; (1894) P. 108).]

Carver, K.C. and *De Hart* for the respondent.—The statement was made up at Antwerp by the average stater—the place where it ought to have been made up. It therefore was a foreign statement within the meaning of the policy. It was in accordance with the law of Belgium, which recognises the special provisions of the contract of affreightment, treating as the subject of general average that which the parties to the contract have agreed shall be so treated. Deck cargoes are allowed in general average where, as in the present instance, they are permitted according to an established custom of navigation:

Strang, Steel, and Co. v. *A. Scott and Co.*, 61 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601, 609.

Even if the average statement was not in accordance with the law of Belgium, the defendants are nevertheless bound by an average statement prepared at Antwerp, for the words "foreign statement" mean nothing more than a statement made up in a foreign country. The parties must be taken to have agreed to treat the foreign average stater as an arbitrator, and to be bound by the statement whether in accordance with the law of the country where made up or not. See the observations upon this subject of Bovill, C.J. and Keating, J. in

Harris v. *Scaramanga*, 26 L. T. Rep. 797; 1 Asp. Mar. Law Cas. 339; L. Rep. 7 C. P. 481, at pp. 489, 490.

[They were stopped by the Court.]

J. R. Atkin replied.

VAUGHAN WILLIAMS, L.J.—In this case the plaintiff, who is a shipowner, effected with the defendant company, who are underwriters, a time policy of insurance upon his ship containing the following clause: "General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with contract of affreightment." The plaintiff sub-chartered the ship to third persons, and by the terms of that charter-party it was provided that the ship might carry a deck load of timber; and that "in case of average the same to be settled according to York-Antwerp Rules 1890, except that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average." The ship sailed for Antwerp with a deck load, and in the course of the voyage and during the currency of the policy she suffered damage, so that it became necessary for the steamer's safety, in consequence of perils insured against, to jettison part of the deck cargo. On her arrival at Antwerp an average statement was then made up, and the average stater, in accordance with the terms of the charter-party, included the jettison of deck cargo in general average. Then there were some admissions between the parties, and there were also letters which passed between the solicitors as to the Belgian law. I may as well read the most important letter in full, as it is very short: "We are in receipt of your letter, dated the 24th inst., and are prepared to admit that a foreign general average statement was prepared, and that by it the deck cargo jettisoned and the freight thereon were, as required by the contract of affreightment, treated as general average subject to your admitting that, apart from the condition in the charter-party, such loss would not have been so treated, as it is not, in accordance either with York-Antwerp Rules or Belgian law, the subject of general average." Now, that being the nature of the action, what Kennedy, J. decided was this: He decided in favour of the plaintiff on the ground that the average statement as made up was in accordance with the Belgian law, because the Belgian law recognises in regard to general average the terms of any special contract of affreightment that the parties—meaning there the parties to the sub-charter, the contract of affreightment referred to really in the policy—may have chosen to make. Kennedy, J. takes notice also of another contention that had been made on behalf of the plaintiff, which contention was to the effect that, having regard to the judgment of Bovill, C.J. and Keating, J. in *Harris* v. *Scaramanga* (26 L. T. Rep. 797; 1 Asp. Mar. Law Cas. 339; L. Rep. 7 C. P. 481), these words in the policy of insurance, "general average payable according to foreign statement if so made up," were words which bound the underwriters, whether the foreign statement was made in accordance with the Belgian law as proved, or whether it was not. But, having noticed it, Kennedy, J. says that it is unnecessary for him to decide whether or not that assumption or that statement of law by Bovill, C.J. and Keating, J. was correctly made or not. Now, that being the state of things, we have to consider whether the judgment of Kennedy, J. is right. I am not at all prepared to say that Kennedy, J.'s judgment may not be supported upon the ground upon which he has put it himself. A passage from the foreign code was read to us, and it would appear from that passage that, according to Belgian law, if there is a special contract as between the parties who are primarily interested in the law of contribution—that is, the shipowner and the cargo owner—effect is given to that special bargain in making up the foreign statement. It is also said, with regard to the particular provision of Belgian law, that a deck cargo does not come within the rules as to contribution; that that rule is subject to the special agreement of the parties to the contract of affreightment. Speaking for myself, I always have some doubt as to whether foreign codes are by themselves admissible as evidence of foreign law. I have always thought that the practice was not to give effect to a foreign code unless the court had a foreign expert present to construe the foreign code and to inform the court, or to assist the court, not so much in construing the foreign code, but in the conclusion of fact that would have to be arrived at in the English courts as to what was the foreign law. That would be done by informing the court what has been recognised by the law in the foreign country. I do not think that it is part of the duty of English judges to take a foreign code and, unassisted by a foreign expert, to construe that foreign code, because that is to make the question of the foreign law a question of law and not a question of fact. I always understood that it was a question of fact and not a question of law, and for that, amongst other reasons, I prefer myself to look and to inquire and see whether the judgment of Kennedy, J. can be supported upon other grounds.

Now, in the first place, I am myself disposed to support it upon the passage in the judgment of Bovill, C.J. and Keating, J. in *Harris* v. *Scaramanga* (*ubi sup.*). In *Harris* v. *Scaramanga* the statement, so far as it is material to the particular part of this paragraph in the policy that I am referring to, was almost identical with the paragraph here, because the paragraph in *Harris* v. *Scaramanga* (*ubi sup.*) was "to pay general average as per foreign statement, if so made up," and upon p. 489 of L. Rep. 7 C. P. Bovill, C.J. first says this: "It seems to me that the general effect of the memorandum is to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum"—that is, the memorandum of the foreign statement, if so made up—"was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the appointment; and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum." Then he deals with the question of the law of England and the law of Bremen, and goes on: "It seems to me, however, that under the terms of this policy the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port, if and when made, as conclusive between them, both in principle and in details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which are

excluded by the express terms of the policy." And then, on the top of p. 490, he says: "It seems to me that, by the express agreement of the parties contained in the memorandum, it is not open to us to determine it"—that is, the question whether the claim was to be determined by the English court or by the statement of the foreign average stater at Bremen—"and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? And how does the matter stand upon the facts as stated in the special case?" I think myself that, so far from there being anything inconsistent with mercantile usage and mercantile convenience in so reading this statement appearing in this policy, and which has appeared in hundreds of policies before, being a very usual clause, I think it is in accordance with mercantile convenience. The parties primarily interested in the adjustment for the purpose of carrying into effect the rights to contribution based upon the law of general average may conveniently be left to deal with questions of contribution both in their contracts of affreightment and in other respects. If adjustment has to be effected in a foreign port, it seems to me obviously convenient that there should be an express provision that the underwriters in such a case shall stand in the shoes of the parties primarily liable. In my view of the law it is perfectly plain that in the absence of any special provision such would be the law. You would not require any special clause to say this; it would be the law without a special clause.

Then in this particular clause are the words following: "If so made up or York-Antwerp Rules if in accordance with contract of affreightment." It is said that the effect of those latter words is that the only case in which the shipowner is to be entitled to affect the matter of contribution by the contract of affreightment is in case he adopts the York-Antwerp Rules without any qualifications. And it is said that the result of that is that in this case the court ought to apply the Belgian law here, and to give no effect whatsoever to the York-Antwerp Rules as qualified by the words of exception; and that that means that the court ought to go back to the simple Belgian law unqualified by this special bargain. I cannot so read these words. I think that there is nothing—at all events in these words—which in the slightest degree prevents us from applying the rule laid down by Bovill, C.J. and Keating, J. in *Harris* v. *Scaramanga* (*ubi sup.*). Taking this view of the case, it seems to me unnecessary to consider the other questions that have been raised in this case. The ground of my decision is simply that I apply here the rule laid down by Bovill, C.J. and Keating, J. in *Harris* v. *Scaramanga* (*ubi sup.*); and, applying that rule, I think that the underwriters here are bound by the foreign statement so made up. It was said in this case, in addition, that we ought not to come to this conclusion for the reason of several passages which were read to us, one from the case of *Mavro* v. *Ocean Marine Insurance Company* (32 L. T. Rep. 743; 2 Asp. Mar. Law Cas. 590; L. Rep. 10 C. P. 414) in the judgment of Cockburn, C.J., where he says: "The only sensible construction appears to be this: the underwriter is only to be liable for a general average, but what is general average is to be determined by the law of the foreign place to which the ship is bound." I quite agree, but that only means in the absence of a special bargain; and in my judgment in this particular case there was a special bargain, if this contract is properly construed, whereby the underwriters agreed to accept the average statement abroad, if so made up, as binding upon all parties. I think, therefore, the judgment of Kennedy, J. must be affirmed and this appeal dismissed with costs.

ROMER, L.J.—I have come to the same conclusion. It is admitted by the appellants' counsel in the case before us that with regard to the clauses of the policy of insurance which are material, the general average was not to be made up according to the York-Antwerp Rules inasmuch as having regard to the special terms of the contract of affreightment here which purported to incorporate these clauses with some exceptions, it could not be said that in the meaning of this policy of insurance the general average could be provided by the contract of affreightment to be per York-Antwerp Rules; the appellants' counsel rested their contention accordingly on this: They said that the general average ought to have been made payable according to foreign statement, whatever that term "foreign statement" may have meant in this policy of insurance. Now, there are two clauses in the policy of insurance dealing with the same subject-matter. They only differ in this, that in the clause in the body of the policy the words are "general average payable according to foreign statement if so made up," and the words "if so made up" are omitted from the corresponding clause in what are called the Institute Time Clauses 1900. But it is clear to my mind that the two clauses must be read together; and I have no hesitation, therefore, in coming to the conclusion that in this policy the foreign statement which is meant is the foreign statement if so made up. Now, I think that, by agreeing that general average shall be payable according to foreign statement if so made up, the parties have in effect agreed to be bound by the foreign statement if so made up as it exists in fact, only subject to two observations which I am about to make. In the first place, I think in order to bind the parties that the statement so made up must have been made up in good faith. It is not challenged here by the appellants that the statement has not been made up in good faith. Moreover, I should like to make a reservation for further consideration if the case I am about to mention should hereafter arise—that is to say, if the statement be made up according, say, to the law of the port which recognised the special terms of the contract of affreightment. I doubt if the parties to the policy of insurance in a case like the present would be bound by the statement if the contract of affreightment imported terms as to general average of a special and unusual character, which could not reasonably have been contemplated by the parties to the policy of insurance. If such a case arises I should like to further consider it; but such a case does not arise here. I may point out that jettison of deck cargoes is in many cases allowable as general average—for example, by English law in the case of voyages where deck cargo is permitted by the established custom of

navigation. And I may point out that in the present case the voyage was one where deck cargo was so permitted, and in the present case, therefore, it could not be said that the contract of affreightment so far as it referred to deck cargoes was of so special or unusual a character as to be outside the reasonable contemplation of the parties to the policy of insurance. In the present case, therefore, I have no hesitation in saying for myself that I think the parties are bound by the statement, which was, in fact, made up at Antwerp, and which decides to my mind the rights of the parties. I agree, therefore, in thinking that the appeal fails.

STIRLING, L.J.—I am of the same opinion. For myself I agree with the reasoning of Kennedy, J. The appellants invite us to deal with the present case reading as applicable thereto the words "General average payable according to foreign statement if so made up" as meaning a statement made up in conformity with foreign law. Now, the statement was made up at Antwerp, which was the proper place for making it up, and what is sued for in the present case is the contribution as defined by that foreign statement. But it is said that that statement was not in accordance with the general law of Belgium, and that these words which I have already read ought to be treated as meaning that the general average is to be payable according to the general law of the country where it is made up, and not in accordance with any specific agreement which may be made between the parties, even if such could be recognised by the law. Now, I am unable for myself to construe these words as referring to the general law of the country. It seems to me that to do so is to give no effect to the words "if so made up." By those words I think the parties meant in some sense or other to bind themselves to a statement actually made up in the foreign country. And the utmost, it seems to me, that could be introduced as qualification would be that, if it is not the actual statement made up by the average adjuster holding the official position there, it should be in accordance with the law of that country, so as to be valid and binding in that country when made. Now, I understand it to be conceded by both the learned counsel for the appellants that, in point of fact, the law of Belgium does recognise the existence of special agreements, and does give effect to them in respect of any contract which they might contain with respect to general average. For these reasons, which are those of Kennedy, J., I should be prepared to follow his decision. I also agree with the view which has been expressed by my brethren, if that be not the case, as to the effect which ought to be given to the clause.

Appeal dismissed.

Solicitors for the appellants, *Waltons, Johnson, Bubb*, and *Whatton*.

Solicitors for the respondent, *Stibbard, Gibson*, and *Co.*, agents for *Gibson, Pybus*, and *Pybus* Newcastle-upon-Tyne.

Aug. 1, 3, 4, *and* 5, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

ROWSON *v.* ATLANTIC TRANSPORT COMPANY. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriage of goods—Damage to cargo—Exceptions in bills of lading—Harter Act (Act of Congress of U.S.A. 1893) — *"Faults or errors in the management of vessel."*

By sect. 3 *of the Harter Act (U.S.A.)* 1893, *which was incorporated in certain bills of lading under which butter was shipped at New York for carriage to London, if the owner of any vessel transporting merchandise shall exercise due diligence to make the vessel seaworthy and properly manned and equipped, then the owner is not to be held responsible for damage or loss "resulting from faults or errors in navigation, or in the management of the said vessel." Owing to the negligence of the persons in charge of the refrigerating apparatus with which the ship was fitted, the butter was damaged.*

Held, that the phrase "faults or errors in . . . the management of the said vessel" meant in the management of the said vessel quâ *vessel; that the refrigerating apparatus not having been introduced into the vessel for the special purpose of the butter, but for the purpose of cooling the vessel and to be used for its provisions available for consumption during the voyage, management of the refrigerating apparatus was, in the particular circumstances, management of the vessel; and that, the damage to the butter having resulted from the negligence of the crew in working this part of the vessel, the shipowners were relieved from liability in respect of such damage by virtue of sect.* 3 *of the Harter Act.*

Decision of Kennedy, J. (87 *L. T. Rep.* 717; 9 *Asp. Mar. Law Cas.* 347) *affirmed.*

SEVERAL parcels of butter, amounting in all to 206 tubs and 170 boxes, were shipped at New York on board the defendants' ship for carriage to London under two bills of lading each signed by the defendants and dated the 29th June 1900.

It was thereby provided that the shipment should be subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States approved on the 13th Feb. 1893, and entitled "An Act relating to navigation of vessels, &c."—commonly known as the "Harter Act."

By that Act it is provided as follows:

Sect. 1. That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void, and of no effect.

Sect. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

Sect. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . . or the inherent defect, quality, or vice of the thing carried.

The butter, which was in apparent good order and condition when shipped at New York, was delivered in London to the plaintiff, the indorsee of the bills of lading, to whom the property in the goods passed by such indorsement, in a damaged condition, the depreciation on the same amounting, as the plaintiff alleged, to 250*l.*

The butter was carried in insulated chambers connected with the refrigerating apparatus with which the ship was supplied for the purpose of enabling her to carry perishable goods during the summer months.

There were eight of such chambers, of which six were used for the cargo carried, and two for the purpose of preserving the ship's provisions.

At the time of the shipment the insulated chambers were cooled down to a proper temperature for the reception of the butter, and the refrigerating machinery was in good working order.

The damage to the butter was caused by the failure on the part of those in charge of the refrigerating machinery during the voyage to properly work the same, whereby the insulated chambers were not kept at a proper and sufficiently low temperature.

The plaintiff brought an action against the defendants claiming 250*l.* damages, with interest thereon at 5 per cent. from the 31st Aug. 1900.

The defendants contended that the negligence in the management of the refrigerating machinery was a fault or error in the management of the vessel.

In Nov. 1902 the action came on for trial before Kennedy, J. sitting without a jury, when his Lordship decided (87 L. T. Rep. 717; 9 Asp. Mar. Law Cas. 347) that the neglect to keep the chambers sufficiently cooled during the voyage was a fault or error "in the management of" the "vessel" within the meaning of the bills of lading; and that the defendants were consequently exempted from liability for the damage to the goods.

From that decision the plaintiffs now appealed.

J. A. Hamilton, K.C. and *Loehnis* (with them *Ricardo*) for the appellants. — The questions which the court has to consider in this case are, first, what is the meaning of "seaworthy" in sects. 2 and 3 of the Harter Act; and, secondly, what is the meaning of "management of the said vessel" in sect. 3. The terms, provisions, and exceptions of that Act are to be treated as if they had been set out verbatim in the bills of lading:

Dobell v. *Steamship Rossmore Company*, 73 L. T. Rep. 74; 8 Asp. Mar. Law Cas. 33; (1895) 2 Q. B. 408.

In the absence of anything to the contrary contained in the bills of lading, there is implied in it an absolute warranty by the shipowners that the refrigerating machinery in the ship was fit at the time of the shipment of the butter to properly preserve it:

Owners of Cargo on Board the Steamship Maori King v. *Hughes*, 73 L. T. Rep. 141; 8 Asp. Mar. Law Cas. 65; (1895) 2 Q. B. 550.

The English cases which have dealt with the question of "management" are

The Ferro, 68 L. T. Rep. 418; 7 Asp. Mar. Law Cas. 309; (1893) P. 38;
The Glenochil, 73 L. T. Rep. 416; 8 Asp. Mar. Law Cas. 218; (1896) P. 10;
The Rodney, 82 L. T. Rep. 27; 9 Asp. Mar. Law Cas. 39; (1900) P. 112;
The Acomac, 63 L. T. Rep. 737; 6 Asp. Mar. Law Cas. 579; 15 P. Div. 208.

There are also American authorities, with judgments in which the observations upon the Harter Act are in point here, and are of considerable weight:

Botany Worsted Mills v. *Knott*, 76 Fed. Rep. 582; 82 *Ib.* 471;
The Prussia, 92 Fed. Rep. 838; on appeal, 93 *Ib.* 837;
Calderon v. *Atlas Steamship Company*, 170 U. S. Rep. 271.

Another point is that sect. 3 of the Harter Act is a negligence clause. The principle has over and over again been laid down that when shipowners stipulate for exemption from the exercise of care, they must do so in clear and explicit terms. The best authority for the proposition, in which all the authorities are summarised, is

Steinman and Co. v. *Angier Line* (1887) *Limited*, 64 L. T. Rep. 613; 7 Asp. Mar. Law Cas. 46; (1891) 1 Q. B. 619, at p. 623.

They referred also to

Burton and Co. v. *English and Co.*, 49 L. T. Rep. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218.

Robson, K.C. and *D. Stephens* for the respondents.—The first question is what is the vessel itself. It must not only be a ship to go through the water, but a ship as affecting the cargo—to carry the cargo. The shipowners are bound to give the shippers a ship which can safely carry their cargo—a ship which is fit for the purpose for which it is employed. The refrigerating machinery is part of the ship for the purpose of carrying the cargo of butter; it is part of the ship to which the obligation of "seaworthiness" applies. That is a conclusive test as to what is and what is not part of the ship. The refrigerating machinery is as much a part of the ship as the material by which it is connected or the rudder or any other part. It is the necessary part of that which carries the

cargo. As to the question of seaworthiness or fitness for the purpose of carrying a cargo, see

Queensland National Bank v. *Peninsular and Oriental Steamship Company Limited*, 78 L. T. Rep. 67; 8 Asp. Mar. Law Cas. 338; (1898) 1 Q. B. 567;

Steel v. *State Line Steamship Company*, 37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72.

American cases upon the question of seaworthiness are

The Mexican Prince, 82 Fed. Rep. 484; 91 *Ib.* 1003;

The Strathdon, 89 Fed. Rep. 374.

J. A. Hamilton, K.C., in reply, referred to

Tattersall v. *National Steamship Company*, 50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297;

The Thames, 61 Fed. Rep. 1014.

VAUGHAN WILLIAMS, L.J.—This case seems to me to be rather on the border line. But the question that we have to decide is really a question of fact, and not a question of the construction of the clauses that have been imported into this bill of lading from the Harter Act. Now, the decision, as I understand it, of Kennedy, J. comes to this: He finds that the vessel at the moment of starting on this voyage carrying this butter was, in all respects, seaworthy and properly manned, equipped, and supplied. Having come to that conclusion, he also comes to another conclusion of fact, which is that the damage which admittedly occurred in respect of this butter, by reason of its not being kept cool in the refrigerating chambers, was a damage which arose in the management of the vessel. I do not think that anyone dealing with these clauses imported from the Harter Act would deny that if those two conclusions of fact of Kennedy, J. are right, his ultimate judgment is right. If it is really true that at the moment of commencing the voyage the ship was seaworthy and properly manned, equipped, and supplied, and if it is also true that the damage which has occurred to this butter is damage resulting from the management of the vessel, it would seem to be an irresistible conclusion that the shipowner is relieved from liability in respect of the damage. Now, one has to consider first what are the facts in this case, and see whether the evidence is such and the facts which are admitted are such, as to justify the conclusion of Kennedy, J. But before doing that I want to say a word or two about these clauses which have been imported. Clause 1 is the first which is imported. That is a section which deals with the improper care of the cargo, and it forbids clauses being introduced by the shipowner which shall relieve him from liability for the improper care of cargo. Clause 2 is rather more complicated, and it is better therefore to read it in this case: "It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy, and capable of performing her intended voyage. . . ." There is the first part of clause 2 preventing the shipowner relieving himself in any way from the obligation of seaworthiness. Then it goes on with a further prohibition that he is not to introduce any clauses "whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided." Now we have not got to apply either of these two clauses to the present case, for the present case is not of a character, and the claim is not of a character, which raises the question whether there are clauses in this bill of lading which are prohibited by these words. But we have heard a good deal about these two clauses, and for this reason, that Mr. Hamilton and Mr. Robson take a different view of the three clauses as a whole. Mr. Hamilton says you must construe clause 3 in the light of clauses 1 and 2, and he says when you find in clauses 1 and 2 that it is prohibited to introduce into a bill of lading or other shipping document anything which shall relieve the shipowner of his liability to stow properly or to carefully handle and stow a cargo, and to care for it properly and deliver the same, or by which such obligations shall in anywise be lessened, weakened, or avoided, it is quite plain that you must not put upon the words "in navigation or in the management of the said vessel" which occur in clause 3 any meaning which will neutralise or take away the effect of the provisions in clauses 1 and 2. Further he says that if you come to the conclusion that Kennedy, J. did, that the mismanagement of this refrigerating machine was mismanagement of the vessel, the effect of that is really that you are neutralising and reducing to nothing the provisions in clauses 1 and 2. Mr. Robson, on the other hand, says clauses 1 and 2 are merely two independent prohibitions — these are things you shall not do. Then he says that clause 3, instead of allowing the shipowner and the shipper to determine what their respective positions are, the Act, by clause 3, defines what those obligations shall be for the future. He says that that is the proper way of construing clause 3, and that you have no right to read it as a connected clause with clauses 1 and 2. There is a good deal to be said for both sides, but the conclusion I have come to myself is that they are neither of them quite right; that the one makes the dependence stronger than it really is, and the other alleges more independence than we should really find in these clauses. Taking that view, when I come to read these words I so far agree with Mr. Hamilton that I think that "in the management of the said vessel" means in the management of the vessel *quâ* vessel. I do not think that "the management of the said vessel" is at all the same thing as "in navigation." What you have to ask yourself, in my judgment, is: What, for the purpose of clause 3, is the meaning of "in the management of the said vessel?" I repeat it means in the management of the said vessel *quâ* vessel. Now, under those circumstances, if you had had in this case some appliance placed in the refrigerating chamber where the butter was, simply for the purpose of refrigerating the butter, I should have hesitated very much to say that the refrigerating apparatus was part of the vessel; and I should, I think, not have been able to persuade myself to come to the conclusion that mismanagement of that special

apparatus was a mismanagement of the vessel. But it is not the fact here that this refrigerating machine was introduced into this ship with special reference to this butter. It was no more, to my mind, introduced into this ship with reference to this butter than the port-holes or the removability of the hatches for the purpose of ventilation, or any other ventilating apparatus, could be said to be introduced for the purpose of a particular cargo. I think that on the evidence this refrigerating machine was put in the ship for the purpose of cooling the ship. It is quite true that when you get the refrigerating machine there you could apply it either to cool the butter, which in this case happened to be in chambers A, B, C, and D, or the meat, which happened to be in chambers E and F, or the store-room of the ship, in which the provisions for consumption on the voyage were kept. You could use it for any of those purposes. But, in my judgment, we ought not, sitting as a Court of Appeal here, to say that Kennedy, J. was wrong in holding, as he seems to me by his judgment to have done, that this particular refrigerating apparatus was part of the ship; that the management of it was management of the vessel; and that therefore the mismanagement of it was the mismanagement of the vessel. That is the conclusion I have come to in this case. I have not got to construe clauses 1 and 2, but I do construe them to this extent: It is the contrast between the dealing with the stowage of the cargo and the dealing with the vessel itself that makes me say, when I come to clause 3, that "management of the vessel" means management of the vessel *quâ* ship, not *quâ* navigation, but *quâ* ship. The moment I arrive at the conclusion that I cannot say that Kennedy, J. was wrong in finding as he did, in effect, do, that this refrigerating machine was a part of this vessel, it seems to me that all the rest of his conclusion follows. I think it was part of the vessel, and I think that this damage to this butter resulted from negligence in the management of this part of the vessel, and, therefore, of this vessel. The appeal will therefore be dismissed with costs.

ROMER, L.J.—I have come to the same conclusion. Under the first two clauses of the Harter Act it is clear that the common law liability of the shipowner in respect of the necessity for due care being taken in respect of the cargo was carefully reserved, except so far as that liability may have been expressly cut down by the provisions of clause 3. When I look at clause 3 I think it is reasonably clear that that clause was directly aiming at negligence of the owners, agents, or charterers of the ship in respect of the navigation or the management of the vessel properly so called. The shipowners are free from negligence in the management of the vessel, regarded as, as has been said, a vessel. But I also agree that in considering what is a vessel you must bear in mind that it is to be regarded as a cargo-bearing carrier, and, moreover, it may be regarded specially by consideration of the particular cargo which may have been injured in the course of the voyage. Cases of difficulty may often arise, as they do in the present case, as to whether the negligence which has resulted in an injury to cargo is to be regarded as negligence in the care of the cargo within the earlier clauses of the Act, or negligence in the management of the vessel under clause 3. I think it is difficult, if not practically impossible, to attempt successfully to lay down any general principles as to how any particular case is to be dealt with. I think you must look at the facts of each case as it arises, and determine on those facts on which side of the line the case falls. In considering those special facts I think the following that I am going to mention are worthy of consideration, or may be, in determining the question. For example: What was the act of negligence complained of; by whom was it committed; in particular, was the man who was guilty of the negligence acting at the time as an ordinary member of the officers, engineers, or crew of the ship; was he, or not, acting in the ordinary course of his duties and on behalf of the vessel regarded as a whole, or was he acting solely or in particular in looking after the cargo and for the purposes of the cargo? Further, in some cases it may be important to consider: Was the injury to the cargo caused directly or indirectly by the act of negligence? I do not, as I have said, attempt to lay down any general principle; I only say that, in considering the circumstances of each case, attention may well be had, so far as they are applicable, to the kind of considerations I have indicated. In the present case the facts which prevent me from differing from the learned judge in the court below in his conclusion of fact are these: It appears that as part of the vessel there were several refrigerating chambers, and there was a pipe, in particular, the operation of which when properly worked was to keep the air of the refrigerating chambers properly cool. Now those chambers were not all used for cargo, and in the case of the particular voyage we have to consider in this case that two of those chambers were being used for the ordinary purposes of the ship in this sense: They were used for the storage of provisions which required refrigerating, those provisions being required for the ordinary purposes of the ship's crew or passengers, if there were any, during the course of the voyage as a sea-going carrier. The man who had to attend to this pipe was an engineer of the ship, employed in the ordinary way in looking after this pipe, regarded as part of the vessel. He had not been specially told, nor was it his special duty, to look after the cargo in particular or any part of the cargo. The pipe he had to attend to was wanted, as I have pointed out, for the general purposes of the ship, as well as for the requirements of some of the cargo. But, so far as the engineer attending to it was concerned, all he had to look upon it as was as a pipe required for the general purposes of the vessel. He had not to consider it as affecting any special or particular part of the cargo. Indeed, I may point out that the engineer would have had to attend to this pipe, as it appears from the facts of the case, even if there had been no cargo requiring refrigerating, for he would have had to keep the pipe at work for the purpose of keeping cool the two chambers which contained the provisions of the ship; and the injury to the cargo which was caused by the act of negligence was only indirectly caused by the act. The effect of this act was to prevent the pipe acting properly so as to cool the refrigerating chambers as a whole, and the effect of that upon one of the refrigerating chambers was that the temperature got above the proper tempera-

ture necessary for proper preservation, and part of the cargo became injured. But, as I have said, it really was, properly regarded, only an indirect injury to the cargo, so far as the pipe itself was concerned; the pipe was intact. The mismanagement of the pipe was a mismanagement of it in working the pipe *quâ* pipe, as I have said, and as part of the vessel. When I look at all these facts of the case, the conclusion I have come to is that what this engineer did was, to be guilty of an act of negligence in the management of the ship regarded as a vessel, and even regarded as a vessel carrying cargo. In any point of view you like it was, as far as I can see, an act of negligence by an officer of the ship performing his duties to the ship as a ship, and not with regard to any particular cargo, and such an act as really was concerned in the management of the vessel as a whole, and which, therefore, in my opinion, really came within the express limitation of clause 3 of the Act.

STIRLING, L.J.—I have come to the same conclusion. I am bound to say that I think this is a case of very considerable difficulty. We have here to deal with a bill of lading which stipulates that the shipment is to be subject to all the terms and provisions of and all the exceptions from liability contained in the Harter Act. We have been invited by counsel on both sides to deal with this case on the same footing as if those terms and provisions and exceptions had been set out verbatim in the bill of lading. Whether that is the true construction it is unnecessary to say. The course we adopt has been sanctioned by the Court of Appeal in former cases, and particularly in that of *Dobell* v. *Steamship Rossmore Company* (73 L. T. Rep. 74; 8 Asp. Mar. Law Cas. 33; (1895) 2 Q. B. 408). The general scheme of the Harter Act was this, that the first section forbids the introduction into any bill of lading or other shipping document any clause relieving the shipowner from liability in respect of negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of the cargo. The second clause deals, first of all, with prohibiting the shipowner from introducing into any bill of lading or shipping document anything which exonerates him from his obligation to exercise due diligence in proper management, equipping, and outfitting the vessel, and making the vessel seaworthy and capable of performing her voyage. It also, secondly, prohibits introducing any clause which exempts the owner from liability in respect of the "master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same." Then the third clause provides: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." The question we have to deal with here is whether a fault or error has been committed in the management of the vessel within the meaning of that third clause. This question has been considered both by the courts of this country and by the courts in the United States. I say nothing as to the decisions of the United States, because we are not, on the present occasion, dealing with American law. But I understand them to have gone on the same lines as the cases which have been dealt with in this country—namely, two cases in the Probate Division of *The Glenochil* (73 L. T. Rep. 416; 8 Asp. Mar. Law Cas. 218; (1896) P. 10) and *The Rodney* (82 L. T. Rep. 27; 9 Asp. Mar. Law Cas. 39; (1900) P. 112). I agree with the general view which has been taken of the sections in those two cases—namely, that there is a broad distinction drawn in the Act between the dealing with the cargo and the management of the vessel. Those two matters seem to be distinguished one from the other in the Act, and I accept the view which is taken by the President of the Probate Division in *The Glenochil* (*ubi sup.*), where he says at p. 14 of (1896) P. that the object of sect. 1 is to prevent the insertion of clauses in mercantile instruments "which would exempt the carrier from want of proper care in regard to the cargo." Then he says: "It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary, sense, any mismanagement of the ship, in navigation or otherwise, is want of proper care as regards the cargo. But it is clear that it was intended by sect. 3 to exempt from liability for damage or loss resulting from faults and errors of navigation or in the management of the vessel; and the way in which these two provisions may be reconciled is, I think, first that the Act prevents exemptions in the case of direct want of care in respect of the cargo, and, secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel, and not with the cargo." And Barnes, J., who also took part in the decision, says this (at p. 18 of (1896) P.): "But I think if those sections [in the Harter Act] are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" In the subsequent case of *The Rodney* (*ubi sup.*) the same lines are adhered to, but the learned judges both say that in that case the learned County Court judge had limited their meaning too narrowly, and the President says (at p. 117 of (1900) P.); "The acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel, and falls within the principle of *The Glenochil* (*ubi sup.*)." And Barnes, J. says: "I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo." Kennedy, J. in his judgment in the present case, taking, I think, the words from the prior judgment of Walton, J. in

an action by other plaintiffs against the present defendants, says this: "One part of this machine is a compressor in which carbonic acid gas is put under very great pressure by means of a piston. In order that that work may be done effectively it is necessary that the carbonic acid gas should not escape. One place by which it would very naturally escape, unless special precautions were taken, is the gland in which the piston rod works, and to prevent escape there the gland has to be very securely packed. It is packed and made tight by means of leather rings, and that is supplemented by driving into the gland lubricating oil, which acts both as a lubricant and also as a kind of additional cushion, and makes the gland work perfectly light so that the gas cannot escape at all." Now what was done here was that, for the purpose of saving trouble, the engineer in charge, more particularly of this portion of the apparatus, saw fit to turn a handle, by means of which the passage of the oil into the gland was stopped; the result was that the temperature was very much raised in the refrigerator, and the butter was damaged. The learned judge in the court below found that the damage was done by the engineer in working the refrigerating apparatus in the vessel.

The question is whether this is a fault or error committed, within the language of the Act, in the management of the vessel, or is it a fault or error committed in taking care of the cargo, which is the duty of the shipowner to see to. That ultimately comes down to a question of fact, the general meaning of the clauses having been ascertained in the way which I have pointed out. It raises questions which are not by any means easy to decide in many cases, but let me put an example or two to see how the case can be put. Suppose, for example, by negligence, if you will, but by some fault or error committed in the engine-room, a rod which worked the piston was broken and it was impossible afterwards to set the refrigerating apparatus in motion. Which side would that lie? It seems to me it would be impossible to say that that was not a fault or error committed in the management of the ship. On the other hand, if the refrigerating chambers or refrigerating machines were entirely devoted to cargo, and the neglect had been, as it was in the present case, that of turning a handle which intercepted the supply of oil to this particular spot in the machine, I should have felt very great hesitation in saying that was not neglect in taking proper care of the cargo. And for a long while I was under the impression that that really represented the state of things here, and that the negligent act had nothing to do really with anything connected with the vessel at all, but simply a portion of the vessel which was appropriated to the cargo. But it now turns out that the refrigerating portion of the vessel does include chambers which are applied and used for carrying provisions for the ship, and these are worked with precisely one and the same apparatus as the chambers which are devoted for the preservation of the cargo. The duties of the particular engineer in charge were not limited, as I understand, to taking care of the cargo or, indeed, to this particular portion of her refrigerators, and although I think the case, on the whole, is very near the line, it does seem to me that I must come to the conclusion that the fault or error was committed in the management of the vessel within the meaning of this clause. I therefore agree with my learned brethren that I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Waltons, Johnson, Bubb,* and *Whatton.*

Solicitors for the respondents, *Holman, Birdwood,* and *Co.*

Aug. 4, 5, *and* 6, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

GREENOCK STEAMSHIP COMPANY *v.* MARITIME INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance—Marine—Voyage policy—Warranty of seaworthiness—Breach—Negligence of master—Insufficient supply of coal for steamship—Burning ship's fittings and cargo—"Held covered" clause in policy.

Owners of a steamship insured their vessel with a marine insurance company under a policy which contained (inter alia) *the following provisions: "At and from . . . to port or ports in any order in the United Kingdom and* (*or*) *Continent between Bordeaux and Hamburg, both inclusive, and while there and thence to port or ports, place or places, on west coast of South America, backwards and forwards, and forwards and backwards, in any order or rotation, while there and thence to port or ports of call and* (*or*) *discharge in any order in the United Kingdom and* (*or*) *Continent between Bordeaux and Hamburg, both inclusive, and while there, however employed, until expiry of thirty days after arrival or until sailing on next voyage, which may first occur; with leave to call at any ports and places for all purposes, and any ports and places on the east coast of South America and* (*or*) *Falkland Islands, both outwards and homewards."*

The perils insured against were of the seas, &c., subject to clauses annexed to the policy, which provided (inter alia): *"This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. Including all risks incidental to steam navigation. General average salvage and special charges payable as per official foreign adjustment, if so made up, or per York-Antwerp Rules* 1890 *if in accordance with the contract of affreightment. Held covered in case of any breach of warranty, deviation, and* (*or*) *any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged."*

During the voyage the ship called at Monte Video, and through the negligence of the master sailed thence without having sufficient coal on board to take her to St. Vincent, her next place of call, where in ordinary course she would coal again. After leaving Monte Video the ship experienced strong head winds and seas. Her coal supply failing between Monte Video and St. Vincent, the master burnt as fuel some of the ship's fittings, spars, and a portion of the cargo, and if he had not done so she would have been in danger of becoming a total loss. The plaintiffs did not know until after the ship reached St. Vincent that she had left Monte Video without sufficient

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

coal, and no premium had been arranged under the "held covered" clause. The shipowners brought an action against the insurance company on the policy to recover in respect of the loss of the fittings, spars, and cargo.

Held, that the case was governed by the decision of the Court of Appeal in The Vortigern (80 *L. T. Rep.* 382; 8 Asp. Mar. Law Cas. 523; (1899) *P.* 140); *and that there was an implied warranty of seaworthiness which the shipowner had broken.*

Decision of Bigham, J. (88 *L. T. Rep.* 207; 9 Asp. Mar. Law Cas. 364) *affirmed.*

APPEAL by the plaintiffs from a decision of Bigham, J. (88 L. T. Rep. 207; 9 Asp. Mar. Law Cas. 364).

The action was tried before the learned judge, sitting in the Commercial Court, upon the following statement of facts agreed by the plaintiffs and the defendants:—

The plaintiffs were the owners of the steamship *Gulf of Florida*, and the defendants were a marine insurance company who had insured the steamship by a policy dated the 19th July 1897.

The more important terms of the policy were as follows:

For 3000*l.* on the *Gulf of Florida* valued at 30,000*l.* At and from . . . to port or ports in any order in the United Kingdom and (or) Continent between Bordeaux and Hamburg, both inclusive, and while there and thence to port or ports, place or places on west coast of South America, backwards and forwards, and forwards and backwards, in any order or rotation, while there and thence to port or ports of call and (or) discharge in any order in the United Kingdom and (or) Continent between Bordeaux and Hamburg, both inclusive, and while there, however employed, until expiry of thirty days after arrival or until sailing on next voyage, whichever may first occur; with leave to call at any ports and places for all purposes, and any ports and places on the east coast of South America and (or) Falkland Islands, both outwards and homewards. The risk not to commence before the expiration of previous policies; against the risk of total loss only but including collision clause, general average and salvage charges. Perils insured against of the seas, &c. Subject to and including Gulf Line voyage clauses as annexed.

Such clauses were, so far as material, as follows:

This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. Including all risks incidental to steam navigation. General average salvage and special charges payable as per official foreign adjustment, if so made up, or per York-Antwerp Rules 1890 if in accordance with the contract of affreightment. Held covered in case of any breach of warranty, deviation, and (or) any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged. It shall be lawful to the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard, and recovery of the said ship, &c., and any part thereof without prejudice to this insurance, to the charges whereof we, the assurers, will contribute each according to the rate or quantity of this sum herein insured. In the event of any inaccuracy in the description of voyage, interest, name of vessel, clauses, or conditions, it is agreed to hold the assured covered at a premium to be arranged.

The previous policies, before the expiration of which the risk was not to commence, were all in similar terms.

One of them was dated the 1st Jan. 1897, and was subscribed by the defendants.

The events giving rise to disputes between the parties took place after the *Gulf of Florida* left Monte Video on the 18th Dec. 1897.

Stated shortly, they were as follows:—

On arrival at Monte Video the *Gulf of Florida* had on board 232 tons of bunker coals. She took on board a further 330 tons, and sailed on the 18th Dec. with 562 tons in the bunkers, the bunkers being full and the quantity, apparently, more than sufficient for the passage to St. Vincent, where in the ordinary course she would coal again.

On the same day that she left Monte Video she put back in consequence of an accident to the condenser door. This was renewed, and the voyage resumed on the 23rd Dec.

By this time about 20 tons of the bunker coals had been used, but those on board considered she had still sufficient for the passage to St. Vincent.

After leaving Monte Video the *Gulf of Florida* experienced strong head winds and seas.

On the 7th Jan. 1898 the coal was found to be burning very quickly, at a rate equal to 36 tons per day. As the rate of consumption continued very high, the speed was reduced on the 9th Jan., and to save steam the steam steering gear and electric light were shut off.

On the 10th Jan. some of the ship's fittings were used for fuel, and on subsequent days further fittings and spars, and portions of the cargo were burnt to assist in keeping up steam. If this had not been done the *Gulf of Florida* would have been unable to reach port without assistance, and without such assistance would have been helpless and in danger of being totally lost.

The quantity of coal with which the *Gulf of Florida* left Monte Video, both on the 10th and 23rd Dec., was, in fact, insufficient for the passage to St. Vincent.

This insufficiency happened owing to the negligence of the master and engineers.

The value of the ship's fittings and spars burnt was 312*l.* 4*s.*

The plaintiffs had paid the consignees of cargo for the cargo used as fuel 662*l.* 1*s.* 11*d.*

The plaintiffs claimed that they were entitled to the defendant company's proportion of the value of the ship's fittings and spars burnt, and of the sums paid for cargo burnt. Alternatively they claimed the defendant company's proportion of the value of the fittings and spars burnt, and of the ship's contribution in general average of the value of the cargo burnt. In the further alternative, the plaintiffs claimed to be entitled, as above, on payment of an additional premium to be fixed by the court, or as the court might direct.

The defendants denied that the plaintiffs were entitled to any of the said sums, or any part thereof, even on payment of an additional premium.

It was decided by Bigham, J. that an implied warranty of seaworthiness existed when the ship left Monte Video, and that there was a breach of that warranty in not there providing her with sufficient coal, so that the policy then ceased to attach to the risks insured against; also that the clause with respect to loss through the negligence

of the master did not apply, because his negligence was not the proximate cause of the loss; and that the implied warranty of seaworthiness was a warranty to which the "held covered" clause applied, but that, as the premium which the defendants might reasonably have charged if they had known of the breach of warranty before the loss occurred was at least equal to the amount of the loss, the plaintiffs were not entitled to recover anything.

From that decision the plaintiffs now appealed.

Carver, K.C. and *D. C. Leck* for the appellants.—The question raised by this appeal is whether upon the terms of the policy of insurance a warranty of seaworthiness is to be implied. We submit not. A warranty of the kind ought not to be implied by a court of law unless it appears that the parties contemplated that such an implied term was to be part of their contract. There is no difference between the rule applicable to maritime contracts and the rule applicable to other contracts. The general principle upon which the court acts in interpreting contracts appears from the observations of Lord Esher, M.R. in

Hamlyn and Co. v. *Wood and Co.*, 65 L. T. Rep. 286; (1891) 2 Q. B. 488, at p. 491.

There is no authority for a warranty of seaworthiness of this kind; or, if there is any such warranty, it is only as to the first part of the insurance. The case of *The Vortigern* (80 L. T. Rep. 382; 8 Asp. Mar. Law Cas. 523; (1899) P. 140), upon which Bigham, J. relied, does not, we submit, apply to the present case having regard to the facts. There was no warranty of seaworthiness, at any rate at the time the loss in question occurred. Assuming that this was a voyage policy, the warranty of seaworthiness, if any such existed, was of seaworthiness at the commencement of the voyage. Even allowing that this warranty reattached at every port of call, and that the departure of the vessel from Monte Video with an insufficient supply of coal was a breach of such warranty, such breach, and therefore the consequent loss, arose through the negligence of the master and engineers, and was covered by the policy. The plaintiffs are consequently entitled to recover the defendants' proportion of the value of the ship's fittings which were burnt as for a general average loss. They are also entitled to recover from the defendants the contribution which had to be paid as general average to the cargo owners. The sacrifice of the fittings and cargo was made for the safety of the whole adventure, and it is the subject of general average:

Dixon v. *Sadler*, 5 M. & W. 405, at p. 413;
Dudgeon v. *Pembroke*, 36 L. T. Rep. 382; 3 Asp. Mar. Law Cas. 393; 2 App. Cas. 284;
Gibson v. *Small*, 4 H. L. Cas. 353;
Strang v. *Scott*, 65 L. T. Rep. 597; 6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601;
Montgomery v. *Indemnity Mutual Marine Assurance Company Limited*, 86 L. T. Rep. 462; 9 Asp. Mar. Law Cas. 141; (1902) 1 K. B. 734;
Arnould on the Law of Marine Insurance, 7th edit., s. 707.

A definition of "voyage policy" and "time policy" appears in *Gibson* v. *Small* (*ubi sup.*).

J. A. Hamilton, K.C. (with him *R. I. Simey*) for the respondents.—The points are whether a warranty of seaworthiness is to be implied, and, if so, what that warranty is. [VAUGHAN WILLIAMS, L.J.—The sole question now raised appears to be whether upon the terms of this particular policy of insurance we ought to imply a warranty of seaworthiness.] This was clearly, having regard to the terms of the policy and the attached clauses, a voyage policy for a voyage by stages; and there was an implied warranty that the vessel was seaworthy at the commencement of each stage of the voyage. Being a voyage policy, the fact that the vessel in commencing her voyage had not sufficient coal in her bunkers to enable her to complete the voyage made her *primâ facie* then unseaworthy. But this unseaworthiness may be cured when the voyage is by stages by her recoaling at each port of call sufficiently to enable her to complete the next stage:

The Vortigern (*ubi sup.*).

Here on the facts stated the ship was not coaled sufficiently when she left Monte Video. She therefore commenced that section of the voyage in an unseaworthy condition. [He was stopped by the Court.]

VAUGHAN WILLIAMS, L.J.—In my opinion this case is covered by the decision in the case of *The Vortigern* (80 L. T. Rep. 382; 8 Asp. Mar. Law Cas. 523; (1899) P. 140). Mr. Carver's argument, although he was not invited to have it so expressed, really was an argument to show that the policy here in effect was a time policy. I feel impressed by the words of the policy, which not only do not describe the risk to be taken as being a "time risk," but so describe it that it is obvious that the real risk was to continue from the time of leaving one of the optional ports, either in the United Kingdom or on the Continent, until the arrival back again of the ship at one of the optional ultimate ports. In the stress of having to satisfy those words, he attempted to say that this was neither a time policy nor a voyage policy; and that therefore there was absolutely no warranty of seaworthiness by the shipowner at all. I do not myself think that it very much matters what you call this policy—whether you call it a "time policy" or whether you call it a "voyage policy." One has to look at the policy, and what was contemplated by the shipowner, and the underwriters respectively, and see whether, having regard to what they both contemplated, the ship was seaworthy. I utterly, myself, reject the notion that under this policy you could say that there was no warranty of seaworthiness at all. In fact, Mr. Carver himself shrank from saying that there was no warranty of seaworthiness at the commencement of the voyage. Once assume that there was an original warranty of seaworthiness, then it seems to me that the principle of the decision in the case of *The Vortigern* (*ubi sup.*) absolutely covers this case. If you look at the judgments in *The Vortigern*, it seems to me that, whether you regard the judgment of Barnes, J. in the first instance or the judgments in the Court of Appeal, you will find that the whole of the reasoning of the learned judges applies to the present case. I am for the purposes of my judgment assuming that under the circumstances of this case there was a plainly implied warranty of seaworthiness at the commencement of the voyage. If that is so, I repeat that it seems to me that the present case is

entirely covered by the judgments of Barnes, J. and of the Court of Appeal. I called attention just now to the passage in the judgment of Barnes, J., on the top of p. 147 in the report in (1899) P., and it seems to me that that entirely accords with the statements of Smith, L.J. on p. 153 of the same report, where the learned judge said: "To obviate this difficulty—and a very great difficulty it is in cases of long voyages of cargo-carrying steamships, for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts on such a voyage as the present by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination—it has become the practice, by reason of the necessity of the case, for cargo-carrying steamship owners to divide these long voyages into stages for the purpose of replenishing their ships with coal, and thus, as far as practicable, complying with the warranty of seaworthiness which attached when the ship commenced her voyage." If you look at that passage and look at the passage on p. 155, you can see that in each case really the warranty of seaworthiness in the case of these long voyages is not broken because the steamer does not start in a seaworthy condition, but that the shipowner is entitled to satisfy the implied warranty by taking on board coal at the commencement of each stage. It is plain that really so to hold that there is no breach is a concession made by the law in favour of the shipowner, rather than in favour of the underwriters. And it is also plain that the way in which the court regards these stages is to look at the voyage which is contemplated at each point where the ship takes advantage of this liberty and stops to coal. The shipowner must coal before the contemplated voyage. That does not mean in a case like the present a voyage which is defined in terms upon the face of the policy, but it means that the shipowner, taking advantage of this method of satisfying the implied warranty, must make up his mind where he intends to proceed; and he will only satisfy the warranty if he takes on board a sufficiency of coal for that contemplated voyage.

I do not know that it is necessary to say anything more about this particular case. I cannot help saying, however, that I have never been quite able to understand the ways of underwriters and shipowners—they are too hard for me. Here is a case which, having regard to the enormous extent of sea carriage in the present day, must be arising every day. This particular voyage which was contemplated by the shipowner and the under writers here, including, as it does, undefined coasting voyages upon the west coast of South America, obviously must be apt to give rise to occasions when the master of the ship is put in great difficulty, not only in respect of the quantity and quality of the coal which he may be able to obtain, but also as to the time when he really will be able to reach another coaling station. In such cases a very great stress must be thrown upon the master—even the most prudent master. One would have thought that it must have occurred to the shipowners that, unless they wished to go to sea under such conditions, it was by no means impossible that even with a fairly prudent master they might find themselves uninsured through the breach of warranty of seaworthiness—a warranty which *ex hypothesi* it is impossible to satisfy at the starting of the ship. One would have thought that as between the contracting parties the underwriters would have charged a sufficient premium in such a form that the shipowners' insurance should not be entirely dependent upon the judgment of the master in the decision of this difficult question as to the quantity and quality of the coals which he might require. But for some reason or other the parties to these contracts of insurance seem to consider that the interests of commerce are forwarded by leaving things in a more or less uncertain state, and in such a condition that the shipowner undertaking a voyage of this sort can never feel very confident that he is really covered by his insurance. The appeal will be dismissed with costs.

ROMER, L.J.—I have come to the same conclusion. I think that this case is covered in principle by the case of *The Vortigern* (*ubi sup.*), by which this court is bound. The form of the policy on which the case before us turns is one which to my mind shows that the policy is what is commonly termed "a voyage policy"—a voyage policy properly so called. I may remark that the policy is so described by the parties to it on the face of it. It is a voyage from any port or ports in the United Kingdom and the Continent between Bordeaux and Hamburg to any port or ports on the west coast of South America and back again to corresponding ports from which the steaming takes place. Undoubtedly this voyage is a curious one, because it may cover voyages between ports on the west coast of South America. If the case had been one simply for a voyage, say, from any port at any part to be selected in a defined portion of Europe to a port to be selected in any defined portion of the west coast of South America and back again, nobody could for a moment have suggested that that was not a voyage policy in the strictest sense of the term to which the ordinary insurance law applicable to an implied warranty of seaworthiness would apply. The difference between that case and the present is really only one of degree. No doubt the voyage that is defined in this policy was a very onerous one for shipowners to undertake to insure against on one policy, but that was for them to consider. If the shipowners had wished to negative the implied warranty of seaworthiness on such a voyage to any extent, it was for them to do so by express bargain and by express stipulation in the policy. As at present matters stand according to insurance law there are only two kinds of insurance policy known—a time policy and a voyage policy. I am referring, of course, to the kind of question we have to decide on for the purpose of this appeal. Speaking for myself, I think it would be most unfortunate for commercial law, and therefore for commercial people, if we had been obliged in this case to say that there was also a policy of a third kind known to the law—a kind of policy not hitherto supposed even by lawyers or by commercial men to exist. I do not mean to say, of course, but that one document might cover two policies—a voyage policy and a time policy. But in the present case the policy is not really two policies. The document does not cover two distinct insurances, and the policy is not in any true sense in part a time policy. It is, as I have pointed out, a voyage policy and nothing else; and I may add, as has

been frequently stated before, that the case of *The Vortigern* (*ubi sup.*) was really decided in favour of the shipowners. It was to free them in long voyages from what would otherwise have been a most onerous obligation on their part in the case of steamers—namely, that they would have been obliged, however long a voyage, to have shipped coal sufficient to last the whole of the voyage. In the present case but for the principle of *The Vortigern* (*ubi sup.*)—which applies in favour of the shipowners here notwithstanding the curious nature of the voyage—it would have been obligatory on the part of shipowners to have taken care that when their vessel started from the port of departure it was reasonably coaled for the coming voyage. With reference to an argument that was used before us in which it was said that it was impossible for any shipowners to have coaled for such deviations of voyages on the west coast of South America as appears to have been contemplated by this policy, I need only remark that this is not necessarily so. What the shipowners would have to do would be to coal to the extent that was reasonable having regard to the probable nature and duration of the voyages likely to take place on the west coast. As I have said, if shipowners choose to undertake voyages with steam vessels—particularly such a voyage as this, so described, and so long—it is for them to protect themselves, if they do not wish to incur the ordinary obligations that are cast upon them as shipowners in respect of such a voyage. For the reasons I have given I think that this appeal fails.

STIRLING, L.J.—I am of the same opinion. I entirely agree with what was said by Bigham, J. in his judgment. He rested his decision to a large extent on the case of *The Vortigern* (*ubi sup.*). That is a decision of the Court of Appeal. It was binding on Bigham, J. and it is no less binding upon us, and, unless it can be effectually distinguished, it seems to me that the result is that Bigham, J.'s decision must be affirmed. Now, how is it sought to distinguish that case from the present? In the first place, it is said that case related to a contract of affreightment, whereas the present relates to a contract of insurance. In the case of *The Vortigern* (*ubi sup.*) I observe that the learned counsel who argued for the appellants said in his reply that the doctrine of stages which was relied upon was a doctrine of insurance and ought not to be extended to a case of affreightment. Here the argument is the other way, that this is a doctrine which relates to cases of affreightment and ought not to be applied to cases of insurance. Now it seems to me that the Court of Appeal and Barnes, J. rejected that argument in the passage which is referred to by Bigham, J. in his judgment which I think has already been read in this court and treated the case as being the same whether it arises between the steamship owner and his underwriter on a voyage policy or between the steamship owner and the cargo owner upon a contract of affreightment. I think, therefore, that the two cases can be distinguished on that ground.

But then it is said in the second place—and this is really the main contention—that the contract in the case of *The Vortigern* (*ubi sup.*) related to specified points, and that the present contract relates to a voyage of a different character. In *The Vortigern* (*ubi sup.*) the voyage was in substance from Manila to Liverpool, with liberty to coal at any ports in order, and it was held there that this doctrine of stages applied. Now we have before us undoubtedly a case in which the voyage is described in much wider terms. It is from a port or ports in the United Kingdom or within specified limits on the Continent to a port or ports, or place or places, on the west coast of South America, and then back to a port in the United Kingdom, and between specified limits on the Continent, with power to go backwards and forwards, and forwards and backwards, on the west coast of South America. The risk is extended also until the expiry of thirty days after arrival or until the sailing of the next voyage, whichever first happens. Now Bigham, J. held that that was what is termed in the language of insurance a "voyage policy," and it seems to me that it was. If the voyage had simply been described as one from a port in the United Kingdom to a port on the west coast of South America and back from there to the United Kingdom, it would have been precisely within the decision in *The Vortigern* (*ubi sup.*). And although it reduced the power to go backwards and forwards on the west coast of South America it really would not in my opinion affect the substance of the case. It seems to me that there are reasons which may be urged against the law as laid down in *The Vortigern* (*ubi sup.*). But if such there be, I express no opinion one way or another upon them. They must be considered, it seems to me, by a higher tribunal. I think that *The Vortigern* (*ubi sup.*) cannot be distinguished for the purposes of the present case.

Appeal dismissed.

Solicitors for the appellants, *Coote* and *Ball*, agents for *Adamson* and *Adamson*, North Shields.

Solicitors for the respondents, *Field*, *Roscoe*, and *Co.*, agents for *Batesons*, *Warr*, and *Wimshurst*, Liverpool.

July 1 *and* 2, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

RATHBONE BROTHERS AND CO. v. MACIVER, SONS, AND CO. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Construction—Exceptions—"Unseaworthiness"—Ship unfit to receive cargo—Liability of shipowner.

Bills of lading provided that certain sheepskins should be delivered in good order and condition with several exceptions, amongst which were loss or damage resulting from the consequence of any injury to or defect in hull, tackle, or machinery, or their appurtenances, however such defect or injury might be caused, and notwithstanding that the same might have existed at or at any time before loading or sailing of the vessel, and whether the loss or injury arising therefrom was occasioned by the negligence of the owners, master, officers, or crew, and whether before or after or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

beginning or at any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness.

Some of the sheepskins were damaged by fresh water which escaped from a pipe which was broken when they were put on board. It was admitted that the vessel was not fit to receive cargo at the time when it was loaded, and that reasonable means had not been taken to provide against such unfitness.

Held, that "unseaworthiness" in this bill of lading included unfitness to receive the cargo, and was not limited to the unfitness of the ship to meet the perils of the sea; and, the shipowners not having taken all reasonable means to provide against such unseaworthiness, they were liable for the damage.

Decision of Wills, J. reversed.

THIS action was brought by the indorsees of four bills of lading signed by the defendants' agents against the owners of the steamship *Barbary* for damages for injury to some bales of sheepskins.

The sheepskins were shipped at Buenos Ayres for conveyance to Liverpool, and were damaged while on board by fresh water which escaped from a broken pipe which supplied a fresh-water tank for domestic service and which was already broken at the time when the sheepskins were put on board the ship at the commencement of the voyage.

The bill of lading was as follows:

Shipped in apparent good order and condition . . . at Buenos Ayres . . . to be delivered in the like good order and condition at Liverpool (the act of God . . . loss or damage resulting from effects of climate, heat of holds, vermin, rain, spray, insufficiency in strength of wrappers and packages, non-marking, obliteration or insufficiency of marks, and all injury to the same, sweating . . . and all damage arising from other goods . . . or from errors, obliteration, insufficiency, or absence of marks . . . risk of lighterage to or from the vessel, risk of craft or hulk or storage or transhipment, or transhipment from or to craft, explosion, heat, fire, before loading or in the ship or after unloading, and at any time and place whatever, boilers, steam machinery or their appurtenances, or from the consequence of any damage, breakdown, injury to or defect in hull, tackle, boilers, or machinery or their appurtenances, refrigerating engine or chamber, or any part thereof, outfit, tackle, or other appurtenances, however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, collision, stranding . . . or any other peril of the sea . . . and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, negligence, or error in judgment of the owners, master, officers, pilots, mariners, crew . . . or other persons employed in or about the ship, and whether before or after or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any cause whatever excepted).

The defendants admitted that the vessel was not fit to receive cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against that unfitness.

The action was tried by Wills, J. without a jury at the Liverpool Summer Assizes on the 25th and 30th July 1902, and he held that the shipowners were not liable, on the ground that the latter part of the exception as to "unseaworthiness" extended only to unseaworthiness of the ship as a ship—*i.e.*, to her unfitness to meet the perils of navigation with safety to the ship, and not to her unfitness to carry the cargo.

The plaintiffs appealed.

Pickford, K.C. and *Leslie Scott* for the appellant.—The defendants have broken the warranty for seaworthiness in these bills of lading. "Unseaworthiness" has now a wide meaning in a commercial sense; it means more than the perils of the sea, and includes unfitness of the ship to convey the goods included in the bills of lading. The defect in the fresh-water pipe which caused this damage to the sheepskins made the vessel unseaworthy within the usual commercial meaning of that term; there are no words to restrict the meaning of "unseaworthiness" to the strict meaning of the term—viz., unfit to encounter the perils of the sea—and therefore shipowners are liable. The decision of Wills, J. that the words which follow the expression "unseaworthiness" in the bill of lading—viz., "at the beginning or at any period of the voyage"—showed that the word was used in its strict sense is wrong:

Owners of Cargo on Maori King v. *Hughes*, 73 L. T. Rep. 141; 8 Asp. Mar. Law Cas. 65; (1895) 2 Q. B. 550;
Rowson v. *Atlantic Telegraph Company*, 89 L. T. Rep. 204; 9 Asp. Mar. Law Cas. 347;
Morris v. *Oceanic Steam Navigation Company*, 16 Times L. Rep. 533;
The Carron Park, 63 L. T. Rep. 356; 6 Asp. Mar. Law Cas. 543; 15 P. Div. 203;
Carver's Carriage by Sea, ss. 2, 17;
Scrutton on Charter-parties and Bills of Lading, art. 29.

Horridge, K.C. and *Maurice Hill* for the defendants.—Apart from the proviso as to unseaworthiness at the end of the exceptions, the shipowners would not be liable under this bill of lading. The shipowners are not liable for any defect, even before the loading of the vessel. The exceptions relieve them from liability under the warranty of seaworthiness, and the addition as to "unseaworthiness" refers to anything which comes within it which is not included in the former clause, provided reasonable care has been used. Therefore the owners were under no obligation to provide a ship fit to receive the cargo:

Cargo ex Laertes, 57 L. T. Rep. 502; 6 Asp. Mar. Law Cas. 174; 12 P. Div. 187;
Owners of Cargo on Board Steamship Waikato v. *New Zealand Shipping Company*, 79 L. T. Rep. 326; 8 Asp. Mar. Law Cas. 442; (1898) 1 Q. B. 645; (1899) 1 Q. B. 56;
Tattersall v. *National Steamship Company Limited*, 50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297;
Quebec Marine Insurance Company v. *Commercial Bank of Canada*, 22 L. T. Rep. 559; L. Rep. 3 P. C. 234;
Gilroy v. *Price*, 68 L. T. Rep. 302; 7 Asp. Mar. Law Cas. 314; (1893) A. C. 56;
Morris v. *Oceanic Steam Navigation Company* (*ubi sup.*);
Steel v. State Line Steamship Company, 37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72, 77.

There is a distinction between a warranty of sea-

worthiness and a warranty of fitness. A warranty of seaworthiness proper begins at the commencement of the voyage:

Carver's Carriage by Sea, s. 21.

The term "unseaworthiness" refers to fitness to encounter the perils of the sea unless there are words which show a contrary intention. Wills, J. was right in holding that here the word must be read strictly, and means only unseaworthiness proper. It refers strictly to cases of the entry of sea water. A warranty of "fitness" applies when the loading is commenced, before the commencement of the voyage. A ship may be unfit and yet seaworthy:

Stanton v. *Richardson*, 33 L. T. Rep. 193; 3 Asp. Mar. Law Cas. 23; L. Rep. 7 C. P. 421, 431, 436; L. Rep. 9 C. P. 390;
Cohn v. *Davidson*, 36 L. T. Rep. 244; 3 Asp. Mar. Law Cas. 374; 2 Q. B. Div. 455.

They also referred to

Borthwick v. *Elderslie Steamship Company*, 19 Times L. Rep. 313;
Queensland National Bank v. *Peninsular and Oriental Steam Navigation Company*, 78 L. T. Rep. 67; 8 Asp. Mar. Law Cas. 338; (1898) 1 Q. B. 567.

Pickford, K.C. in reply.

VAUGHAN WILLIAMS, L.J.—I do not think that this judgment can be supported. I am not sure that it is necessary for us to differ from Wills, J. on any point that he really decided, but I may say at once that we should be prepared, if it were necessary, to take a wider view of the meaning of the word "unseaworthiness" in this bill of lading than that which was taken by him. I wish, before I go more into detail in this case, to point out the broad principle which I think ought to be applied in the construction of a bill of lading, or of any other contract relating to carriage of goods by sea, just as much in the case of a charter-party as of a bill of lading. It is the principle laid down both by Bigham, J. and by the Court of Appeal in *Owners of Cargo on Board Steamship Waikato* v. *New Zealand Shipping Company* (*ubi sup.*), that with reference to carriage by sea the law implies certain warranties on the part of the shipowner; it puts upon him certain obligations which will always bind him unless there are clear and express words in the contract which, without ambiguity, relieve him from what I may call his common-law obligations. In that case Bigham, J. says: "The common-law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to evade this responsibility he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation." That obligation applies, in my judgment, to all these common-law warranties which are implied by the law in the absence of words excluding them. Collins, L.J. in the Court of Appeal in the same case says: "I am not sure myself that the shipowners did not really mean to cover by the exception all defects at the beginning of the voyage whether latent or patent. I am inclined to think that they probably did mean to do so. But they are the persons setting up the exception, and who have to make out their exemption. I do not think they can sustain that onus, unless by unambiguous language they have excluded the liability which would *primâ facie* rest upon them. I think that the language used in this case is far too ambiguous for that purpose." Shortly, the basis of my judgment here is the same as that expressed by Collins, L.J. The same thing was said by the other judges, Smith and Rigby, L.JJ. but I have quoted from the judgment of Collins, L.J. because the principle is very conveniently expressed there. I think that those observations apply to the present case, and that the language of this bill of lading is far too ambiguous to exclude the common-law warranties of the shipowner. I will also refer to what was said by Lord Blackburn in *Steel* v. *State Line Steamship Company* (*ubi sup.*): "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is probably called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." I read that to show the view that Lord Blackburn took of these warranties, that they can only be got rid of by a clear and express stipulation. Having said that, I will now consider the terms of this bill of lading. [His Lordship read the exceptions, and continued:] I think it is plain that it was not intended by the clause relating to unseaworthiness to create any new exception. In my judgment, the clause is a qualification which overrides the exceptions before mentioned, and it is not a new exception.

Having dealt thus with the bill of lading, I wish to deal with the case with regard to the point on which Wills, J. seems to me to have based his judgment solely and entirely—namely, the construction of the word "unseaworthiness" in this bill of lading. I think that Wills, J. considered that the effect of the clause that I have just been commenting on was to add an additional exception; but whether he did so or not, he based his judgment upon the meaning of the word "unseaworthiness," and he says (8 Com. Cas. 5): "But, in my opinion, the words which follow the expression 'unseaworthiness' in this bill of lading—viz., 'at the beginning or at any period of the voyage'—conclusively show that the expression 'unseaworthiness' as used, means what I may call unseaworthiness proper, because if it were used with regard to the cargo, and the fitness of the particular portion of the vessel to receive it, the phrase by which it is followed, instead of being 'at the beginning or at any period of the voyage,' would certainly be 'at the time of loading,' or some equivalent phrase, because the time of loading would be the critical time at which provision would be made for the obligation of seaworthiness to arise. But in the bill of lading it is not till the beginning of the voyage that the obligation arises, and it therefore seems to me that the intention was to confine the meaning of the word to unseaworthiness proper—that is to say, unseaworthiness of the ship as a ship." In my judgment, it is not right to put this narrow construction on the word "unseaworthiness." I

think that after what was said by Lord Blackburn in *Steel* v. *State Line Steamship Company* (*ubi sup.*) and by the Lords Justices in *Owners of Cargo on Maori King* v. *Hughes* (*ubi sup.*) we ought not so to limit this word "unseaworthiness," but to hold it covers not only the unseaworthiness of the ship in the sense that it was not fit to meet the perils of the sea, but also in the sense that the ship was not in a fit condition to carry the cargo. This opinion of mine, however, does not, if it is right, dispose of the whole case, because counsel for the defendants urged an argument upon us upon which, if correct, his clients would succeed, whether the wider or the narrower construction be put on the word "unseaworthiness" in this bill of lading. The point does not seem to have been raised before Wills, J., and I cannot find that he expressed any opinion whatsoever upon it. The point is this. Even if the shipowners cannot get rid of what I will call their common-law liability—that is, the warranty of seaworthiness, taking it as including fitness of the ship to receive the cargo; or, if the warranties are to be treated as separate, the warranty of seaworthiness and the warranty of fitness of the vessel to carry the cargo—without some plain and unambiguous words in the bill of lading excluding them, it is said that those express words are in this bill of lading. Counsel rely on the words "before the loading or sailing of the vessel," and say that, there being two admissions by the defendants—that the vessel was not fit to receive the cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against such unfitness—there is a defect in hull, tackle, or machinery which existed before the loading, or at all events at the time of loading, and this loss has resulted from that defect; and whether that defect amounts to unseaworthiness, or whether it amounts to unfitness of the vessel to carry the cargo, it is equally covered by these words; and, under those circumstances, they are entitled to say that there are plain words exempting the shipowners from their common-law liability in respect of this particular defect, this damaged pipe. They say if the word "unseaworthiness" is taken in its wider sense as covering unfitness of the vessel to receive the cargo, yet the clause must be read together with the clause to which I have already called attention, and the effect of them is that the shipowners are not to be liable on the implied warranty of seaworthiness. It seems to me that the answer is tolerably plain. It is impossible for anyone who reads the proviso to say that it is manifest on the face of this bill of lading that the parties did not intend the shipowners to have any responsibility for unseaworthiness. On the contrary, it says in the plainest possible manner that their exemption from their common-law liability for unseaworthiness is to be limited to the particular case mentioned in the proviso. Then counsel ask us to read "unseaworthiness" in that portion of the bill of lading as being limited to what Wills, J. calls unseaworthiness proper. For the moment, although it does not agree with my opinion, I will assume that "unseaworthiness" ought to be limited in that way. What counsel are really saying, then, is that the clause which comes at the end of the exception, having regard to the prior words about the time of the occurrence of the peril, or of the damage or loss resulting from the peril, exempts the shipowners from all liability in respect of things occurring before the loading, or at the time of loading, of the vessel, and therefore from the warranty of seaworthiness generally. They say that if the word is read as meaning unseaworthiness proper, then there is nothing here to prevent the exceptions applying to the warranty of fitness, because the warranty of fitness is not in any way asserted by the clause at the end with its proviso. The answer to that is, that really the argument ought to go the length of saying that the words of the exception exclude every defect and every loss resulting from the defect which was in existence before or at the time of the sailing. If that is so, it follows that they ought to say that it excludes the warranty of seaworthiness in its widest sense. But they are bound to admit that the words cannot, having regard to the express mention of unseaworthiness have that effect. The result is that it is plain that their contention, that the parties ought to be taken on the words of this contract to have included everything in the exceptions which occurred before or at the time of loading, is an unsound argument, and if that is so, the common-law warranty of fitness is left untouched. In my judgment, we ought in this case to hold that the parties said nothing to save the shipowners from the warranty of fitness, if it is treated as a separate warranty. On the other hand, if you treat the warranty of fitness as part of the warranty of seaworthiness, then it seems to me upon any reasonable construction of this document that that warranty, so far from being negatived, is positively affirmed, unless the shipowners can save themselves under the words in the proviso. For the reasons which I have given, I think that the warranty of fitness really is untouched by anything in this bill of lading, and I have no doubt, having regard to the admissions, that the warranty of fitness, at all events, has been broken, and I think that under those circumstances the shipowners must be held liable for the consequences. As I have said before, though I base my judgment on this ground, I need not differ from Wills, J. at all. Not only was this point not argued before him, but he expressed no opinion upon it at all; but if it should be necessary to fall back on the question of what is the proper meaning of the word "unseaworthiness" in this bill of lading, in my judgment the wider and not the narrower meaning is the right one.

ROMER, L.J.—I cannot say that the question we have to decide on this appeal is an easy one, but after the best consideration that I can give to it I also am of opinion that the appeal ought to succeed. A bill of lading in respect of the matters that we have to consider on this appeal has been the subject of a very large number of decisions, and the general principles according to which bills of lading should be interpreted are well known at the present day; and the general construction to be given to them, in some respects of an artificial character, is well ascertained. In my opinion, it is advisable not to depart from these principles in dealing with any special bill of lading that comes before the court, and, so far as possible, not to allow small variations in the form to affect the general construction which has hitherto been put upon such documents. I understand that for a long time shipowners have

been trying to limit the general liability cast upon them as sea-carriers by putting in special exceptions from their general liability without going the length of refusing, or seeking to exclude their liability in respect of a warranty of seaworthiness, and they have from time to time been extending the special exceptions. I think, however, that I am right in saying that as a principle of construction the warranty of seaworthiness will not be held to have been excepted by the special exceptions, unless it plainly appears that it was intended to except it. In other words, the court will not readily infer an exception of the warranty. I think, moreover, that nowadays, whatever views may have been entertained in years gone by, the warranty of seaworthiness includes, and is well known to include, the warranty that the ship and her equipment are fit for the purpose of safely carrying to their destination the goods which the shipowners know are to be carried; and, further, I think that in a bill of lading of the present day the expression "seaworthiness" or "unseaworthiness," and so forth, would be used, and would be understood as being used, with reference to the well-known extent of the warranty. In the present bill of lading the special exceptions are very numerous. In part they are very general expressions, and in part they are expressions minutely detailing special injuries, or injuries arising in respect of special parts of the ship or its equipment. The exceptions, so far as they are general and essential, are, all damage arising from the consequence of any injury to or defect in hull, tackle, machinery, outfit, or appurtenances, however the damage may be caused, notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, and whether the loss or injury was occasioned by the negligence of the officers or crew before or after or during the voyage, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness. In the first place, I ask myself, Does that make it clear to me that the general warranty of seaworthiness is intended to be swept away, as it would undoubtedly practically be if all the special exceptions enumerated were treated as being absolutely without limit? In my opinion, not only is it not clear that that was intended, but I think the wording shows that the numerous and wide exceptions to which I have referred are not intended to extend or refer to unseaworthiness unless all reasonable means have been taken to provide against such unseaworthiness. To my mind, the very way in which these exceptions are wound up, by reference to the unseaworthiness, points to this—that the shipowners were, notwithstanding the prior exceptions, intended to be made liable for unseaworthiness unless reasonable means had been taken to provide against it. I think, therefore, on the construction of this bill of lading, that the list of exceptions must all be taken to be subject to this—that the shipowners were to be under liability as specified for unseaworthiness. Therefore, in my opinion, the general argument for the respondents, that the special exceptions must first have given to them their full effect, and then that the warranty as to seaworthiness must be cut down accordingly—that is to say, practically destroyed—fails. I agree that the construction which I put upon these provisions in this bill of lading cuts down to a very great extent the operation of the special exceptions; but it does not destroy their effect. Therefore, as I have said, the first argument, and really the main argument, on behalf of the respondents appears to me to fail.

There is, however, a further argument on behalf of the respondents, which I understand was the one acceded to by Wills, J. It is said that in this bill of lading the word "unseaworthiness" is not to receive its ordinary meaning, but is to be limited to unfitness of the ship as a ship to meet the ordinary perils of navigation without special regard to the cargo. On consideration of the case, I think that it would not be right on this bill of lading to cut down the meaning of the word "unseaworthiness" in that way. In the first place, it is important to bear in mind that the word is being used in a mercantile document by mercantile men, and ought to receive its well-known meaning unless there are overwhelming considerations which compel the court to depart from that meaning of the word. To my mind, there is nothing in this bill of lading, taken as a whole, which prevents the court from giving to the word "unseaworthiness" its ordinary meaning. The exceptions cover defects in the hull itself before, during, or after the voyage, and if all the exceptions are to be given their full effect, then the word "unseaworthiness" cannot even have the limited meaning that Wills, J. gave to it. That would practically take away from the term "unseaworthiness" the whole of its meaning. Then, lastly, with regard to the point relied upon by Wills, J., which depended upon the expression used in the bill of lading, "unseaworthiness of the ship at the beginning or at any period of the voyage," I think that it is not sound to infer from that phrase that it was intended to expressly exclude the period of loading. I think that the expression "at the beginning or at any period of the voyage" was used, not with a view of narrowing the term "unseaworthiness," but with a view of showing that it was not to be limited. There are cases in which similar expressions have been dealt with by the courts, which show that such expressions ought to have the full meaning that I am indicating now, and ought not to have such a limited construction as is sought to be put upon the words here. For example, in *The Carron Park* (*ubi sup.*) the shipowners had stipulated that they should not be liable for neglect or default of their servants during the voyage, and it was contended that "during the voyage" would only apply to the time at which the voyage commenced, and that, at any rate, the voyage could not begin before the ship's loading was completed. But it was pointed out by the President, Sir James Hannen, following other authorities, that, the expression being a general one, it would cover, in the case he had before him, the period during which the ship was going from her then berth to the port of loading and was being loaded. In fact, in the case of a warranty of seaworthiness "at the beginning of or during the voyage," I think that expression by itself, without any context to cut it down, would clearly cover, so far as concerns the cargo, the period of loading. The fact is, that for the pur-

poses of the cargo and of that part of the warranty which extends to the ship being fit to receive the cargo, the voyage really begins when the cargo is put on board; and I think that *primâ facie* the expression that we have to deal with here ought not to receive another interpretation, as contended by the respondents. To my mind, there is nothing to justify us in giving it such an interpretation. It appears to me, therefore, that this argument on behalf of the respondents also fails, and, in my opinion, the appeal must succeed.

STIRLING, L.J. — I have come to the same conclusion, and substantially for the same reasons as have been given by my learned brothers; but as we are differing from Wills, J., and out of respect to the very able arguments which have been addressed to us, I shall endeavour, as shortly as possible, to give the general grounds on which I come to the conclusion that the appeal ought to be allowed. We have here to deal with a bill of lading which on the face of it presents difficulties of construction; it bears marks of not having been all framed at the same time, but of having been added to or altered from time to time, probably to meet the exigencies of commerce as various difficulties arose; but the general object is to limit the liability of the shipowners, and to relieve them from the general obligations imposed by law and attaching to such contracting parties. The shipowners contract to deliver the goods in good order and condition at the port of discharge, but they except from that liability various matters, and, amongst others, all damage from the consequence of any defect in the hull or machinery or other appurtenances of the ship, "however such damage may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel." It is contended on behalf of the respondents that if those words stood alone they would be sufficient to exonerate the shipowners from liability by reason of the unseaworthiness of the vessel, which would be one of the liabilities attaching to them by law. Cases were referred to to establish this, and it may be that such would be the effect of the clause in the absence of any context; but in construing documents, especially documents of this kind, it is not safe to deal with the contract piecemeal, but in ascertaining the meaning of one portion of it one must examine the context. In the latter portion of the document we find this: [His Lordship read the bill of lading from "Whether any of the perils, causes, or things above mentioned" down to the end of the exceptions, and continued:] This portion of the document was not introduced for the purpose of enlarging the perils, causes, or things which are to be excepted, because it begins by reference to "the perils, causes, or things above mentioned." The object of it, therefore, must be to define the limits of exemption with reference to the perils, causes, and things which have been already mentioned in the prior part of the bill of lading. Consequently it seems to me that the earlier part of the document cannot be read in the wide sense in which the respondents desire that it should be read, as excluding all liability whatever on the part of the shipowners by reason of unseaworthiness. I think the two portions must be read together; and so reading them, I come to the conclusion that the shipowners were to be liable in respect of unseaworthiness unless all reasonable means had been taken by them to provide against it. That being so, the question arises, What is the meaning of the word "unseaworthiness"? The learned judge in the court below says that it admits of two meanings—one relating to the fitness of the ship to encounter the perils of the sea, and the other including not only that fitness, but also the fitness of the ship and her equipment to carry the particular goods with which she is to be loaded. He thinks that the word is appropriate to both species of fitness, and in that I agree with him. He, however, came to the conclusion that in this particular bill of lading it is limited to what he calls the narrower sense of unseaworthiness—namely, the unfitness of the ship to encounter the perils of the sea. I am unable to agree with the learned judge in that. Looking at the object of this clause, I cannot doubt that the shipowners intended to exempt themselves as widely as possible from liability, and that their meaning was that everything which the term "unseaworthiness" would appropriately cover was to be excluded. But it is not absolutely necessary to decide that point. The cases already referred to show that when a shipowner desires to relieve himself from his common-law liability he must do so in plain and unambiguous language; and the result is that either unseaworthiness must be read in the wider sense, or else that the unfitness with respect to the cargo to be carried is not to be excluded. In either view the shipowners here fail.

Solicitors: *Field, Roscoe,* and *Co.*, agents for *Batesons, Warr,* and *Wimshurst,* Liverpool; *Rowcliffes, Rawle,* and *Co.*, agents for *Hill, Dickinson,* and *Co.*, Liverpool.

Thursday, Aug. 6, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L JJ.)

HERNE BAY STEAMBOAT COMPANY LIMITED v. HUTTON. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Failure of consideration — Foundation of contract—Charter of ship for review—Review postponed.

A ship named C. was chartered to be at the defendant's disposal on the 28th June 1902 to take out a party "for the purposes of viewing the Naval Review and for a day's cruise round the fleet; also on Sunday, the 29th June, for a similar purpose. . . . Price 250l., payable 50l. down, balance before ship leaves H. B." On the Naval Review being postponed, the defendant repudiated the contract on the ground that it ceased to be binding.

Held, that the object with which the defendant hired the vessel, though stated in the contract, did not concern the shipowners; that the happening of the Naval Review was not the foundation of the contract so as to discharge the parties from further performance of it in accordance with the doctrine of Taylor *v.* Caldwell (8 *L. T. Rep.* 356; 3 *B. & S.* 826); *and therefore the defendant was liable to the plaintiffs for breach of contract.*

Decision of Grantham, J. (88 *L. T. Rep.* 269; 9 Asp. Mar. Law Cas. 394) *reversed.*

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

THE plaintiffs' claim was for 200*l.* alleged to be due under an agreement dated the 23rd May 1902, the balance of the hire of the steamboat *Cynthia*, and the defendant counter-claimed for 50*l.* paid by him under that agreement.

The plaintiff company were the owners of the steamboat *Cynthia*, which was usually employed in carrying passengers daily between Herne Bay, Gravesend, and other places. It having been announced that there would be a Naval Review at Spithead by the King on the 28th June, the defendant entered into negotiations with the plaintiff company for the hire of a steamboat, and the following agreement was entered into between the defendant and Henry C. Jones on behalf of the plaintiff company:

The *Cynthia* to be at Mr. Hutton's disposal at an approved pier or berth at Southampton on the morning of the 28th June, perils of the sea, &c., permitting, to take out a party not exceeding the number for which the vessel is licensed to the position assigned by the Admiralty for the purposes of viewing the Naval Review and for a day's cruise round the fleet; also on Sunday, the 29th June, for similar purposes. Owners to provide crew, coals, and all necessary assistance. Mr. Hutton to pay all tolls, pier dues, &c. Owners to have the right of ten persons above crew, &c., on board. Price 250*l.*, payable 50*l.* down, balance before ship leaves Herne Bay.

The *Cynthia* was fitted for this trip, and supplied with coal.

On the 25th June it was officially announced that the review was postponed, and the plaintiffs telegraphed to the defendant on the 26th June:

What about *Cynthia*? She is ready to start six to-morrow. Waiting cash.—JONES, Herne Bay.

No reply being received, the ordinary sailings of the *Cynthia* were continued by the plaintiffs on the days mentioned in the agreement of the 23rd May, and the difference between the takings on those days and the price under the agreement was 90*l.*

The action was tried by Grantham, J. without a jury, the claim being reduced by deducting the 90*l.* from the 200*l.* and leaving a balance of 110*l.* Judgment was given for the defendant on the claim with costs, and also on the counter-claim with costs.

The plaintiff company appealed.

Montague Lush, K.C. and *A. S. Poyser* for the appellants.—This was a contract to hire the vessel for two days, and the principles which apply to the case of the hire of seats to view the Coronation procession, and which have recently been discussed in *Krell* v. *Henry*, but in which judgment has not yet been delivered [Judgment delivered on the 11th Aug.; see *ante*, p. 328; (1903) 2 K. B. 740], do not apply here. The purpose of the contract was not entirely frustrated, Although there was no Naval Review, the fleet remained at Spithead, and the vessel could have cruised round it on both days. Besides, the vessel was absolutely chartered at a certain date, and the price was to be paid before the event took place. Therefore it made no difference whether the event took place or not. This case is therefore not within *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826). The purposes of the hirer under this contract did not concern the shipowner. The motive of the contract is different from the consideration: (per Jessel, M.R. in *Besant* v. *Wood*, 40 L. T. Rep. 445, 448; 12 Ch. Div. 605, 617).

Hansell and *Ferminger* for the defendant.—The foundation of the contract was that the Naval Review should take place as announced, and, as it did not do so, the performance of the contract became impossible, and both parties were excused from any further performance under it:

Taylor v. *Caldwell* (*ubi sup.*):
Nickoll and Knight v. *Ashton, Edridge, and Co.*, 84 L. T. Rep. 804; 9 Asp. Mar. Law Cas. 209; (1901) 2 K. B. 126;
Hobson v. *Pattenden*, 88 L. T. Rep. 90.

[VAUGHAN WILLIAMS, L.J. referred to *Jackson* v. *Union Marine Insurance Company* (31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125).] The contract did not amount to a demise of the ship. It was a mere licence to the defendant to occupy the ship with his nominees, the passengers:

Scrutton on Charter-parties and Bills of Lading, p. 6;
Dean v. *Hogg*, 10 Bing. 345;
Lucas v. *Nockells*, 4 Bing. 729.

Besides, under the contract the plaintiffs had the right to have ten persons on board above the crew, so it was a joint venture. The plaintiffs repudiated the contract by using the vessel for their own purposes on the days referred to in the contract.

VAUGHAN WILLIAMS, L.J.—I am of opinion that this appeal must be allowed. I wish first to call attention to the fact that what the plaintiffs originally claimed in this action was 200*l.*, the balance of the agreed price which was to be paid. In my judgment they were not entitled to recover that sum, and I do not think that counsel for the appellants bore in mind that that was the plaintiffs' original claim, and therefore he took some of the observations of Grantham, J. dealing with the original claim as if they were intended to deal with the amended claim. I think here that before the time came for the performance of this contract there was a plain repudiation by the defendant of his obligations under it. He refused to carry out his contract, and the plaintiffs, very properly, under the circumstances, used the steamer in her usual daily services, and made what profit they could out of it during the two days on which, under the contract, the defendant was to have the use of her. Under those circumstances the action is really one for damages caused by the defendant's refusal to carry out a contract, and the amount of the damages has been agreed at 200*l.*, less the profit made by the plaintiffs from having the use of the ship after the repudiation of the contract by the defendant. To those damages the plaintiffs are in my opinion entitled. This contract, I think, placed the ship at the disposal of the defendant for those particular days, and does not contain a demise of the ship. A charter-party seldom contains a demise of the ship. Generally the ship is not demised, but remains under the control of the shipowner. Under this contract this ship remains under the management and control of the master, but it is placed at the disposal of the defendant in the same way as under a charter-party a vessel is placed at the disposal of the charterers. Then, what is there in this case besides that? The

defendant when hiring this boat had the object in view of taking people to see the Naval Review, and on the next day of taking them round the fleet and also round the Isle of Wight. But it does not seem to me that, because those purposes of the defendant became impossible, it is a legitimate inference that the happening of the Naval Review was contemplated by both parties as the foundation of the contract, so as to bring the case within the doctrine of *Taylor* v. *Caldwell* (*ubi sup.*). On the contrary, when the contract is properly considered, I think that the purposes of the defendant, whether of going to the review or going round the fleet or the Isle of Wight with a party of paying guests, do not make those purposes the foundation of the contract within the meaning of *Taylor* v. *Caldwell* (*ubi sup.*). Having expressed this view, I do not know that there is any advantage to be gained by in any way defining what are the circumstances which might or might not constitute the happening of a particular contingency the foundation of the contract. I will only say I see nothing to differentiate this contract from a contract by which some person engaged a cab to take him on each of three days to Epsom to see the races, and for some reason, such as the spread of an infectious disease or an anticipation of a riot, the races are prohibited. In such a case it could not be said that he would be relieved of his bargain. So in the present case it is sufficient to say that the happening of the Naval Review was not the foundation of this contract.

ROMER, L.J.—I am of the same opinion. This is not a case where the subject-matter of the contract is a mere licence to the defendant to use the ship for the purpose of seeing the Naval Review and going round the fleet. It is really a contract for hiring the ship by the defendant for a certain voyage, though the object of the hirer is stated—viz., to see the Naval Review and the fleet. But that object was one with which the defendant as hirer of the ship was alone concerned, and not the plaintiffs, the owners. This contract cannot, in my opinion, be distinguished from many common cases of the hiring of vessels in which the object of the hiring is stated; very often the contract states the details of the voyage and the nature and details of the cargo to be carried. If the voyage is a pleasure trip it might also state the object in view, which is a matter which concerns the passengers. But this statement of the objects of the hirer would not, in my opinion, make the owner of the ship as much concerned with these objects as the hirer himself. The shipowner would say: "I am concerned with the ship only as a passenger or cargo carrying machine. It is for the hirer to concern himself with the objects." In the present case it is suggested that the provision that the plaintiffs were to have the right of having ten persons on board besides the crew changed the nature of the hiring; but there is nothing in that provision to prevent the court treating the transaction as a hiring of the vessel by the defendant. It does not make it in any sense a joint speculation. It only amounts to this, that the defendant, being the hirer, gives the owners a licence to put ten men on board. This view of the general effect of the contract is borne out by this consideration. The ship itself had nothing to do with the review or the fleet. It was only a carrier of passengers to see it, and many other ships would have done just as well. It is similar to the hiring of a cab or other vehicle, on which, though the object of the hirer was stated, that statement would not make the object any less a matter for the hirer alone, and would not affect the person who was letting the vehicle for hire. There was not here, by reason of the review not taking place, a total failure of the consideration, nor anything like a total destruction of the subject-matter of the contract. Nor can I on this contract imply any condition which would relieve the defendant from liability to carry out the contract. Conditions are only implied to carry out the presumed intentions of the parties, and I cannot find any such presumed intention here. It follows that in my opinion, so far as the plaintiffs are concerned, the objects of the passengers on this voyage with regard to sightseeing do not form the subject-matter or essence of the contract. On the question of fact on which the defendant relies, that the owners of the ship had put themselves in a position of not being able to carry out the contract, I do not think the defendant has proved his case.

STIRLING, L.J.—I am of the same opinion. The plaintiffs are owners of a steam vessel used for carrying passengers from Herne Bay to Gravesend and other places. The defendant formed the idea of making a profit by carrying passengers on the 28th and 29th June from Southampton to see the Naval Review, and afterwards to cruise round the fleet. The correspondence appears to me to show that the venture was a venture of the defendant's alone, and, although the plaintiffs assisted him by selling some tickets and posting notices of what was proposed to be done, yet the venture was entirely that of the defendant. In that state of things the defendant entered into this contract by which the steamship belonging to the plaintiffs was to be employed by the defendant for the purposes of his venture, and the contract was put into writing. The most material part of it is that the vessel is to be at the defendant's disposal to take out a party of passengers. I agree that this contract did not amount to a demise of the ship. It was, however, a contract entered into for a valuable consideration for the employment of the ship on those days. It conferred at least this interest on the defendant, that if the plaintiffs had attempted to violate the agreement, the defendant could have obtained an injunction to prevent them. That is established by *De Mattos* v. *Gibson* (4 De G. & J. 276). It is said that, in consequence of the reference in the contract to the Naval Review, the existence of the review formed the basis of the contract, and therefore, as the review did not take place, the parties were discharged from further performance of the contract, as in *Taylor* v. *Caldwell* (*ubi sup.*). I cannot come to that conclusion. It seems to me that the reference in the contract to the review is explained by the object of the voyage, and I am quite unable to treat the reference to the voyage as the foundation of the contract so as to entitle either party to the benefit of the doctrine in *Taylor* v. *Caldwell* (*ubi sup.*). I come to that conclusion more readily as the object of the voyage was not to see the review only, but included a cruise round the fleet. The fleet was there, and the passengers might have

been willing to go round it. It seems to me that that was the business of the defendant, whose venture it was. I am therefore unable to agree with the decision of Grantham, J., and I think the defendant was not discharged from the performance of the contract. I also agree that there is no evidence that the plaintiffs repudiated the contract before any breach of it by the defendant.

Solicitors: *Jones* and *Hamp*; *Biggs, Roche, Sawyer*, and *Co.*

Friday, Aug. 7, 1903.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

UPPERTON AND WIFE *v.* UNION-CASTLE MAIL STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriage of goods—Passengers' luggage—Conditions on ticket — Stowage in lavatory — Damage by water — Fitness of ship — Seaworthiness.

A steamship company received passengers on board a vessel at an intermediate port on her homeward voyage. The ticket issued by the company contained a condition exempting them from liability for damage to passengers' luggage although the damage be caused by negligence or default of the company's servants, or by unseaworthiness or unfitness of the ship, provided that reasonable diligence had been used by the company to render the ship at starting seaworthy and fit for the voyage.

In consequence of the crowded state of the vessel, the only available place for stowing the passengers' luggage was a lavatory, and their luggage was accordingly put in there and the lavatory locked.

This lavatory was separated from an adjoining lavatory by a bulkhead which did not quite come down to the floor. A water-closet in the adjoining lavatory became stopped up and overflowed. The overflow, running underneath the bulkhead into the lavatory in which the passengers' luggage was stowed, damaged the luggage.

In an action by the passengers against the company claiming damages for injury to the luggage, Bigham, J. at the trial found that the damage was not caused by negligence of the company's servants, but by unseaworthiness or unfitness of the ship, and that reasonable diligence had not been used by the company to render the ship at starting seaworthy and fit for the voyage, and he gave judgment for the plaintiffs. On appeal:

Held, affirming Bigham, J., that the plaintiffs were entitled to judgment.

APPEAL by the defendant company from the decision of Bigham, J. at the trial of the action without a jury.

The action was brought to recover damages for injury to the luggage of the plaintiffs, who were passengers on a ship of the defendant company from Las Palmas to Southampton.

The ship in question started from East London on a voyage to Southampton.

On her voyage she called at Cape Town, and afterwards at Las Palmas.

At Las Palmas the company received the plaintiffs on board the ship as passengers to Southampton upon the terms contained in a printed ticket.

By the terms of the ticket the plaintiffs were entitled to have the amount of luggage which they brought with them carried free of freight.

The ticket contained several conditions, one of which, No. 5, provided that, upon making certain extra payments, passengers might put their luggage "under the company's charge," whereupon the company would hold themselves liable in respect of it up to certain amounts provided by the condition.

Condition 9 was as follows:

The company will not (except on the conditions prescribed in condition 5 hereof) be liable for loss or damage to, or detention or delay of, passengers' luggage at or between the point of departure and arrival, however caused, although such loss, injury, detention, or delay be caused by negligence or default of the company's servants, or although such loss, injury, detention, or delay be caused by unseaworthiness or unfitness of the ship, provided that reasonable diligence has been used by the company to render the ship at starting seaworthy and fit for the voyage.

In consequence of the crowded state of the ship all the hold space usually reserved for the stowage of passengers' luggage was filled when the plaintiffs' luggage came on board, and the plaintiffs' luggage was thereupon put by the proper officer of the ship into one of the lavatories, the door of which was then locked.

At the trial of the action Bigham, J. found that, considering the crowded state of the ship, and the risk of pilfering to which the luggage might have been exposed if placed on deck under tarpaulins, the lavatory was not in itself an improper or unsuitable place in which to put it.

This lavatory was separated from an adjoining lavatory by a bulkhead which did not come down to the floor, but left a space of about an inch for the convenience of sluicing the two lavatories at once.

In the adjoining lavatory was a water-closet, which, being improperly used by someone during the voyage after the plaintiffs had come on board, became stopped up and overflowed.

The overflowing water ran under the bulkhead into the lavatory where the plaintiffs' luggage was stowed, and the luggage became thereby damaged.

The amount of damage was agreed by the company to be 100*l.*

The company contended that under the conditions of the ticket they were not liable for this damage.

Bigham, J., in giving judgment, said that, having regard to the contingency of an overflow from the other lavatory and a consequent ingress of water under the dividing bulkhead, the place was not a proper place; and the ship, in sailing with the luggage so stowed, was not seaworthy, in the sense that she was not properly fit to carry out the contract with regard to the carriage of the plaintiffs' luggage. In his opinion reasonable diligence was not used by the company to render the ship at starting seaworthy and fit for the voyage within the meaning of condition 9; and

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

he therefore gave judgment for the plaintiffs for 100*l.*, the agreed amount of damages.

The company appealed.

Scrutton, K.C. and *Lochnis* for the company.—First, the damage was caused by the negligence of the company's servant in not stowing the luggage properly, and the company are therefore relieved under condition 9. Secondly, the ship was not unseaworthy. The matter at fault in this case was one which could have been cured at any moment, and this distinguishes the case from such a one as *Steel* v. *State Line Steamship Company* (37 L. T. Rep. 333; 3 Asp. Mar. Law. Cas. 516; 3 App. Cas. 72), where the fault was the insufficient fastening of a port just above the water line which could not be got at, after the ship had started, except with the greatest difficulty in consequence of its being covered up with a cargo of wheat. A neglect of duty by a servant of the company in using the proper equipment of the ship does not render her unseaworthy:

Hedley v. *Pinkney and Sons Steamship Company Limited*, 70 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 483; (1894) A. C. 222.

Marshall Hall, K.C. and *R. E. Moore*, for the plaintiffs, were not called upon.

COLLINS, M.R.—In this action brought by two persons who had been passengers in a ship belonging to the defendant company, the plaintiffs complain that their luggage was damaged in the course of the transit. The damage is admitted by the company, but they contend that, upon the true construction of the terms of the ticket taken by the plaintiffs, they are under no liability for the damage. The action was tried before Bigham, J., who came to the conclusion that upon the facts and in law the defence set up by the company does not protect them. Now, the luggage in question was stowed in a lavatory immediately adjoining some water-closets and a urinal. The bulkhead separating the lavatory from these adjoining places did not come right down to the floor, but left a space of an inch or so through which any water which might be on the floor of the part where the water-closets were would easily run. As a matter of fact one of the water-closets got stopped up, and the filthy water which consequently overflowed found its way underneath the bulkhead into the lavatory on the floor of which the plaintiffs' luggage was stowed, and thus damaged the contents of their portmanteaus. Now, the company rely on condition 9 of the plaintiffs' ticket, which runs thus: [His Lordship read it.] Bigham, J. found as a fact that reasonable diligence had not been used by the company to render the ship at starting seaworthy and fit for the voyage. To be seaworthy for the purpose of carrying passengers and their luggage, the ship ought to have had a fit and proper receptacle for passengers' luggage, and in the evidence given by the company's officer it was repeatedly admitted that this lavatory, with the conditions attendant thereon that I have already described, was the only available space for stowing the plaintiffs' luggage. *Primâ facie*, therefore, this ship at the time of starting was not properly supplied with a special receptacle appropriated to passengers' luggage. Now, it was suggested that the case falls within the class of case where a ship is adequately equipped at starting on her voyage, but where damage has accrued by reason of some negligence on the part of the officers of the ship in misusing the equipment that has been provided. But on the question of fact it appears to me that this ship was not at starting properly equipped with an adequate receptacle for passengers' luggage. The officer whose duty it was to attend to the storage of passengers' luggage put the plaintiffs' luggage in the best place he could find. It was not proved that there was any negligence on his part in choosing a place to put the luggage. The lavatory seems to have been the only available space. The learned judge at the trial has not found that any negligence on the part of the company's officer was the cause of the damage. He was of opinion that the ship was not seaworthy at starting, in the sense that she was not properly fit to carry out the contract with regard to the carriage of passengers' luggage. I see no reason to differ from Bigham, J. There was plenty of evidence in support of his finding of fact, and he has made no mistake as to the law. I therefore think that the appeal fails.

MATHEW, L.J.—I am of the same opinion. This vessel, after sailing from her port of loading, touched at various places, and the company at one of these places issued tickets to passengers who brought on board a quantity of luggage. Up to that time passengers' luggage had been properly stowed in the hold, but, occasion having arisen to find some place for stowing the luggage brought on board by passengers under the tickets I have referred to, the chief officer had to do his best; and the evidence is clear that, as there was no other receptacle but the lavatory in which to stow the plaintiffs' luggage, he was obliged to put it there. Now, the contract was that reasonable diligence should be used to take means to insure that the ship should be fit to carry the luggage of passengers on the voyage. Has that contract been broken? Bigham, J. clearly thought that it had been; that there was no proper provision for the luggage that was intended to be put on board, or anticipated to be put on board, in the course of the voyage. We have been referred to the case of *Steel* v. *State Line Steamship Company* (*ubi sup.*) and cases which followed it, but those authorities were cases in which the ship was properly equipped, but from some default of those on board the equipment was not used. This is a totally different case, because no place was provided in which the plaintiffs' luggage could be properly stowed. The only place available for that purpose was one in which nobody would have dreamt of putting luggage if the owners of it had had the option of saying where it should be stowed. I agree with the judgment of Bigham, J., and the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the plaintiffs, *Upperton* and *Co.*

Solicitors for the defendants, *Parker, Garrett, Holman*, and *Howden*.

Thursday, Oct. 29, 1903.

(Before Lord HALSBURY, L.C., Lord ALVERSTONE, C.J., and COZENS-HARDY, L.J.)

CIVIL SERVICE CO-OPERATIVE SOCIETY LIMITED *v.* GENERAL STEAM NAVIGATION COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract — Subsequent impossibility of performance—Money paid before that event—Right to recover back — Charter of ship to visit Naval Review—Payment of hire—Subsequent abandonment of review on account of King's illness—Costs—Successful defendant—Deprival of costs —Discretion of judge—Case tried without a jury.

The plaintiffs chartered the defendants' ship for three days to attend the Naval Review to be held in the following June or July on the occasion of the King's Coronation. The money to be paid for the hire of the ship was paid, in accordance with the terms of the charter-party, ten days before the day fixed for the review. A week later the review was postponed on account of the King's illness, and was not in fact held either in June or July.

In an action by the plaintiffs to recover back the sum they had paid for the hire of the ship:

Held (affirming the decision of Bigham, J.), that the defendants were entitled to retain the whole sum.

Blakeley *v.* Muller (88 *L. T. Rep.* 90) *approved.*

At the trial of the action without a jury Bigham, J. gave judgment for the defendants, but, because the defendants had refused to let him act as arbitrator to say what he considered ought to be done in the matter, he ordered that each of the parties should bear their own costs.

Held (reversing the order of Bigham, J.), that there were no materials before him on which he had power to exercise any discretion with regard to depriving the defendants of their right to costs.

APPEAL by the plaintiffs from the judgment of Bigham, J. at the trial of the action without a jury, and cross appeal by the defendants against the order of the judge that each party should bear their own costs.

The action, which arose out of the postponement of the King's Coronation, was brought to recover a sum of 1500*l.* which had been paid by the plaintiffs to the defendants under the terms of a charter-party.

The charter-party was dated the 22nd March 1902, and, so far as is material, was in the following terms:

It is this day mutually agreed between the General Steam Navigation Company, owners of the steamshil *Hirondelle*, and the Civil Service Co-operative Society Limited, of 28, Haymarket, London, charterers, that the said General Steam Navigation Company will let and the said charterers will hire the said steamship for the term of three days from the hour she is placed at the charterers' disposal in London on the day preceding that of the Naval Review to be held at Spithead on the occasion of the Coronation of His Most Gracious Majesty King Edward the Seventh in June or July 1902. . . . The hour of departure from London to be mutually agreed, but to be sufficiently early to permit of the steamer reaching her berth at Spithead at the time appointed by the naval authorities after calling at Southampton to embark further passengers. After the review, should the charterers desire it, the steamer is to proceed through the lines of the fleet and return to her berth to witness the illumination of the fleet in the evening. . . . The amount to be paid by the charterers for the hire of the steamer is 1500*l.* lump sum, payable 250*l.* on signing the charter and the balance ten days before the date of the review. . . .

The plaintiffs paid 250*l.* on signing the charter and the balance—viz., 1250*l.*—on the 18th June, the Naval Review having been fixed, shortly after the signing of the charter-party, for the 28th June.

On the 25th June a notice was issued by the Admiralty that owing to the King's illness the review would be postponed, and thereupon the plaintiffs wrote to the defendants saying that they would not require the steamer.

The steamer was accordingly not placed at the plaintiffs' disposal.

The review was not in fact held until the following August.

Under these circumstances the plaintiffs claimed that they were entitled to be repaid the whole of the 1500*l.* which they had paid to the defendants under the charter-party.

Evidence was given at the trial to show that the defendants had spent a considerable sum of money in fitting out the steamer for the intended employment, and the learned judge at the trial found that the amount which the defendants were out of pocket by reason of work done or money spent, either under the contract or in preparation for it, amounted to 500*l.*, which sum would include compensation for loss of time in finding other employment for the vessel.

Before the action negotiations took place between the parties for a settlement of the dispute, the General Steam Navigation Company offering to return 750*l.*, but this offer was refused by the Civil Service Co-operative Society, who claimed a right to the whole of the 1500*l.*

At the trial of the action without a jury, Bigham, J. was desirous that the parties should leave the matter to him to say what under the circumstances, apart from the parties' strict legal rights, should be done, but the defendants would not agree to that course. The learned judge thereupon held that in law the defendants were entitled to retain the whole of the 1500*l.*, and he gave judgment for them accordingly; but he said that the circumstances out of which the action arose were such that he thought that neither party ought to avail themselves of their strict rights, and that the defendants ought to be satisfied with 500*l.* and the costs of the action; and he therefore made an order that, if no compromise was made, each party should bear his own costs of the action.

The plaintiffs appealed against the judgment, and the defendants appealed against the order depriving them of their costs.

Bray, K.C. and *Eustace Hills* for the plaintiffs. —The hiring of the ship never really began, and the defendants were never able to perform their part of the contract and place the vessel at the plaintiffs' disposal on the day preceding the review. There has therefore been a total failure of consideration, which entitles the plaintiffs to the return of all the money that they have paid under the contract. Bigham, J. held that the moment

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

that the day of the review was fixed, the expression in the contract, "day of the Naval Review," must be read as meaning "28th June." That cannot be right, because no alteration in the date, provided that the review had taken place in the following June or July, would have affected the validity of the contract. It could not have been the intention of the parties that the defendants should have all the benefit of their contract and yet be relieved from any liability to perform it, if the ship did not go to the review. There must be an implied term in the contract that, if the contract could not be performed by reason of there being no Naval Review, it should be treated as rescinded. The latest case on the subject is a decision of the Court of Appeal in which the court held that the owner of rooms overlooking the route of the Coronation procession could not recover from the defendant, who had agreed to take the rooms for the 26th and 27th June, the money which the defendant had agreed to pay for the use of the rooms on those days, the Coronation having been postponed on account of the King's illness:

Krell v. *Henry*, 89 L. T. Rep. 328.

But in that case the point which now arises, the right to recover back money which has been paid by the hirer to the owner, was expressly left open. The following principle was laid down by Blackburn, J.: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance":

Taylor v. *Caldwell*, 8 L. T. Rep. 356; 3 B. & S. 826.

Nothing there suggests that money paid under a contract which has become impossible in the manner there mentioned cannot be recovered back. Reference was also made to

Appleby v. *Myers*, 16 L. T. Rep. 699; L. Rep. 2 C. P. 651;

Blakeley v. *Muller*, 88 L. T. Rep. 90.

Scrutton, K.C. (*Maurice Hill* with him), for the defendants, was only called upon as to the defendants' appeal. Bigham, J. had no jurisdiction to deprive the defendants of their costs:

Cooper v. *Whittingham*, 43 L. T. Rep. 16; 15 Ch. Div. 501.

The defendants had been guilty of no misconduct. The sole ground upon which the learned judge seems to have acted is that the defendants refused to accept him as an arbitrator, and stood upon their legal rights. This court has held that the fact of a defendant successfully pleading the Gaming Act 1892 was not good cause for depriving him of costs:

Granville and Co. v. *Firth*, 88 L. T. Rep. 9.

Eustace Hills in reply.—The question was one for the discretion of the judge. *Cooper* v. *Whittingham* (*ubi sup.*) cannot now be relied upon, because the discretion of the judge has been enlarged by sect. 5 of the Judicature Act 1890 (53 & 54 Vict. c. 44), which provides that, subject to certain express provisions, "the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

Lord HALSBURY, L.C.—It appears to me that, without overruling a considerable body of authority, we cannot doubt the correctness of the decision of Bigham, J. on the main question in dispute, which was whether the defendants were entitled to retain the money that had been paid to them by the plaintiffs in accordance with the terms of the charter-party. I think that the learned judge rightly construed the obligations of the parties. A similar point was recently raised in *Blakeley* v. *Muller* (*ubi sup.*), and I agree with what was there said by the Lord Chief Justice. In that case Channell, J. used these words: "In *Krell* v. *Henry* (*ubi sup.*) it does not appear whether there was any express contract as to when the money was payable. If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid, and could not be recovered back and could be sued for. All *Taylor* v. *Caldwell* (*ubi sup.*) says is that the parties are to be excused from the performance of the contract, and *Appleby* v. *Myers* (*ubi sup.*) says from the further performance. It is impossible to import a condition into a contract which the parties could have imported and have not done so. All that can be said is that when the procession was abandoned the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment. It is like the case of a charter-party where the freight is payable in advance, and the voyage is not completed and the freight therefore not earned. Where the non-completion arose through impossibility of performance, the freight could not be recovered back. Of course, if the contract for seats had been made subsequent to the abandonment of the procession, that would be different altogether. There the money could be recovered." I concur in every word of that, which exactly applies to the present case, substituting "Naval Review" for "procession." I think, therefore, that the appeal of the plaintiffs must be dismissed.

Then comes the defendants' appeal as to the costs. No doubt when a judge has exercised his discretion upon the materials before him, the Court of Appeal would be very slow to overrule his decision. But here there were no materials whatever before the learned judge upon which any discretion could be exercised in the matter of depriving the defendants of costs. The defendants have successfully in point of law resisted the plaintiffs' claim, and the learned judge has deprived them of their *primâ facie* right to costs because they would not submit to him as arbitrator to say what he considered ought to be done. A judge cannot deprive a suitor of his legal rights upon grounds such as that. The defendants' appeal must therefore be allowed.

Lord ALVERSTONE, C.J.—I am of the same opinion. On the merits of the case I have nothing to add to what has been said by the Lord Chancellor. As to the defendants' appeal, sect. 5 of the Judicature Act 1890 has not altered the law as to the nature of a judge's discretion or as to the jurisdiction of the Court of Appeal.

It merely brought into the ambit of a judge's discretion certain cases as to which there had formerly been a doubt whether or not they were subject to his discretion. Before a judge can exercise any discretion, there must be some materials before him on which it can be exercised. Here there were no such materials. The case of *Granville and Co.* v. *Firth* (*ubi sup.*) is exactly in point. There we held that a successful reliance by the defendant upon the rights expressly given him by the Gaming Act 1892 was no ground for depriving him of his costs.

COZENS-HARDY, L.J.—I agree.

Plaintiffs' appeal dismissed. Defendants' appeal allowed.

Solicitors: for the plaintiffs, *Nicholson, Patterson,* and *Freeland*; for the defendants, *William Batham* and *Son.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, April 6, 1903.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE PORT CALEDONIA AND THE ANNA. (*a*)

Salvage—Agreement to pay an exorbitant sum—Compulsion.

The ship P. C. *while at anchor dragged down towards the ship* A.

In response to signals a tug came up, but her master refused to render assistance except for 1000*l.*

The services of the tug were accepted, and the P. C. *was towed to her former berth.*

In an action against the P. C. *to enforce the agreement, and also claiming salvage against the owners of the* A., *her cargo and freight:*

Held, that the agreement was made under compulsion, and must be set aside on the ground of its being inequitable and exorbitant. An award of 200*l. with County Court costs made.*

Held, also, that the action against the A. *must be dismissed with costs, as she was in no real danger and no salvage service had been rendered to her.*

ACTION for salvage by the owners, master, and crew of the tug *Sarah Jolliffe* against the owners of the barques *Port Caledonia* and *Anna.*

The *Sarah Jolliffe* was a screw tug of 299 tons gross register with engines working up to 900 horse power effective, and was manned by a crew of eleven hands all told.

The *Port Caledonia* was a four-masted barque of 2426 tons register, and at the time the services were rendered was on a voyage from San Francisco to Queenstown with a cargo of grain. Her value was 15,000*l.*, cargo 21,715*l.*, and freight at risk 4417*l.*—41,132*l.* in all.

The *Anna* was a four-masted German barque of 2663 tons register, and was on a voyage from Tacoma to Queenstown with a cargo of grain. Her value was 16,000*l.*, cargo 20,906*l.*, and freight at risk 5000*l.*—41,906*l.* in all.

Both vessels had met with bad weather, and had put into Holyhead Harbour for shelter. The *Anna* arrived on the 27th Feb. 1903, and anchored inside the breakwater with her starboard anchor and thirty fathoms of chain out, and the *Port Caledonia* came in on the 28th Feb., and brought up with both anchors down about four ships' lengths to the S W. of the *Anna.*

During the night the weather was very heavy, and the port anchor of the *Anna* was let go, and fifteen more fathoms of chain paid out on the starboard anchor, and on the morning of the 1st March it was found that the *Port Caledonia* had dragged down towards the *Anna.*

Signals were hoisted by the master of the *Port Caledonia* for a tug and a pilot, and in response to them the tug *Sarah Jolliffe* put off with a pilot on board.

On coming alongside the master of the *Sarah Jolliffe* refused to put a rope on board except for 1000*l.*

The master of the *Port Caledonia* offered 100*l.*, and also suggested the matter should be left to the respective owners to settle, but the master of the *Sarah Jolliffe* refused, and the master of the *Port Caledonia* therefore told him to make fast.

This the *Sarah Jolliffe* did, and held the *Port Caledonia* until she had got her anchors, and then towed her to her former berth.

There was some dispute as to the respective positions of the *Port Caledonia* and *Anna.*

According to the evidence of the plaintiffs the *Anna's* jibboom was nearly overlapping the port quarter of the *Port Caledonia,* and the *Anna* was in great danger of being fouled by her.

According to the evidence of both the defendants the *Port Caledonia* had dragged down to within about 200ft. of the *Anna* and then brought up; the wind shifted to the W.N.W. in the course of the morning, and consequently, even if the *Port Caledonia* had continued to drag, she would have been in no danger of fouling the *Anna.*

The plaintiffs claimed 1000*l.* from the owners of the *Port Caledonia* under the agreement, and such salvage as the court might see fit to award for the services rendered to the *Anna.*

The defendants, the owners of the *Caledonia,* admitted the verbal agreement, but pleaded that it was exorbitant and inequitable, and asked that it should be set aside.

The owners of the *Anna* denied that their vessel was at any time in any danger, or that any services had been rendered to her.

Aspinall, K.C. and *Bateson* for the plaintiffs.

Pickford, K.C. and *Balloch* for the defendants the owners of the *Port Caledonia.*

Laing, K.C. and *Christopher Head* for the defendants the owners of the *Anna.*

BUCKNILL, J.—[His Lordship summarised the facts as above set out, and continued:] I may as well say at once that I find as a fact that the *Port Caledonia* was nothing like as near the *Anna* as the master of the tug would have me believe. I accept the evidence of the master of the *Port Caledonia* and of the master of the *Anna* as to the distance between these two ships, as nearly as they can give it, and of the assistant lighthouse-keeper at Holyhead, an intelligent man, who gave his evidence very fairly and very well. Now, the *Port Caledonia* wanted to be shifted; she had dragged and she might drag again, although I find as a fact that at the time the tug came

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

alongside her she was firm to her anchors and was not dragging, but there was always a possibility that she might drag, and if she had dragged with the wind S.W., and remaining in that quarter, serious consequences might have ensued. She probably would have got foul of the other ship, and they might both of them have got adrift, and if the wind had remained in the S.W. they might have got on the rocks, but that is just what did not happen; the wind did not remain in the S.W.—it got round to the W.N.W., and at last to the N.W. Shortly after the tug got alongside the wind was W.N.W., and from that direction there would have been no danger to the two ships. Then came the question what was the tug master to get, and what was the master of the *Port Caledonia* to offer for the tug's help. The tug master said—I hope there are not many tug masters who would say it—that he wanted "1000*l.* or no rope." I stopped him before he gave an answer to a question which was put to him by counsel for the *Port Caledonia*, because if he had given a certain answer I am sure his owners would not have allowed him to remain in their employ. But he did say, "I should not have let them them go on the rocks. I should have let them break each other adrift, and when they were adrift I should have gone to their assistance, but not unless they gave the 1000*l.*" I shall not attempt to describe what the Elder Brethren and I think of conduct like that. Language could not be too strong. It was most reprehensible conduct, and, I will add, cowardly. But the master of the *Port Caledonia*, finding himself in a difficulty, promised to give 1000*l.* for the tug's services, which I value at very much less. The tug, having without much difficulty put a hawser on board, held the *Port Caledonia* up so that she could get her anchors. The tug did her work very well. I have no fault to find with that. I am advised that it would have taken some time for those on board the *Port Caledonia* to get in her chain by the manual labour which would have to be used, there being no steam power. In all the tug was engaged about one hour and forty-five minutes. What she did do she did well. There was no danger to the tug, as the wind had moderated. The case has been described as one of towage, but the owners of the barque have admitted that the plaintiffs are entitled to a salvage award. With the 1000*l.* agreement on one side, and that which I think was the value of the services on the other, I have to ask myself whether the bargain that was made was so inequitable, so unjust, and so unreasonable that the court cannot allow it to stand. The first question to consider is, What was the position of the two persons who made the agreement? The position was this: One man was in a position to insist upon his terms, and the other man had to put up with it. He could not help himself. He says in his letter to his owners: "He demanded 1000*l.* to take me away. I offered him 100*l.* or to leave it to the owners, but he would not agree, so I agreed to give 1000*l.* rather than foul the *Anna*." He appreciated the possibility of fouling the *Anna* if the weather had remained bad, and if the wind had remained in the S.W., neither of which things happened. So he found himself obliged to give way to a person who would not move him, and who would have allowed him and the *Anna* to drift towards the rocks, and who would, I think, have seen them go there without putting a hawser on board unless he got a promise of 1000*l.* I have expressed my opinion about the matter. This opinion is shared by the Elder Brethren, and I hold that this agreement cannot be allowed to stand, and I set it aside. I hope that those who perform such grand services in tugs from time to time in worse weather than this, and, in peril of their own lives, save property around the coast, will note that this court will keep a firm hand over them if they attempt to do what has been done in this case. This was an inequitable, extortionate, and unreasonable agreement, and I think that the services rendered will be well rewarded by the sum of 200*l.* and with County Court costs.

Now with regard to the claim against the *Anna*. The *Anna* was not, in my judgment, at any time in such a position as that a prudent master would have thought it right and fit or to be his duty to call upon a tug to take the *Port Caledonia* away from him. His own letter shows that. I have asked the Elder Brethren this question in the language of the decisions which are well known, Would he as a prudent man have found himself called upon, in the position in which he then was with regard to himself and the *Port Caledonia*, to engage a tug to take the *Port Caledonia* from the place where she was? And the answer is "No," because there was no danger, or very little danger, and not that sort of danger which allows towage to be turned into salvage. By easing away his own cables he could have increased, as he said, the distance between the two ships; but there was no reason to believe, as the wind was moderating and getting more westerly, that there would be any necessity to do that. In his letter to his owners he said: "I do not consider the *Anna* was in danger as regards the *Port Caledonia* when the gale was blowing. She was 100 yards from our jibboom and we were ready to pay out more cable if required." Then again he says: "The *Port Caledonia*, which had dragged to within about 100 yards towards us, had to engage a tug to avoid collision later on, but that cannot concern the *Anna*." I am reading a translation, and I do not know exactly the idea that was passing through the master's mind; but I think I may say that his idea was that if the wind had got round to a dangerous quarter again, and had blown with a force which would have made it possible for the *Port Caledonia* to have done what she did before, then, if steps were not taken, there might have been a collision between the two ships. There, therefore, was appreciable danger, which made it necessary that, as far as the *Port Caledonia* was concerned, she should not continue to give the *Anna* what she had done, namely, a foul berth; but the *Anna* was in no danger according to the language of the master in his letter to his owners. The result is that there will be judgment against the *Port Caledonia* for 200*l.* with County Court costs, and there will be judgment for the *Anna* with costs.

Solicitors for the plaintiffs, *Neave* and *Bretherton*, agents for *H. J. Holme*, Liverpool.

Solicitors for the defendants the owners of the *Port Caledonia*, *Thomas Cooper* and *Co.*

Solicitors for the defendants the owners of the *Anna*, *Rowcliffes*, *Rawle*, and *Co.*, agents for *Hill*, *Dickinson*, and *Co.*, Liverpool.

Saturday, July 11, 1903.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE ELSWICK PARK. (*a*)

Salvage—Signals of distress—Sect. 434, *sub-sect.* (2), *of the Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60).

Sect. 434 (2) *of the Merchant Shipping Act* 1894, *which penalises the master of a vessel who unnecessarily uses or displays signals of distress, does not apply when such signals have been properly used.*

Where, therefore, signals of distress were properly displayed, and a vessel put off in response to them, and on her arrival her services were not required:

Held, that she was not entitled to be compensated for the labour undertaken, or loss sustained in consequence of answering the signals.

ACTIONS for salvage by the owners, masters, and crews of the steam-tugs *Dragon, Petrel, Verne, Queen,* and *Albert Victor,* against the owners of the steamship *Elswick Park.*

The case is reported on the question of the proper interpretation of sect. 434 of the Merchant Shipping Act 1894, and the services of the *Queen* are alone material.

The *Queen* was a steam-tug of 169 tons gross register, with engines working up to 350 horse power indicated, and was of the value of 6000*l.*

The *Elswick Park* was a screw steamship of 3403 tons gross register, and at the time the services were rendered was on a voyage from London to Cardiff in water ballast.

About 11.45 a.m. on the 26th Feb. 1903, when about seven miles S W. by W. of Portland Bill, the *Elswick Park's* tail shaft broke. Signals for assistance were made, and two tugs, the *Queen* and *Albert Victor,* both of which belonged to the same owners, came up and made fast, and eventually, in conjunction with the tugs *Dragon, Petrel,* and *Verne,* which came up subsequently, towed the *Elswick Park* into Portland Roads, where she came to anchor.

During the night and early morning of the 27th Feb. it blew hard, and the *Elswick Park* dragged her anchors and collided with the steamship *Gwentland.* Signals of distress were made, and in response to them the crew of the *Queen* were mustered and she proceeded to her assistance; but, on coming up to the *Elswick Park,* her services were not accepted, as the two vessels had been lashed together, and were riding safely to their anchors. Subsequently the *Elswick Park* was towed by the tugs *Dragon* and *Petrel* to another berth.

At the trial of the action it was contended that the *Queen* was entitled to a salvage award for the services rendered on the 26th, and also to remuneration for the labour undertaken and risk incurred in going out to the *Elswick Park* on the 27th, in response to her signals of distress.

Sect. 434 of the Merchant Shipping Act 1894 is as follows:

(1) Her Majesty in Council may make such rules as to what signals shall be signals of distress, and the signals fixed by those rules shall be deemed to be signals of distress. (2) If a master of a vessel uses or displays or causes or permits any person under his authority to use or display any of those signals of distress, except in the case of a vessel being in distress, he shall be liable to pay compensation for any labour undertaken, risk incurred, or loss sustained in consequence of that signal having been supposed to be a signal of distress, and that compensation may, without prejudice to any other remedy, be recovered in the same manner in which salvage is recoverable.

Batten for the owners, master, and crew of the *Queen.*—Sect. 434 (2) of the Merchant Shipping Act 1894 especially provides for the remuneration of a vessel that goes out to the assistance of another in response to signals of distress, if those signals have been wrongly made. *A fortiori* then, if such signals were properly exhibited, she is entitled to remuneration although her services may not have been required when she came up. The *Elswick Park,* it is submitted, was always in a position of danger even when the *Gwentland* was lashed alongside of her.

Laing, K.C. and *C. Robertson Dunlop* for the defendants, *contra.* — The sub-section is only intended to penalise the improper use of distress signals. Vessels are not entitled to salvage for going out in answer to signals of distress. It is quite a different thing from rendering services upon request. The following cases were referred to in the course of the argument:

The Ranger, 3 Notes of Cases, 589;
The Undaunted, 2 L. T. Rep. 520; Lush. 90.

BUCKNILL, J. (after referring to the services of the other tugs).—Now, with regard to the *Queen.* Her services are first of all that she towed the head of the *Elswick Park* round and on to the course and then she steered astern. That is admitted. It is a good service and a valuable one. And the next morning she went out in answer to signals made by the *Elswick Park* when, as we know, by the evidence in another case, she was dragging her anchors and dangerously approaching another ship with which she afterwards came into collision. In consequence of those signals the *Queen* went out on the early morning of the 27th and tendered her services, which were not then accepted or wanted, because, as I have found as a fact in the other case, the two vessels after they came into collision were lashed together, and were both riding to their anchors safely at that time; and so there was no necessity for assistance, and it was not wanted. Although the *Queen* came out in response to signals from the *Elswick Park* she did not do anything and her services were not wanted. Now, it has been argued before me that, under sect. 434, sub-sect. (2), of the Merchant Shipping Act 1894, the *Queen* is entitled to be remunerated for labour undertaken, risk incurred, or loss sustained in consequence of having answered the signals which were properly made by the ship which made them. The second sub-section runs in this way: [His Lordship then read the sub-section.] I read that sub-section as clearly meaning that where a person makes an improper use of signals, attracting a vessel, that the improper use of those signals is to be penalised by paying the vessel which comes out compensation for labour, risk, or loss sustained in consequence of answering those signals. I think it does not apply in this case. The signals were made properly at the time they were made, but by the time the *Queen* got out her services were not required. [His Lordship sub-

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

sequently awarded the sum of 850*l.* to the *Queen* and *Albert Victor* in respect of the services on the 26th Feb.]

Solicitors for the owners, masters, and crews of the tugs *Queen* and *Albert Victor*, *Pritchard* and *Sons*.

Solicitors for the defendants, *Thomas Cooper* and *Co.*

June 18 *and July* 14, 1903.

(Before BUCKNILL, J.)

THE MANAR; NORTHERN TRUST LIMITED *v.* STRACHAN BROTHERS. (*a*)

Practice — Mortgage — Action for declaration of rights to assist action in foreign country—Order XXV., r. 5.

The plaintiffs, as mortgagees of the steamship M., *on default being made, took possession of her, and chartered her for a voyage to a French port.*

On her arrival the defendants, who were British subjects, arrested the ship in respect of necessaries which they had supplied, and attached the freight, which was payable by certain French consignees.

They also made executory in France a judgment obtained by default in the King's Bench Division against the mortgagors in England in respect of the same debt.

The plaintiffs intervened in the proceedings instituted in France, and, for the purpose of assisting their case in the French courts, brought an action against the defendants claiming under Order XXV., r. 5, *a judgment declaratory of the validity of the mortgage, and the rights of the mortgagees in possession to ship and freight.*

Held, that they were entitled to the judgment asked for, subject to certain modifications.

ACTION by the Northern Trust, as mortgagees of the steamship *Manar*, against Strachan Brothers, creditors of the Manar Steamship Company claiming certain declarations.

The facts of the case will be found fully set out in 89 L. T. Rep. 26; 9 Asp. Mar. Law Cas. 420; (1903) P. 95.

The facts material to the present action were as follows:

By a mortgage dated the 26th June 1900 the Manar Steamship Company mortgaged their steamship *Manar* to the Northern Trust as security for the repayment of 17,000*l.*

In Dec. 1901 the mortgagors made default in payment of an instalment, and continued to do so, and consequently the plaintiffs took possession of the vessel under their mortgage.

The plaintiffs then gave notice to the charterers terminating the charter under which the vessel then was, and on the 28th April 1902 entered into a fresh charter-party under which the vessel was to take a cargo of phosphates from Beaufort, South Carolina, to St. Nazaire.

On the 5th May the Manar Steamship Company went into voluntary liquidation.

The *Manar* arrived at St. Nazaire on the 9th June, and the French consignees of cargo took delivery, and became liable for the freight.

On the 10th June the defendants Strachan Brothers, who were ships' chandlers at Newcastle-on-Tyne, and who had supplied necessaries to the ship, took proceedings in the Tribunal of Commerce at St. Nazaire, and arrested the vessel, and attached the freight in the hands of the consignees. Bail was subsequently given, and the vessel released.

On the 13th June the defendants commenced an action in the King's Bench Division against the Manar Steamship Company for the amount of their debt, and obtained judgment by default on the 21st June. This judgment was subsequently made executory in France.

The plaintiffs also took proceedings there to have their mortgage made executory, and also asked for a declaration that the defendants had no rights over the vessel, and that the arrest of freight was invalid.

On the 12th Dec. notice of these proceedings was served on the defendants, who entered an appearance at St. Nazaire. It was stated that if the plaintiffs' mortgage was made executory in France it would have the same force and validity there as a French mortgage.

On the 20th Jan. 1903 the plaintiffs commenced two actions, one against the Manar Steamship Company and the other against the present defendants, claiming a declaration that their mortgage was valid, that they were entitled to take possession, and that as mortgagees in possession they had a right to the freight carried by the ship.

The learned judge, on the motion of the Manar Steamship Company, stayed proceedings in the first action, but refused to stay proceedings in the present action, although the defendants applied to him to do so.

At the trial of the action both the plaintiffs and the defendants called certain French advocates to give evidence as to the French law relating to mortgages, but the witnesses did not agree as to what would be the practice of the French courts with regard to an English judgment, and as to how far they would give effect to it

Order XXV., r. 5, of the Rules of the Supreme Court 1883 is as follows:

Rule 5. No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

Scrutton, K.C. and *Balloch* for the plaintiffs. — We ask for a declaration as to what the English law is. There is a conflict between the French lawyers as to what use we shall be able to make of the judgment of an English court, but that question can be decided when the case is heard by the French court. Such a judgment will not prejudice the defendants in any way. They referred to

Liverpool Marine Credit Company v. *Hunter*, 18 L. T. Rep. 749; 3 Mar. Law Cas. O. S. 128; L. Rep. 3 Ch. 479;

Re Maudslay, Sons, and Field, 82 L. T. Rep. 378; (1900) 1 Ch. 602.

Robson, K.C. (*Adair Roche* with him) for the defendants, *contra*.—The question is not whether the judgment will or will not be of use to the plaintiffs, but whether they are entitled to it In the absence of the mortgagor no declaration can be made as to the validity of the mortgage. The mortgagor has in effect said that the mortgage is invalid, and on the authority of *Brooking* v. *Maudslay* (58 L. T. Rep. 852; 6 Asp. Mar. Law

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Cas. 296; 38 Ch. Div. 636) he is justified in taking up such a position as has already been decided in *The Manar* (*ubi sup.*). In *Barraclough* v. *Brown* (76 L. T. Rep. 797; 8 Asp. Mar. Law Cas. 290; (1897) A. C. 615) the Court of Appeal laid down that two processes must not be made out of one. Here the plaintiffs have instituted two processes on the ground that the judgment in one may be useful in the other. If the French courts decide the case by French law, then the English law is immaterial; if they decide it according to English law, evidence as to what is the law in England can be called, and it can be proved in the usual way. Order XXV., r. 5, is only intended to apply where the plaintiff can get relief, but not immediately. The office of the court is to decide cases, not to make academic declarations of law. He referred to

Doughty v. *Lomagunda Reefs Limited*, 88 L. T. Rep. 337; (1903) 1 Ch. 673;

The Tagus, 87 L. T. Rep. 598; 9 Asp. Mar. Law Cas. 371; (1903) P. 44.

Balloch in reply.

Cur. adv. vult.

July 14.—BUCKNILL, J.—This case has come before me twice, and has been very fully argued by counsel. The facts are as follows: The Manar Steamship Company, being in want of money about the time of this mortgage, which is dated the 26th June 1900, went to the Northern Trust, and the latter lent, or rather provided them with, the sum of 17,000*l.* As to 16,000*l.* the money was the money of the Northern Trust. To secure the repayment the Northern Trust took a statutory mortgage of the steamship *Manar*, then belonging to the Manar Steamship Company, and in course of time—there having been some payments on account of interest—the company made default, and the moment was reached when the Northern Trust was entitled to say: "You are in default; we are now entitled to take possession of the ship as security for our loan, and we intend to do it." The correspondence which has been put in sets out very clearly all the steps taken between the parties—namely, the persons to whom the ship was then chartered, the Manar Steamship Company, and the Northern Trust. It is sufficient to say here that the Northern Trust were held by the company entitled to, and were allowed to take possession of, the *Manar*; and Captain Denton, the master of the *Manar*, consented to become the servant of the Northern Trust. The next step in the history of the case is that the ship was then chartered to take a cargo from South Carolina to St. Nazaire, in France. That charter-party was made between the Northern Trust and the owners of the cargo. The ship arrived safely. The next thing that happened was that the defendants in this action, who were creditors in respect of goods supplied to the Manar Steamship Company, for a sum exceeding 700*l.*, took steps in France, whilst the ship was being discharged, to prevent the freight being paid over to the Northern Trust; and the Northern Trust also took steps to protect their interests. Other persons then came in. The steamship was arrested and released on bail, and the freights are still *in custodia legis* at St. Nazaire. The next material step in the history of the case was that Strachan Brothers sued in this country the Manar Steamship Company, then and now in liquidation, for the sum of money due and owing to them, in order to place themselves in the position of judgment creditors. The liquidator of the company did not appear, and judgment was given in favour of Strachan Brothers for the amount of their debt and costs. The Northern Trust also took steps to have their mortgage declared valid, and that is as far as they have gone. Two actions were then commenced by the present plaintiffs—one against Strachan Brothers, and the other against the Manar Steamship Company—for substantially the same declarations as the court is now asked to make. Applications were made to me by both sets of defendants to dismiss or suspend both of those actions as vexatious. I did so in the action against the Manar Steamship Company for the reasons which I then gave; but with regard to this action I refused the application. This case then came on for hearing, and learned counsel from France have given evidence as to their view of the French law. Before I deal with their evidence, let me say exactly what are the questions to be decided in France. The first question is as to the right of the defendants Strachan Brothers to arrest the ship; the second is as to their right to the freight in the hands of the French consignees; thirdly, or alternatively perhaps, as to the right of the Northern Trust to be treated as owners of the ship, instead of the Manar Steamship Company; and fourthly, as to the right of the Northern Trust to all the freights in question. These are the main questions to be decided by the French court.

In this case the plaintiffs ask for declarations under the jurisdiction of the court which existed before the Judicature Acts were passed; but Order XXV., r. 5, introduced a novelty in the sense that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether any consequential relief is or could be claimed or not." It is under that rule I am now asked to make the declarations claimed in this action. Now, putting the plaintiffs' case quite shortly, it comes to this. They say: "We want to be in as good a position in the French courts as Strachan Brothers are in. They have brought their action and have obtained judgment against the company, and that judgment has been made 'executory' in France; and what we ask is that the court should make such a declaration as to the English law in relation to the mortgage of this ship and the consequent rights of the mortgagees who have taken possession, that we may be enabled to make that declaration 'executory' in France, and so stand on the same footing as do Strachan Brothers in regard to their judgment." Now, one sees at once that the two things are not exactly alike. There is no doubt that Strachan Brothers were entitled to bring their action in this country, and to get judgment against the company for the amount owing to them, and in due course were entitled to make that judgment executory in France. The objection taken by counsel for the defendants is that to make Strachan Brothers defendants in this action is, as it were, to take hold of a man in the street, and to say: "Come along and see the English court make a declaration in my favour, and you can stand by, or oppose it if you like. You are not a party to the mortgage, it is true, but come in and fight the case." Is that the

correct way of looking at the matter for the purpose of seeing that justice is done? Strachan Brothers, being creditors, and now judgment creditors, of the Manar Steamship Company, say: "We do not know, we do not care, and we will not inquire, whether the mortgage between you, the plaintiffs, and the Manar Steamship Company is valid or not. It is no concern of ours, and you have no right to bring us in for the purpose of making use of us with regard to the declaration which you seek to-day, more particularly as the court has stayed your action against the Manar Steamship Company, in which you asked for a similar declaration." I think one must look at this from a common-sense point of view. I can understand Strachan Brothers taking up the position they do—it is the best position they can take up—but there can be no possible doubt that Strachan Brothers were aware that the Northern Trust had taken possession of the vessel under their mortgage, and that when they took steps to arrest the ship, and tried to get payment of the freight from the consignees of the cargo, they knew perfectly well that the charter-party was not made between the Manar Steamship Company and the French consignees, but between the Northern Trust, who had taken possession of the ship, and the consignees. If I am right in that conclusion, is it quite true to say that to bring them in as defendants in this action is like bringing in a man from the street? Each case must be decided upon its own particular and peculiar facts; and the position being as I have found, I think it is not correct to say that this is an action which cannot be brought against the defendants. I quite admit the force of the argument that I cannot make an order giving any remedy or relief against the defendants. I can only make a declaration. All I am asked to say, and all I can say, is that as between the plaintiffs and the defendants in this country there is evidence to satisfy me that the plaintiffs were mortgagees of this steamship, that as such mortgagees they took possession, that for certain purposes they were to be treated as owners, and, having chartered the ship, they would be entitled, according to English law, to the freight earned under that charter-party. I do not think that any of the cases cited bear directly upon this case. It is one which stands entirely by itself. It is in the nature of an experiment, a noveity. It is the first time I ever heard of a case of the kind being brought in one country for a declaration to be used in legal proceedings in another country. But, if I am satisfied that it is just and right that the tribunal in France should know by the judgment of an English court what the legal position of the Northern Trust was at the time when the steamship *Manar* delivered her cargo in France, then I think I ought to make that declaration in order that the French court may have the best information that can be given it, more particularly because I am told that it is not the custom of the French courts to receive the evidence of English counsel in the same way that we receive the evidence of foreign lawyers to prove a foreign law. Is there any hardship here? Certainly not. I find as a fact that Strachan Brothers knew beyond a shadow of a doubt that the possession of the ship had been taken by the Northern Trust, and that the Northern Trust were entitled to receive the freights for the voyage.

Then let us see what is the evidence of the French advocates. Can I give credence to one side rather than to the other? On the one side there is M. Gouzet and the gentleman who supports his view; on the other side there is M. Govare and the gentleman who supports him. They are all gentlemen well versed in commercial law. They disagree, but they all agree upon this point—namely, that the French court might receive the judgment of this court as evidence to guide them in their decision. In the judgment I am about to give, I shall not in any way attempt to state what the French law is, nor what the remedy of the French court should be. Seeing that these gentlemen disagree, it is impossible for me to say which is right as to the effect of this judgment; but as they agree that the French court will look at it as evidence, I am entitled to conclude that it may be of some use to the plaintiffs; and though it may not be, I must do that which I think is right and proper and just in this particular case. The plaintiffs ask for: "(1) A declaration that the plaintiffs are, and were throughout the year 1902, the duly registered first mortgagees of the steamship *Manar*, a duly registered British ship, under a mortgage dated the 26th day of June 1900." I think they are entitled to that declaration. So also with the second, which is as follows: "(2) A declaration that the said mortgage is and was during the year 1902 valid." Now we come to No. 3, which reads in this way: "(3) A declaration that from the date of the said mortgage the plaintiffs were, so far as was necessary for making the said ship available as a security for the mortgage debt, the owners of the said ship and entitled to the said ship and any bail given for the release of the said ship, in priority to the Manar Steamship Company, and to the defendants." Now, the words in the Merchant Shipping Act, I think, are "deemed to be the owners," and, if so, those words should be inserted and the paragraph should read, "deemed to be the owners of the said ship and entitled to the same." The words "by English law" will be inserted after the words "declaration that." The words "and any bail given for the release of the said ship in priority to the Manar Steamship Company and to the defendants" will come out; for this reason, that, the bail having been given for the release of the ship in the French court in the French proceedings, I shall not attempt to say what the position of that would be according to French law. I do not deal with it at all. No. 4 is as follows: "A declaration that the plaintiffs, as such mortgagees, were in the month of March 1902 entitled to take possession of the said steamship." That will stand as it is, except that it will be a declaration "that by English law," &c. The next is: "(5) A declaration that the plaintiffs, upon and after taking possession of the said steamship, were entitled to the said steamship and to any bail given for the release of the said steamship in priority to the Manar Steamship Company and to the defendants." I shall alter that by striking out all the words after the word "steamship" and altering the first part so as to read, "A declaration that by English law the plaintiffs upon and after taking possession of the said steamship were entitled to the same." Then comes the following: "(6) A declaration that upon taking possession of the said steamship, the plaintiffs, as mortgagees in possession, were entitled to collect

and keep all freights carried by the said steamship while in their possession, and in particular the freight carried by the said steamship under the charter-party on the voyage from Beaufort (South Carolina) to St. Nazaire in the year 1902." I alter that, and I give "A declaration that by English law upon taking possession," &c. I stop at the second "possession," and strike out all the rest of the words, because, in my opinion, they again would be an infringement upon the jurisdiction of the French court. No. 7 asks for "A declaration that the plaintiffs were entitled to collect and to keep the said freight as parties to the said charter-party." I cannot grant that, because it would introduce a doubt in the mind of the French court as to whether I had been dealing with the French law, which is not the same as English law, as to the consequences of a mortgage. In France mortgages on ships are valid, but after that the French and the English law cease to agree as to the rights of a mortgagee to take possession of the ship, and trade with her, and take the freights. Therefore my duty is to leave that alone. So, also, with regard to par. 8, which asks for "A declaration that the plaintiffs are and were entitled to all freights carried by the said steamship, and in particular to the freight under the said charter-party as aforesaid in priority to the Manar Steamship Company Limited, and to the defendants." I alter that to "A declaration that by English law the plaintiffs are entitled to all freights carried by the said steamship whilst in the possession of the plaintiffs as mortgagees." I give nothing more than that. To sum up, I cannot accept the statement of either of the French advocates as being conclusive of the case, because they disagree, and I cannot say which side is right. I think this declaration should be given in order that the French court may, in applying its own remedies, have this information, and the best information as to what is the English law; and I give it in this particular case because I am satisfied upon the facts that the defendants knew what the real facts were, and I cannot draw any other inference than that they knew that the freight would, according to English law, be recoverable by the plaintiffs, and they tried — quite properly, and there was nothing wrong in their doing so—to see if they could not get an advantage. I shall hold over the question of costs, with liberty to either party to apply to me hereafter.

Solicitors: for the plaintiffs, *King, Wigg,* and *Co.*, agents for *George Armstrong* and *Sons*, Newcastle-on-Tyne; for the defendants, *Pritchard* and *Sons*, agents for *Wilkinson* and *Marshall*, Newcastle-on-Tyne.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

July 14, 15, *and* 16, 1903.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, LINDLEY, and Sir ARTHUR WILSON.)

YOUNG v. STEAMSHIP SCOTIA. (a)

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Property of Colonial Government — Salvage — Action in rem—*Liability of property of Crown to arrest.*

An action in rem *is a method of impleading the owners of a vessel, and if the owner is the King the action cannot be maintained.*

A vessel which is the property of a Colonial Government, although built to be used as a ferry boat for the purpose of carrying passengers and merchandise for hire between one part of a railway owned by the Government and another, enjoys the same immunity from arrest as other property of the Crown, and is not liable to an action for salvage.

The Cybele (37 *L. T. Rep.* 773; 3 *Asp. Mar. Law Cas.* 532; 3 P. Div. 8) *discussed.*

APPEAL from a judgment of the Supreme Court of Newfoundland in favour of the respondent.

The appellant was the master of the steamship *Furnessia*, and, acting on behalf of the owners and crew of the *Furnessia*, had brought an action *in rem* against the steamship *Scotia* to recover salvage reward for services rendered to her by the *Furnessia* in the North Atlantic on the 19th and 20th Sept. 1901.

The *Furnessia* was a steamship belonging to the Anchor Line of 5495 tons gross register, and at the time of rendering the services was on a voyage from Glasgow to New York, manned by a crew of 160 hands all told, and with 975 passengers on board, and a general cargo.

The *Scotia* was a twin-screw steam ferry boat of 1461 tons gross register, specially designed and constructed for the carriage of railway cars in Canada.

On the 29th Aug. 1901, after having passed through her trials, she left Newcastle-on-Tyne for Port Mulgrave, Nova Scotia, manned by a crew of twenty-seven hands all told. On the voyage she met with bad weather and ran short of coal and provisions, and by the 18th Sept. nearly all the available woodwork, including the woodwork which filled the open space at the bow and stern and her temporary bulwarks, had been burnt as fuel, and she only had sufficient coal on board to work the steam steering gear for twenty-four hours. The *Scotia* was then in lat. 48° 10′ N. and long. 49° W.

About 9.30 a.m. on the 18th Sept. the *Furnessia* came up, and with some difficulty made fast; she eventually towed her into St. John's, Newfoundland, a distance of 155 miles, where she arrived about 5.30 on the following day, having had the *Scotia* in tow for about twenty-seven hours.

On her arrival there the *Scotia* was arrested in an action for salvage, an appearance was duly entered on her behalf, and, on bail being put in

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

for the sum of 60,000 dollars, she was duly released.

A statement of claim, defence, and reply were filed and delivered, and on the 9th Dec. a date was fixed for the hearing of the action.

On the 16th Dec. the *Scotia* was registered at Ottawa in the name of the Minister of Railways and Canals of the Dominion of Canada, for the time being, in respect of sixty-four sixty-fourth shares.

On the 30th Jan. 1902 a protest was filed on behalf of His Majesty the King, and on the 3rd April the defence in the action was, by leave of the court, amended by adding the plea that the *Scotia* was at the time the services were rendered, and still was, the property of the Crown.

In support of this the building contract, the vouchers for payment of the purchase price, the permit of the Commissioners of Customs allowing the vessel to sail from Newcastle-on-Tyne without being registered, the Board of Trade certificate of survey, and the certificate of registry at Ottawa were put in.

From these documents it appeared that the *Scotia* was built at Newcastle-on-Tyne by Sir W. G. Armstrong, Whitworth, and Co. Limited in pursuance of a contract between the builders and the Minister of Railways and Canals of the Dominion of Canada, acting on behalf of Her late Majesty the Queen.

The vessel was built for the purpose of carrying railway cars across the Straits of Canso, between Port Hawksbury and Port Mulgrave, the termini of the Inter-Colonial Railway of Canada. The railway is the property of the Dominion Government, and managed by the Minister and Department of Railways and Canals.

The following are the material clauses of the contract:

7. Security.—The steamer shall, from the date of the first instalment being paid until final delivery, be considered the property of the purchaser, subject only to the builders' lien for and rights with respect to any unpaid balance due to them in respect of or in connection with the steamer.

9. Price and Payments.—The purchaser shall pay to the builders the sum of 47,000*l.* in the manner following—viz.: One-fifth on the signature of this agreement; one-fifth when the steamer is framed (or equivalent work performed); one-fifth when the steamer is plated (or equivalent work performed); one-fifth when the steamer is launched (or equivalent work performed); one-tenth on satisfactory trial trip of the steamer off the river Tyne; one-tenth on arrival of the steamer at Port Mulgrave (Nova Scotia), or in case of loss during the voyage. Should the delivery of the steamer from Newcastle to Port Mulgrave be undertaken by the builders, the purchaser agrees to pay the last construction instalment previous to the departure of the steamer from the river Tyne. Should the purchaser request the builders to deliver the steamer at Port Mulgrave, the builders agree to prepare and navigate the steamer from the river Tyne to Port Mulgrave for the sum of 1400*l.* (including the wages of the engineers for the voyage), plus the insurance premium if purchaser decides to insure, which the builders shall arrange on the most advantageous terms possible, and the purchaser agrees to pay this sum and the insurance premium to the builders on arrival of the vessel at Port Mulgrave.

10. If the purchaser fails to pay any instalment as and when the same becomes due . . . the builders may . . . either cancel this contract, retaining any sums previously paid on account of the purchase money, or they may sell the steamer in its then state or complete the steamer and then sell it, and charge the purchaser with any loss they may sustain or be put to by the non-performance of this contract by the purchaser.

A certificate of survey was obtained from the Board of Trade, and a pass granted by the Commissioners of Customs at Newcastle-on-Tyne under sect. 23 of the Merchant Shipping Act 1894, enabling the *Scotia* to proceed to Canada without being previously registered, and, after passing through her trials, she sailed for Port Mulgrave in the possession and under the control of the builders.

At that time the last instalment of the purchase money was due under the contract, and the sum of 11,450*l.* was due to the builders under the contract and for extras supplied, out of a total sum of 49,050*l.* On the 5th Sept., while the *Scotia* was on her voyage, a sum of 1955*l.* was paid on account.

On release of the *Scotia* from arrest at St. John's the builders retook possession of her, and delivered her at Port Mulgrave to the purchaser. At the date of her release from arrest the balance of the purchase money, amounting to 9495*l.*, was due to the builders, and the sum of 1400*l.* for navigating the ship. On the 18th Oct. and the 22nd Nov. the builders received payments amounting in all to 10,895*l.*, being the balance of the purchase money unpaid.

At the trial of the action, before Little, C.J. and Emerson, J., the court held that the *Scotia* was at the time of the salvage services, and still was, the property of the Dominion of Canada, and could not be arrested or proceeded against, and they therefore dismissed the plaintiffs' suit.

The plaintiffs appealed.

Sir *Robert Reid*, K.C. and *Robertson Dunlop* (*Aspinall*, K.C. with them) for the appellants.—To exempt a vessel from arrest it is not sufficient to say that she is the property of His Majesty the King. She must be in the possession of the Crown, and held and used by the Crown for public purposes. In *The Parlement Belge* (42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197) and all the earlier cases where immunity from jurisdiction was claimed, a declaration was made on behalf of the Sovereign or State that the property was public property employed in the public service. The reason for the exemption of Crown property from arrest is that such arrest would be a derogation of the dignity of the Crown, or that property employed in the public service ought not on grounds of public policy or international comity to be suddenly withdrawn from the public service. The *Scotia* was not a public ship used for public purposes, but was a ferry boat constructed and intended to be used as part of the plant of a railway owned and managed by a department of the Canadian Government. In *The Cybele* (37 L. T. Rep. 773; 3 Asp. Mar. Law Cas. 532; 3 P. Div. 8) a tug belonging to the Board of Trade was held not to be a Queen's ship, and therefore entitled to claim salvage without the consent of the Admiralty. The grounds of that decision were that the vessel was employed for commercial purposes, was not under the special control of Her Majesty, and was not performing the ordinary duties of a Queen's ship. The Crown can waive its privilege by using property for ordinary trading purposes.

This was the opinion of Lord Stowell in *The Swift* (1813, 1 Dods. 320), of Sir Robert Phillimore in *The Charkieh* (28 L. T. Rep. 513; 1 Asp. Mar. Law Cas. 581; L. Rep. 4 A. & E. 59), and of Story, J. in *United States* v. *Wilder* (3 Sumner, 308), and is not in conflict with the views of Brett, L.J. in

The Parlement Belge (*ubi sup.*).

See also

The Prins Frederik, 2 Dods. 451.

The *Scotia*, it is submitted, was at the time of the services in the possession and control of the builders, who had a lien on her for the unpaid balance of the purchase money, and the further right to cancel the contract if the balance remained unpaid. The master and crew were the servants of the builders, and employed and paid by them, and not by the Crown. The Crown must be held to have impliedly authorised the builders to subject her to such claims as in the ordinary course of her employment might give rise to maritime liens—*e.g.*, wages of her master and crew:

The Ripon City, 77 L. T. Rep. 98; 8 Asp. Mar. Law Cas. 304; (1897) P. 226.

The Crown did not treat the *Scotia* as a King's ship, but registered her and in other ways dealt with her under the provisions of the Merchant Shipping Act 1894, which by sect. 91 applies to Canada, but, by sect. 741, not to ships belonging to His Majesty. She enjoyed the privileges of a private ship registered under the Act, and must also be deemed to have been subjected to the liabilities imposed by the Act, of which one is to pay salvage. There is nothing in the Canadian statutes which relieves the owners of the Inter-Colonial Railway from the ordinary liabilities of a railway company. Sect. 74 of 44 Vict. c. 25 expressly provides that nothing is to relieve the department from the consequences of negligence. The *Scotia* would be liable to arrest for a collision in the Strait of Canso caused by her negligence. Further, the Crown did not make any objection to the jurisdiction until after bail had been put in, pleadings closed, the plaintiffs' evidence taken, and the builders had been enabled to deliver the vessel to the Minister of Railways. Where privilege is claimed it must be set up within a reasonable time after the Crown has notice of the arrest:

Briggs v. *The Light Boats*, 11 Allen, 157.

Newcombe, K.C. (of the Canadian Bar) and *Loehnis* for the respondents, *contra*.—The immunity of our Sovereign in his own courts is at least as wide as the immunity of foreign Sovereigns. In *The Cybele* (*ubi sup.*) there was no question as to the immunity of Crown property from arrest. The British North America Act 1867 (30 & 31 Vict. c. 3) authorised the Canadian Government to make the Inter-Colonial Railway, and sect. 2 of 31 Vict. c. 13 provided that the property of the railway should be vested in the Crown. No action will lie against the Crown, and the only remedy is by petition of right, for the Crown cannot be sued in its own courts. The question was finally raised and decided in *Mighell* v. *Sultan of Johore* (70 L. T. Rep. 64; (1894) 1 Q. B 149). In that case *The Parlement Belge* (*ubi sup.*) was approved of and followed. But the present case goes further than the case of *The Parlement Belge* (*ubi sup.*). for there the court held a foreign Sovereign was not answerable to the jurisdiction, while here it is sought to make our own Sovereign liable in his own courts. An action *in rem* is only a means of enforcing a personal liability by attaching the *res*. If the *res* is insufficient to satisfy the claim, then the owner of the *res* can be proceeded against for the balance due. They also referred to

The Constitution, 40 L. T. Rep. 219; 4 Asp. Mar. Law Cas. 79; 4 P. Div. 39;
The Exchange, 7 Cranch. 116;
Vavasseur v. *Krupp*, 39 L. T. Rep. 437; 9 Ch. Div. 351;
The Five Steel Barges, 63 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142;
The Cargo ex Port Victor, 84 L. T. Rep. 677; 9 Asp. Mar. Law Cas. 182; (1901) P. 243.

Sir *Robert Reid*, K.C. in reply.

The LORD CHANCELLOR (Halsbury).—This is an appeal from a judgment of the Supreme Court of Newfoundland in a salvage suit in which the steamship *Scotia* was arrested for salvage services. The salvage services, which will be referred to hereafter, were of no ordinary character, but the only question of law before the board is whether the vessel so arrested was, or was not, liable to seizure, she being (as it is alleged) the property of the Crown. The *Scotia* was built for the Crown upon a contract which is before their Lordships, and the first piece of evidence which (it is suggested) makes the ship —at all events for some period of her existence —not the property of the Crown, although she was built for the Crown and money was paid for her on behalf of the Crown, is that the money had not been paid in its entirety at the time when this question arose. Their Lordships are not disposed to give any weight to that consideration. Even if the ship was still in the possession of the builders and subject to the builders' lien for the unpaid balance, that would not, in their Lordships' opinion, affect the question arising on this appeal. The seizure is intended to be a preliminary to the sale of the ship, and what would be sold would not be the mere possession, but the proprietary right. If the proprietary right could not be sold by reason of the ship's belonging to His Majesty, the question of possession may be passed by as immaterial. But their Lordships are not disposed to take the view that there was any such possession independent of the proprietary right of the Crown. If there was anything exceptional or unusual in the contract, or not in accord with its provisions, that was a question of evidence which ought to have been dealt with at the trial. The natural presumption from the contract, apart from any evidence to the contrary, is that its provisions were followed. One of these provisions was that possession should be given to the Crown immediately after the trial trip, if such trip proved satisfactory. There was an ancillary provision for the passage of the ship across the Atlantic, which, however, was not necessarily to be carried out by the builders, but only if the parties should agree at the proper time, and elect that that should be the mode of delivery. In that case, from the moment such delivery took place, the persons navigating the ship and acting on her behalf were doing so as servants, or agents, of the Crown. But the possession would then be

in the Crown; and although their Lordships are not disposed to think any different question would arise, whether the possession was in the Crown or in the builders at the moment, it is as well that that matter should be cleared up upon the evidence which is now before their Lordships. Their Lordships are of opinion that the reasonable presumption arising upon the facts before them is that the possession was in the Crown, and not in the builders. If the proprietary right was in the Crown, the matter before their Lordships is reduced to one of those propositions of law which are almost beyond the reach of argument. The question has been discussed in the courts for a very long period, and, after the catena of authorities that have been brought before their Lordships, it is vain to argue that, where the property belongs to the Crown, the Crown can be impleaded, whether in this form or in any other form. Where you are dealing with an action *in rem* for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner, and if the owner is the King, the action cannot be maintained, since it is impossible to contend that the King can be impleaded in his own courts. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute. This is not one of the cases so provided for, and it is, therefore, impossible to maintain that the power of seizing a vessel belonging to the Crown can be exercised as against the Crown. It is, however, suggested that, although (speaking in the widest sense) the Crown cannot be impleaded, this particular vessel, under the circumstances of its employment, was not, strictly speaking, a vessel belonging to the Crown. In support of this proposition counsel for the appellant cited the case of *The Cybele* (*ubi sup.*). Their Lordships think that it is quite possible to defend that case on the ground suggested in the course of the argument—namely, that in taking care of the harbour of Ramsgate, the Board of Trade, to whom that harbour with all its incidents had been transferred, was not, strictly speaking, acting as a Government department, but in the character of trustees of a particular trust. But unless *The Cybele* (*ubi sup.*) is defensible on that ground, it is not a case that their Lordships would be disposed to follow. It is then suggested that the particular use for which the *Scotia* was to be employed—viz., as a ferry boat to connect one part of a railway owned by the Government of Canada with another—although forming, in a general sense, part of Government administration, yet was not sufficient to vest the property in the Crown. Having regard to the various Acts of Parliament which were cited by counsel, their Lordships are satisfied that the land in question, including the railway, belonged to His Majesty. The case falls, therefore, within the general proposition that the Crown cannot be impleaded in its own courts, and the action must fail. Their Lordships are accordingly of opinion that the judgment of the Supreme Court ought to be affirmed.

Sir Robert Reid, on behalf of the appellant, has pointed out with great force the extraordinary condition of things which would arise if the services which were rendered by the *Furnessia*, and which were undoubtedly of the greatest value, were not to receive their appropriate reward. No objection can properly be taken to the defence to this action. It is the duty of those who represent the Crown to place the privileges of the Crown very definitely before the courts, and if the claim in the present case had been allowed to pass without the protest which has been made on behalf of the Crown, the case would undoubtedly have been quoted, and perhaps acted upon, in circumstances where it would not have been so appropriate to give a reward as in this instance. No observation can, therefore, be properly directed against those responsible for advising the Government to resist the present claim in the form in which it was made. The moment the vessel reached St. John's she was arrested for salvage, and, without attributing blame to anybody, it is impossible to say it was wrong either for those who had rendered services to seek to obtain salvage by the appropriate method, or for those who were advising the Crown to resist a claim which it was thought might be made a precedent. Having, however, said this much, their Lordships desire to call the attention of the Canadian Government to the condition of things which this case discloses, and to the most unfortunate results which would ensue if the refusal to compensate those who rendered the services were persisted in. Nothing could be more pitiable than the condition of the vessel as described, not by the parties themselves, but by the learned judges of the Supreme Court, who nevertheless felt compelled to adjudicate in favour of the Crown. "It must be admitted," they say, "that an ordinary steamship, not fitted with towing appliances, with another ship in tow, is at considerable risk if she is suddenly compelled to slow down on meeting an iceberg or an approaching ship, especially in such foggy weather as prevailed on the night of the 19th. Those experienced in maritime affairs will appreciate the risk to a large steamer with another large steamship in tow in mid-ocean, in the absence of those towing appliances which in tugs and other vessels specially equipped for such purposes enable the latter to manœuvre easily at all times when meeting approaching ships or obstacles to navigation The *Furnessia* was enabled to steam from three to seven knots, according to the weather, while she had the *Scotia* in tow, and in about twenty-seven hours reached St. John's in safety, whence, after a delay of a few hours, she proceeded on her voyage to New York. . . . We have no doubt that the services rendered by the plaintiff to the defendant were of a meritorious character and worthy of recompense upon as liberal a scale as could be awarded by this court in the event of its being subsequently held that the plaintiff is entitled to recover against the defendant ship in this action. The *Scotia* was undoubtedly in an extremely dangerous position at the time the *Furnessia* came up with her. It was a season of the year when strong equinoctial gales usually prevail in these latitudes; she was without coal for her engines, and had only about twenty-four hours' coal for steering purposes; and had actually burnt all, or nearly all, the available woodwork about the ship, such as wooden bulwarks and the woodwork specially built at her bow and stern. (The *Scotia* is a ship built open

at the bow and stern for railway ferry purposes, and but for the woodwork specially built for the voyage she would be completely unprotected from the water sweeping her 'tween decks in a heavy sea.) She would have become unmanageable when her fuel for steering purposes was exhausted. She was short of provisions, and was on the northern edge of the 'northern lane' of ocean traffic, and must have soon drifted, with the then prevailing winds, further to the north, and her chances of assistance would become therefore less and less daily. Her means of signalling passing ships were evidently very defective. Two steamers had already passed without seeing her distress signals, which can only be accounted for by the fact that she had no means by masts or poles of hoisting these signals to an altitude sufficiently high to attract passing ships distant over two miles. Altogether she seems to have been in a more helpless condition than an ordinary broken-down steamer would be in mid-ocean. The services rendered were timely, and, though not performed with extra hazardous risk to life or property, there was some considerable risk and danger; first, in getting the towing hawser on board by the officer and crew of the *Furnessia*, and subsequently in the performance of the work of towing. The *Furnessia* had on board a large crew, a valuable cargo, and a large number of passengers, and in addition to the risk to his ship in the performance of his undertaking there was the danger to his passengers and cargo, and the responsibility to his owners and others for the voluntary adoption of a contract [*sic* in the record] under such dangerous circumstances, and involving deviation and delay. These are elements, in addition to others, which must weigh with the court in deciding upon the amount of compensation to be awarded for salvage services." Their Lordships cannot forbear from expressing their hearty concurrence with the view of the Supreme Court as to the meritorious nature of the services rendered, and they also concur in the very cogent observation with which Sir Robert Reid concluded. He pointed out that no question can possibly be raised in this case which would entitle the policy holder to compensation. If, therefore, the refusal to make compensation is insisted on—properly enough insisted on, in the first instance, as a matter of right against the Crown—and if it comes to be thought that the Government will not feel called upon to pay comsation in any circumstances, not even in such circumstances as the present—in which their Lordships are sure that a foreign Government would feel called upon to pay compensation—what would be the result? As Sir Robert Reid most justly said, the result would be to warn everybody not to assist a ship belonging to His Majesty in however great distress she might be, and thereby incur any risk, because any claim for services would be met by the technical objection—in that respect it would be a technical objection—that no one is entitled, as a matter of right, to recover salvage from the Crown. While, therefore, on the one hand their Lordships think that it was quite right to raise the question of the Crown's privilege in this case, they would deeply lament to learn that the Canadian Government, when the circumstances are brought to their attention, refused to give effect to the hearty recommendation of the court below, which their Lordships desire emphatically to indorse and to repeat. Their Lordships will humbly advise His Majesty to dismiss the appeal. As the respondents do not ask for costs, there will be no order as to the costs of the appeal.

Solicitors for the appellants *Botterell* and *Roche*.

Solicitors for the respondents, *Charles Russell* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 7 and 10, 1903.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPORATION. (a)

APPLICATION FOR A NEW TRIAL.

Insurance — Marine — Voyage policy — Insurance for "thirty days" after arrival—Computation of "days."

By a policy of insurance a vessel was insured for a voyage to a certain port until she had "moored in anchor in good safety," and "for thirty days in port after arrival however employed."

Held (affirming the judgment of Bigham, J.), that the words "thirty days" in the policy meant thirty consecutive periods of twenty-hours commencing from the precise time of the day at which the vessel arrived and was moored in safety.

APPEAL of the plaintiff from the judgment of Bigham, J. after the trial of the action with a jury.

The plaintiff brought this action upon a policy of marine insurance, underwritten by the defendants, to recover for a total loss of his vessel the *Inchcape Rock*.

The policy was on a printed form, being the ordinary form of a Lloyd's policy, which described the risk as running until the vessel "hath moored at anchor twenty-four hours in good safety."

The printed words "twenty-four hours" were struck through with a pen, and the words "as above" were written over them.

The risk was described in the body of the policy, in an earlier part than the above clause, in the following words: "For a voyage from Portland, Oregon, by any route to Algoa Bay, and for thirty days in port after arrival however employed."

The vessel came into Algoa Bay on the 2nd Aug. 1902 and there anchored. She remained there until the 1st Sept. 1902, when she was driven ashore in a gale and lost.

The action was tried before Bigham, J. with a jury. The jury, in answer to questions left to them by the learned judge, found: (1) That the vessel arrived in Algoa Bay at 10 a.m. on the 2nd Aug. 1902; (2) that she was safely moored at anchor in the bay at 11.30 a.m. on that day; and (3) that she was totally lost at 4.30 p.m. on the 1st Sept. 1902.

The learned judge, on further consideration,

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

gave judgment in favour of the defendants upon the ground that "thirty days" meant thirty consecutive periods of twenty-four hours from 11.30 a.m. on the 2nd Aug. 1902, and that therefore the policy had expired before the vessel was lost: (89 L. T. Rep. 179).

The plaintiff appealed.

J. A. Hamilton, K.C. and *Leck* for the appellant.—The judgment of the learned judge was wrong because he wrongly construed the policy of insurance in this case. The insurance during the voyage and for thirty days after was all one insurance. The vessel was insured by one insurance for the period of the voyage and thirty days after. The "days" within the meaning of the policy were calendar days, to be computed from midnight to midnight, the first day commencing at midnight of the day on which the vessel arrived at Algoa Bay. The law takes no notice of a fraction of a day, and therefore the remaining part of the day on which the vessel arrived cannot be reckoned as one of the thirty days. A day does not mean a period of twenty-four hours commencing from some point of time in a calendar day:

The Katy, 71 L. T. Rep. 709; 7 Asp. Mar. Law Cas. 527; (1895) P. 56;
Re Railway Sleepers Supply Company, 52 L. T. Rep. 731; 29 Ch. Div. 204;
Stone and others v. *Marine Insurance Company*, 34 L. T. Rep. 490; 3 Asp. Mar. Law Cas. 152; 1 Ex. Div. 81.

Scrutton, K.C. and *Loehnis* for the respondents.—Upon the true construction of this policy the words "thirty days" must mean thirty consecutive periods of twenty-four hours commencing from the point of time at which the vessel arrived and was anchored in safety. If that were not so, there would be an interval of time, between the arrival and the end of the day of arrival, during which the vessel would be uninsured. That could not have been the intention of the parties. This is made clear upon looking at the words in the printed clause which have been struck out, "twenty-four hours in good safety," for which these words "thirty days" were substituted.

J. A. Hamilton, K.C. replied.

COLLINS, M.R.—This is an appeal by the plaintiff from the judgment of Bigham, J. after the trial of the action with a jury. The question turns mainly upon the true construction of a clause in the policy of insurance. The defendants are the underwriters. The insurance was upon the plaintiff's vessel, the *Inchcape Rock*, for a voyage from Portland, Oregon, to Algoa Bay, "and for thirty days in port after arrival however employed"; and then the policy describes the risk as running until the vessel "hath moored at anchor as above in good safety," the words "as above" being written over the printed words, which were "twenty-four hours." This last clause defined the limits during which the policy on the vessel would have lasted but for the addition of the words in the earlier part, "for thirty days after arrival in port." The insurers would therefore have to ascertain the time of the arrival of the vessel in order to ascertain when the thirty days would begin to run. From that point of time the thirty days must run. That is the obvious and natural construction of the policy. That is made even more clear by the printed clause as to "twenty-four hours in good safety," from which the words "twenty-four hours" were struck out. That makes the time from which the thirty days were to run the same as that from which the twenty-four hours would have run if those words had not been struck out. The period begins to run from the time when the vessel can properly be said to be an arrived vessel. The jury have found when the vessel arrived and when she was moored; they have found that she was anchored in safety at 11.30 a.m. on the 2nd Aug. The thirty days from that time would expire at 11.30 a.m. on the 1st Sept., and therefore the vessel ceased to be insured in respect of any damage which occurred after that time. The crucial question then is, At what time was the vessel lost? It is a question of fact at what hour she was lost. The jury have found that the vessel was moored in safety at 11.30 a.m. on the 2nd Aug., and that she was lost at 4.30 p.m. on the 1st Sept. Those findings have been challenged, but there was evidence both ways, and the jury could properly find as they did find. Those findings, then, fix the time of the expiration of the policy at 11.30 a.m. on the 2nd Aug., and the time of the loss of the vessel at 4.30 p.m. on the 1st Sept. The plaintiff, therefore, cannot recover upon the policy, and the judgment of the learned judge was right. The appeal fails and must be dismissed.

MATHEW, L.J.—I am of the same opinion. The findings of the jury dispose of the case, and there was ample evidence to support those findings. Upon the question with regard to the thirty days, the policy describes the risk as for a voyage to Algoa Bay "and for thirty days in port after arrival." In the ordinary printed form of the policy the words "twenty-fours hours" have been struck out and the words "as above" substituted. It seems to me that there is only one possible construction of the policy, and that is that the thirty days are to run from the same time as the twenty-four hours would have run. It was intended to be a continuous insurance without any interval between the arrival of the vessel and the commencement of the thirty days. That intention is carried out, and the provisions of the Stamp Act satisfied, by construing the words "thirty days" as meaning thirty consecutive periods of twenty-four hours. There was ample evidence to justify the findings of the jury as to the time when the vessel was moored in safety and the time when she was lost. The judgment of Bigham, J. was therefore right, and this appeal must be dismissed.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Botterell* and *Roche*.

Solicitors for the respondents, *Hollams, Sons, Coward*, and *Hawksley*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, June 30, 1903.

(Before Lord ALVERSTONE, C.J., WILLS and CHANNELL, JJ.)

KESLAKE (app.) *v.* BOARD OF TRADE (resps.). (*a*)

Merchant shipping—Desertion of seamen while abroad—Forfeiture—Private settlement—Promise not to prosecute—Payment of wages earned after desertion subject to deduction—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 131, 221, 232.

By sect. 131 *of the Merchant Shipping Act* 1894, *when a seaman is discharged before a superintendent in the United Kingdom he is to receive his wages through or in the presence of the superintendent unless a competent court otherwise directs, and if in such case the master or owner of a ship pays his wages within the United Kingdom in any other manner, he shall for each offence be liable to a fine not exceeding* 10*l.* *By sect.* 221, *if a seaman deserts his ship he shall be guilty of the offence of desertion and be liable to forfeit . . . the wages he has earned and also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him: and also, except in the United Kingdom, he shall be liable to imprisonment.* *By sect.* 232, *where any wages . . . are under the Act forfeited for desertion from a ship . . . those wages . . . shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and, subject to that reimbursement, shall be paid into the Exchequer.*

M. was engaged for a voyage in the ship S. *to the River Plate and back as a fireman. When at the River Plate he deserted. The master of the ship* S. *was compelled to engage another fireman in his place at higher wages. M. obtained employment on a voyage home in the ship* U. G. *On the arrival of the ship* U. G. *in England the owners of the ship* S. *sent a written request to the master of the ship* U. G. *not to pay M. his wages without deducting* 15*s.* 3*d.*, *the amount of extra expense caused to them by M.'s desertion. They promised if M. consented to this not to prosecute him for desertion. M. consented to the deduction, which was made by the master of the ship* U. G. *in the account of M.'s wages. On the master coming to pay M.'s wages in the presence of the superintendent, the latter objected to this deduction as illegal, and, when the master insisted on making it, left the office. The master then paid M. subject to the deduction, and M. signed a receipt and discharge. A summons having been taken out against the master of the ship* U. G. *for paying the wages otherwise than in the presence of the superintendent, contrary to sect.* 131 *of the Act, the magistrate convicted on the ground that the deduction was a forfeiture and there could be no forfeiture under the Act except by order of a court of competent jurisdiction, and so, the payment being made in an illegal manner, the superintendent was justified in refusing to be present at it.*

Held, that the magistrate's decision was right.

CASE stated by a metropolitan magistrate sitting at the Thames Police-court.

On Thursday, the 16th Dec. 1902, an information was laid by the solicitor to and on behalf of the Board of Trade (hereinafter called the respondents) against Walter Keslake (hereinafter called the appellant), master of the foreign-going British steamship *Urmston Grange*, then lying in the West India Dock, for that the appellant did on the 11th Dec. 1902, at the Mercantile Marine Office, 133, East India Dock-road, Poplar, E., unlawfully pay the wages of Charles Mellen, late fireman of the steamship, otherwise than through or in the presence of the Superintendent of Mercantile Marine, contrary to the statute in such made and provided:

Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 131 (1). Where a seaman is discharged before a superintendent in the United Kingdom he shall receive his wages through or in the presence of the superintendent, unless a competent court otherwise direct, and if in such case the master or owner of a ship pays his wages within the United Kingdom in any other manner he shall for each offence be liable to a fine not exceeding ten pounds.

Sect. 221. If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, he shall be liable to be punished summarily as follows: (*a*) If he deserts from his ship he shall be guilty of the offence of desertion, and be liable to forfeit all or any part of the effects he leaves on board, and the wages which he has then earned, and also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him, and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour.

Sect. 226. Nothing in the last preceding sections or in the sections relating to the offences of desertion or absence without leave shall take away or limit any remedy by action or by summary procedure before justices which an owner or master would but for those provisions have for any breach of contract in respect of the matters constituting an offence under those sections, but an owner or master shall not be compensated more than once in respect of the same damage.

Sect. 232 (1). Where any wages or effects are under this Act forfeited for desertion from a ship those effects may be converted into money, and those wages, effects, or the money arising from the conversion of the effects shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and, subject to that reimbursement, shall be paid into the Exchequer, and carried to the Consolidated Fund.

At the hearing before the learned magistrate the following were found as facts:—

Charles Mellen, mentioned in the information, signed an agreement, as provided by sect. 115 of the Merchant Shipping Act 1894, to serve as a fireman on board the foreign-going British steamship *Saxony*, owned by D. MacIvor, Sons, and

(*a*) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

Co., of Liverpool, on the 14th June 1902, for a voyage from Liverpool to the River Plate and back for a period not exceeding twelve months at the rate of 4*l.* per month wages. He received in advance the sum of 3*l.* 10*s.*

On the 15th July 1902, after the arrival of the *Saxony* at Buenos Ayres, in the River Plate, on the voyage contemplated in the agreement, and before she sailed thence, Charles Mellen, in breach of the agreement, went ashore and deserted the *Saxony*, and failed to serve on board during her passage from Buenos Ayres to Liverpool.

In consequence of such breach of agreement the master of the *Saxony* was compelled, for the safe and proper working of the vessel, to engage a fireman as substitute, to whom he paid wages at the rate of 4*l.* 10*s.* per month. This was the rate then prevailing at the port.

By reason of this breach the owners of the *Saxony* incurred a loss of 15*s.* 3*d.*

On the 21st Oct. 1902 Charles Mellen, being still at Buenos Ayres, signed an agreement as foreman on board the British foreign-going ship *Urmston Grange* at Buenos Ayres at 4*l.* 10*s.* per month.

On the 7th Dec. 1902 the *Urmston Grange* arrived at the West India Docks, London.

On her arrival the appellant received the following letter addressed to him from the office of the Shipping Federation Limited, of which the owners of the *Saxony* were members:

The Shipping Federation, 101, Leadenhall-street, London, E.C.—Dec. 4, 1902.—To the Master, ss. *Urmston Grange*, care of Messrs. Houlder Brothers and Co. Limited, London, E.C.—Dear Sir,—

1. The Shipping Federation is informed that C. Mellen, now serving on your vessel, deserted the *Saxony* at Buenos Ayres previous to engagement with you.

2. Under sect. 221 of the Merchant Shipping Act 1894 the penalty for desertion is forfeiture of wages due at desertion and subsequently earned until the deserted returns to the United Kingdom. From such forfeiture the owners of the vessel from which the desertion took place are entitled to be reimbursed the extra expenses incurred by them in hiring a substitute in place of the deserter, and the excess wages, if any, paid to such substitute. The balance of the forfeiture is payable to the Exchequer.

3. It is the intention of this federation to prosecute if necessary in the present instance with the object of enforcing the penalty provided by law.

4. I have therefore to ask on behalf of the owners of the *Saxony* that you will be good enough to withhold payment of the wages earned on your vessel by the above-named seaman pending the issue of the proceedings which are contemplated.

5. The amount of the owners' claim is 15*s.* 3*d.* Please give the above-named the option of agreeing to one of the two following courses: (*a*) If the balance of wages due exceeds the amount of the owners' claim by 2*l.* or over, give him the opportunity of voluntarily agreeing to the deduction of the claim from such balance of wages. (*b*) If the balance of wages is less than or does not exceed by more than 2*l.* the amount of the owners' claim, give him the opportunity of voluntarily agreeing to the deduction of all but 2*l.* from such balance of wages.

6. If a voluntary settlement is arrived at, the seaman should sign the inclosed form of request and authority. Before he does so kindly read over to him the first four paragraphs of this letter and the form of request and authority in the presence of the ship's officer, and explain the matter to him fully if he so desires, obtaining an assurance from him in the presence of the said officer that he clearly understands what he is doing.

7. The amount so agreed to be deducted must be entered up in the account for wages by you under the heading "other deductions" in the following words—namely, "Deducted by your authority."

8. Please to be careful to see that the seaman receives his account of wages containing the entry as above at least twenty-four hours before he is paid off, in accordance with sect. 132 of the Merchant Shipping Act 1894.

9. If the deduction (which is suggested in the interest of the seaman to save the cost and delay of litigation) is agreed to, there will be no need to withhold the balance of wages thereafter remaining; if, on the other hand, it is not agreed to, kindly stop the entire wages as requested above, and let me know the seaman's reasons for refusing to come to a settlement.

10. The Shipping Federation will hold you and your owners indemnified against any action for the recovery of such wages.

11. A copy of this letter (which is addressed to you direct, in order to save time) has been forwarded to your owners with the request that they will confirm the course suggested.

Yours faithfully,

CUTHBERT LAWS, General Manager.

This letter was put before C. Mellen on board the *Urmston Grange*, and was read over and thoroughly explained to him on behalf of the owners of the *Saxony* by the chief officer of the *Urmston Grange* in the presence of the second officer. C. Mellen, who was a man of fair education, read over the letter, and thoroughly understood the terms of it.

He then agreed to 15*s.* 3*d.*, the amount of the claim, being deducted from his wages earned on board the *Urmston Grange*, and signed a form of authority which had also been read to him and which he thoroughly understood.

In consequence of this agreement and authority the appellant entered in the amount of wages on the form approved by the Board of Trade under the heading "Other Deductions" the words "Deducted by your authority, 15*s.* 3*d.*," and handed the account of wages to Mellen in pursuance of sect. 132 of the Merchant Shipping Act 1894, who raised no objection to it.

On the 11th Dec. 1902 the appellant attended at the shipping office for the purpose of paying Mellen and the other members of the crew of the *Urmston Grange* in accordance with sect. 131 of the Merchant Shipping Act 1894. Mellen also attended. The appellant was then and there ready and willing to pay Mellen his due wages, less 15*s.* 3*d.*, in the presence of the Superintendent of Mercantile Marine, and Mellen was ready and willing to receive payment in this manner. The superintendent then read to the appellant sub-sect. 1 of sect. 221 of the Merchant Shipping Act 1894, and expressed his view that the deduction of the 15*s.* 3*d.* from the wages of Mellen was not legally made, and refused to accept the wages with such deduction or to allow them to be paid to Mellen in his presence. The appellant then asked to see the articles of the *Urmston Grange*, which were supplied to him; and the superintendent then left the office where the interview had taken place, and the appellant, while still in the office, but in the absence of the superintendent, paid the balance shown by the account of wages to be due after deduction of the sum of 15*s.* 3*d.* to Mellen, and Mellen thereupon signed the account of wages,

and signed a release upon the ship's articles of agreement.

On these facts it was at the hearing before the learned magistrate contended by counsel on behalf of the respondents that it was not competent for the appellant to deduct the sum of 15*s.* 3*d.* from the wages of Mellen, even with his consent, as compensation to the owners of the *Saxony* on account of his desertion from that ship, for that such deduction could only be made by a court of summary jurisdiction for a forfeiture of wages on the offence having been proved according to the true construction of the provisions of sects. 221, 232 (1) of the Merchant Shipping Act 1894.

It was further contended that before any sum could be deducted from a seaman's wages in respect of desertion: (1) That the seaman must be proceeded against summarily; (2) that he must be convicted of the offence of desertion; (3) that a forfeiture of his wages must be decreed by the court; (4) that a quantum of forfeiture of wages as compensation in respect of the desertion must also be decreed.

It was also contended that in deducting the sum of 15*s.* 3*d.* from Mellen's wages the appellant was attempting to usurp the functions of a court of summary jurisdiction as defined by the Legislature, and that therefore the superintendent was right in refusing to accept the wages on behalf of Mellen or allow them to be paid to him in his presence, and as the appellant paid the wages in the absence of the superintendent he ought to be convicted of the offence alleged in the information.

Counsel on behalf of the appellant contended that: (1) Mellen by deserting the *Saxony* committed a breach of his agreement with the owners of that vessel and put them to direct expense, amounting to 15*s.* 3*d.*, which, by sect. 226 of the Merchant Shipping Act 1894, they were entitled to recover by civil procedure; (2) the owners of the *Saxony* were entitled to compromise their right of action, and did so by the agreement concluded as above stated between the master of the *Urmston Grange*, acting on their behalf, and Mellen; (3) the right of the Board of Trade (if any) to take proceedings against Mellen under sect. 221 of the Merchant Shipping Act for an offence under that Act was not prejudiced by such agreement; (4) a full and true account of the seaman's wages in the form approved by the Board of Trade had been delivered to the seaman as required by the Merchant Shipping Act 1894; (5) the deduction of 15*s.* 3*d.*, as shown on this account, was a proper and lawful deduction and not contrary to the provisions of the Act; (6) the appellant was ready and willing to pay off Mellen in manner provided by the Act, but was prevented from doing so by the absence of the superintendent, who improperly withdrew his presence; (7) by reason of the premises the summons ought to be dismissed.

The learned magistrate was of opinion that a forfeiture for desertion of any part of a seaman's wages must be determined by a court of competent jurisdiction in accordance with the provisions of sects. 221 and 232 of the Merchant Shipping Act 1894; that it could not be the subject of private arrangement, and that the deduction of 15*s.* 3*d.* from the seaman's wages was illegal. He accordingly convicted the appellant and fined him the sum of one shilling, and ordered him to pay the respondents the sum of seven guineas for their costs.

The learned magistrate declared that he would not have so convicted him had he not agreed with the view taken by the Superintendent of Mercantile Marine, for if the appellant was legally entitled to have made the deduction from the seaman's wages he should have held (as was conceded by counsel for the respondents) that the superintendent should have afforded the appellant facilities for paying the wages, less the deduction, in his presence, and that the payment must be taken to have been so made.

The appellant now appealed against the learned magistrate's decision.

J. A. Hamilton, K.C. (*Noad* with him) for the appellant.—All that has been done here is to compromise a right of action. The seaman Mellen entered into a contract with the owners of the *Saxony*. Subsequently he broke that contract. His breach caused the owners of the *Saxony* damage which they estimated at 15*s.* 3*d.* The master of the *Urmston Grange*, acting as their agent, proposed that their claim should be settled for this amount, and the seaman agreed. How can this be illegal? Sect. 226 of the Act expressly reserves all civil remedies for desertion, notwithstanding the penal provisions for that offence which the Act contains. The respondents were in no way concerned in this compromise. Their right to prosecute and to forfeiture were not prejudiced by it. The owners of the *Saxony* were under no obligation to prosecute, and so their undertaking not to do so if the damage inflicted upon them by the seaman's breach of contract was made good was no breach of duty. If the appellant was justified in making the deduction there is no offence in paying the wages after the superintendent withdrew, since by withdrawing the superintendent rendered it impossible to pay the wages in his presence.

Sir *Edward Carson* (S.-G.), *H. Sutton*, and *Howard Smith*, for the respondents, were not called on.

Lord ALVERSTONE, C.J.—I am of opinion that the decision of the magistrate is right for the reason that he has given. But I am anxious it should not be thought that I have expressed any opinion except upon the facts which are before us. In this case the captain was summoned for not paying the seaman his wages in the presence of the Superintendent of Mercantile Marine, and if it is merely a question of paying wages, and they are paid otherwise than as provided by sect. 131 of the Merchant Shipping Act 1894—that is to say, through, or in the presence of a Superintendent of Mercantile Marine—it is undoubtedly clear that an offence has been committed. Those words "through or in the presence of a superintendent" are not merely formal words to show that the man gets his money—not merely to show that it does not pass through the hands of a crimp or anybody who will deduct a portion of the money. The Superintendent of Mercantile Marine is there for another purpose. Under sect. 132 an account has to be delivered, and any deduction from the wages must appear in the account which is delivered at the time the wages are paid. Now, the superintendent, of course, on the face of the document would see nothing but

"Deducted by your authority 15*s.* 3*d.*" That might mean anything; but it was in fact a deduction made in pursuance of the bargain made between the captain and the fireman, which, I take it, for this purpose he thoroughly understood. That being so, what did the bargain practically amount to? By sect. 221 it is provided that if a seaman commits the offence of desertion he shall "be liable to forfeit all or any part of the effects he leaves on board and of the wages which he has then earned and also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him." By sect. 232, "Where any wages or effects are under this Act forfeited for desertion from a ship those effects may be converted into money, and those wages and effects or the money arising from the conversion of the effects shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and, subject to that reimbursement, shall be paid into the Exchequer and carried to the Consolidated Fund." Therefore, in proceedings before a magistrate the claim of the owners of the *Saxony* in this case would be a first charge upon any money which the magistrate thought fit or directed should not be paid over to the seaman. It is plain, therefore, to my mind that this particular bargain was a bargain which purported not merely that the captain should receive a sum of money on account of the owners of the *Saxony*, but also purported to place the seaman in a different position with reference to the consequences of deserting as provided for by sects. 221 and 232. In other words, the agreement had dealt with his liabilities under the forfeiture without the sanction of the court. Now, the effect of the superintendent being present to see that the money is paid, which is shown on the face of that bill, having regard to the terms of that bill, would have been to make him—certainly indirectly and I think, to a certain extent, directly—sanction the deduction so made. It seems to me the superintendent was right in saying that he would not be a party to a deduction made upon the basis of this statement, and therefore he declined to be present when the wages were paid. That being so, the man is paid without the superintendent being present; therefore the payment when the superintendent was not present was not a lawful payment, and the master took the responsibility of making it. There is nothing in sect. 226 which conflicts in any way with the view which I have expressed. Sect. 226 does reserve certain rights. I express no opinion at present as to what may be the actual rights of a shipowner apart from the rights given to him which are reserved by sect. 226. Of course, it is quite possible there may be other matters to which our attention has not been called which may have a bearing upon that point; but that I do not know. All I say is that the rights reserved by sect. 226 of a remedy by action or by summary procedure have no bearing, in my opinion, upon sects. 131, 221, and 232, under which this arrangement was purported to be carried out. Therefore, I am of opinion that, for the reason stated by the learned magistrate, his decision is perfectly right.

Wills, J.—I am of the same opinion, and I also wish to limit my judgment entirely to the facts of this case. Undoubtedly sect. 226 preserved certain civil remedies; and whether there is any objection to their application in such a case as this, I really do not know. It has been intimated that even upon that point there might be a question, and, therefore, inasmuch as I have not had my attention necessarily directed to anything which might conflict with the *primâ facie* meaning of sect. 226, I desire to say that I express no opinion that, under sect. 226, exactly what has been done here could be done, although the compromise of the criminal proceedings has been admitted. That question must be considered when it arises. The utmost that can be said about sect. 226 and its application to this case is, supposing that it would entitle the Shipping Federation to do what they have done with different expressions as to the nature of the reservation of the 15*s.* 3*d.*, and omitting anything which could be construed into a promise not to prosecute—supposing that could be done—that is not the present case. The case here, to my mind, was perfectly plain. The letter which has been written, and after reading which the seaman signed the authority, seems the clearest possible intimation that if he signed that authority the owners of the *Saxony* would not prosecute him, and, inasmuch as they are the only people who are likely to prosecute, that is a strong consideration leading him to agree to this, because, by the compromise, he would get rid of the criminal proceeding. It is quite true that, under sect. 231 (1), as far as the owners of the *Saxony* were concerned, all that they could get was the 15*s.* 3*d.* It is also clear that if proceedings were taken under sect. 221 nothing could prevent the magistrate, if he thought right, from forfeiting the whole of the seamen's wages. Therefore, the bargain is one by which the seaman gets rid of the liability to criminal proceedings which may result in a fine or a forfeiture to the Exchequer of the whole of his wages. I therefore think, under these circumstances, that the superintendent was perfectly justified in going into the matter and refusing to be present when the payment was made. Sect. 137 of the Act clearly shows that the superintendent has a good deal more to do than to be merely mechanically present when the wages are paid over; his functions are of a different character from that. I think, therefore, the superintendent was right, and the magistrate right in the decision at which he has arrived.

Channell, J.—I am of the same opinion. I think the magistrate was quite right in saying that a forfeiture for desertion of any part of a seaman's wages must be determined by a court of competent jurisdiction and cannot be the subject of private arrangement. It is clear that these provisions as to forfeiture are in the nature of criminal proceedings. It is only in some cases that the man may be liable to imprisonment. The forfeiture is a penalty according to the section, and it speaks about the "offence" and so on. There can be no doubt about that part of the case. There is also no doubt that the private bargain which was, in point of fact, come to in this case was in the nature of an arrangement

with respect to forfeiture of seamen's wages. The document refers to that. It refers not only to the forfeiture of the wages in the first ship, but to the wages subsequently earned; and it says if the man does not agree, then they ask the present appellant to retain all his wages earned on the second ship. The result, therefore, is that this is an arrangement which is arrived at by the seaman with full knowledge of what he is doing, and it is an arrangement settling what is to be done in respect to that claim for forfeiture. As to the case which might arise, although it would not be so effective—namely, the Shipping Federation sending to the captain of the second ship a notice to the effect that the seaman has committed a breach of contract and would be liable to be sued in the County Court for damages, and requesting the seaman to agree that those damages should be deducted from his wages—as to what would happen in such a case as that it is not for the court now to say. All we do say is that it would be a very different case from the present. What answer there may be to such a case I do not know; but one thing is obvious, and that is that it would not be so effective in inducing the seaman to agree that the money should be deducted, and, therefore, it would not be quite so satisfactory even if it is valid. As to whether it is valid or not, I do not think it would be right for the court to express any opinion until the question arises.

Appeal dismissed.

Solicitors: for the appellant, *Botterell* and *Roche*: for the respondents, *Solicitor to the Board of Trade.*

Nov. 5 and 11, 1903.

(Before Walton, J.)

Turner, Brightman, and Co. *v.* Bannatyne and Sons Limited. (*a*)

Demurrage—Lay days—Grain cargoes—London Corn Trade Association Contract—Construction—Number of days to be allowed in discharging.

The London Corn Trade Association Contract, No. 22, provided as to the discharge of grain cargoes from vessels, "Sufficient days to be left for unloading," and, by clause 4, "Sufficient days (counting quarter days) shall be as follows: One running day for every 400 tons up to 2800 tons of grain, and for all quantities in excess 500 tons per day (as provisionally invoiced)," but in no case were less than five days to be allowed.

Held, upon the construction of this clause, that for all vessels of whatever size the time to be allowed for discharging the cargo was one day for every 400 tons of cargo up to 2800 tons, and one day for every 500 tons above 2800 tons, subject in every case to the minimum of five days; and that consequently, in discharging a grain cargo of 3800 tons, one day was to be allowed for every 400 tons up to 2800 tons—that is, seven days—and one day for every 500 tons for the excess above 2800 tons—namely, 1000 tons—making in all nine days.

Commercial action tried before Walton, J.

The plaintiffs were the owners of the steamship *Zodiac*, of 2918 tons gross register.

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

The defendants were the holders of a bill of lading, dated the 9th Dec. 1902, for a cargo of maize laden upon the *Zodiac* at Buenos Ayres, and under the bill of lading the defendants took delivery of the cargo at Limerick in the month of Jan. 1903.

By the charter-party the cargo had to be discharged as per London Corn Trade Association Contract, No. 22, and demurrage at the rate of 4*d.* sterling per gross register ton per day was payable for any detention in taking delivery of cargo at the port of discharge.

The contract No. 22 provided:

Sufficient days to be left for unloading (Sundays, Good Friday, Easter Monday, Whit-Monday, and Christmas Day excepted).

And, further, by clause 4:

Sufficient days (counting quarter days) shall be as follows: One running day for every 400 tons up to 2800 tons of grain, and for all quantities in excess 500 tons per day (as provisionally invoiced).

The *Zodiac* arrived at Limerick on Saturday, the 17th Jan. 1903. The provisional invoice for her cargo showed an amount of 3839 tons, and the discharge of the cargo began on Monday, the 19th Jan., and was completed at 6 p.m. on the 28th Jan., being a period of eight and three-quarter days.

The plaintiffs said that at the stipulated rate of discharge of 500 tons per day the defendants had the period up to and including three-fourths of a day on the 26th Jan. for the discharge, and that, as the discharge was not in fact completed until 6 p.m. on the 28th Jan., there was demurrage for two and a quarter days due from the defendants to the plaintiffs, and the plaintiffs claimed as demurrage 4*d.* per ton on 2918 tons gross register —48*l.* 12*s.* 8*d.* per day, which for two and a quarter days amounted to 109*l.* 8*s.* 6*d.*

The defendants said that the vessel was not ready to discharge on Saturday, the 17th Jan.; and that by the custom of the port of Limerick the day of entry did not count in the computation of lay days and also that they were not bound to begin discharging on a broken day, and that the discharge properly began on Monday, the 19th Jan., and, according to their construction of the contract, the stipulated rate of discharge—one running day for 400 tons up to 2800 tons of grain and for all quantities in excess 500 tons per day —gave the defendants nine and a quarter days for the discharge, and that as the actual period of discharge—from Monday, the 19th Jan., to 6 p.m. on the 28th Jan.—was only eight and three-quarter days, no demurrage was payable by them to the plaintiffs.

Scrutton, K.C. (*A. A. Roche* with him) for the plaintiffs.—The question is as to the construction of the contract, and how the lay days are to be computed under the contract. If the cargo does not exceed 2800 tons, then one lay day is to be allowed for every 400 tons of cargo, subject to the minimum of five days. If the cargo were exactly 2800 tons, then the number of days to be allowed would be seven. Up to this point there is no dispute. If the cargo exceeds 2800 tons, then it is submitted that the true construction of the contract is that the cargo must be discharged at the rate of 500 tons a day, and that one lay day must be allowed for each 500 tons of the cargo. In

that case the whole number of lay days is ascertained by dividing the whole cargo by 500. Thus in the present case, where the cargo is 3800 tons, the lay days are ascertained by dividing 3800 by 500, which gives seven and three-quarter days. The reason for the difference is that the larger ships have larger and better appliances for discharging cargoes.

Bray, K.C. (*Clavell Salter* with him) for the defendants.—The true construction of the contract is that, whatever be the amount of the cargo, one day is to be allowed for every 400 tons up to 2800 tons, and one day for every 500 tons above 2800 tons, subject in all cases to the minimum of five days. Applying that to the present case, where the cargo is 3800 tons, there is one lay day to be allowed for every 400 tons up to 2800 tons—namely, seven days—and one day for every 500 tons for the excess above 2800 (that is, for 1000 tons)—namely, two days—making nine days in all. If the plaintiffs' construction be adopted, it would follow that for a cargo of 2800 tons seven lay-days would be allowed, being one day for each 400 tons; but if the cargo were, say, 2801 tons, then only one day would be allowed for each 500 tons, in all only five and a half days. That result shows that the plaintiffs' construction cannot be correct.

Cur. adv. vult.

Nov. 11.—Walton, J.—In this case the plaintiffs, who were the owners of a steamer called the *Zodiac*, sued the defendants for demurrage which they claimed under a charter-party dated the 17th Nov. 1902. The only question which I have to deal with is as to the construction of a clause in that charter-party. The charter-party is in a printed form adapted for steamers loading wheat or maize in the Argentine, and provides, amongst other things, in clause 16, which is headed "Demurrage," as follows: "Demurrage as above"—that is, at the rate which had been mentioned above—"shall be payable for any detention in taking delivery of cargo at port of discharge, the same having to be discharged as per London Corn Trade Association Contract, No. 22." The printed form originally stood thus, "the same having to be discharged as customary at the port of discharge," but those words "customary at the port of discharge" were struck out, and for them were substituted in writing the words: "Per London Corn Trade Association Contract, No. 22." The result is that, to find out what lay days are to be allowed to this steamer at the port of discharge, it is necessary to refer to the London Corn Trade Association Contract, No. 22. It is called "La Plata grain contract, steamer cargoes," and, it being a contract for the sale of a cargo of grain on terms as to price of cost, freight, and insurance, it provides for the conditions and terms upon which the cargo is to be shipped and received by the purchaser in the United Kingdom, and, amongst other things, it provides that sufficient days are "to be left for unloading (Sundays, Good Friday, Easter Monday, Whit-Monday, and Christmas Day excepted), or to discharge as per custom of port if so provided by charter-party." In the charter-party it is not provided that the discharge is to be in accordance with the custom of the port, but is to be in accordance with the terms of this Corn Trade Association Contract; and therefore the contract says that sufficient days are to be allowed for loading, Sundays and other days excepted. To find out what "sufficient days" means, we have to turn to the back of the contract, and amongst the conditions and rules applicable to the contract printed on the back of the form there was this: "Provisional invoice based on bill of lading weight, with ship's name and date of bill of lading, is to be sent by the seller to his buyer within seven days after arrival of the documents in due course in Europe." Then lower down comes condition No. 4: "Sufficient days (counting quarter days)"—that is, counting quarters of days—"shall be as follows: One running day for every 400 tons up to 2800 tons of grain, and for all quantities in excess 500 tons per day (as provisionally invoiced), whether for direct port or for orders, but in no case less than five days." Then follow the same exceptions: "Sundays, Good Friday, Easter Monday, Whit-Monday and Christmas Day excepted." It thus appears that the clause as to the lay days in this case is not a clause originally written into the charter-party, but is in truth the merchant's clause intimating the merchant's requirement, and that requirement, as stated by the contract form, is accepted by the shipowner; but that perhaps has no real bearing on the construction of the contract. What I have to construe is the meaning of these words: "Sufficient days shall be as follows: One running day for every 400 tons up to 2800 tons of grain, and for all quantities in excess 500 tons per day (as provisionally invoiced), but in no case less than five days." Certain things are agreed. First, it is agreed and plain that the bill of lading weights are to be the basis for the computation to be made in order to ascertain the number of lay days at the port of discharge. It is intended that the master should know as soon as the bills of lading are signed what number of lay days are to be allowed at the port of discharge; and it is intended that the consignees, as soon as they get the provisional invoice setting out the bill of lading weights, should also know at once by an easy calculation what lay days are to be allowed, as I have said, at the port of discharge. Again, it is plain, and there is no dispute about it, that at least five days are to be allowed, and it is suggested, and probably rightly suggested, that this is stipulated for because there is always certain work preliminary to the actual discharge which has to be done, and which, speaking generally, will very likely occupy more or less the same length of time in the case of a small ship as in the case of a larger ship. So that the consignees stipulate that they must have, whatever the weight of cargo to be discharged may be, at least five days. Then the next question which arises is, What number of lay days are to be allowed over and above the minimum of five? Here, again, it cannot be disputed that if the cargo does not exceed 2800 tons in weight, the number of lay days is to be computed at the rate of one day to every 400 tons of cargo, subject, of course, to the minimum of five days. Thus for 2800 tons the lay days would be seven. So far there can be no dispute as to the meaning of the clause. Then comes the question, How many lay days are to be allowed where the cargo exceeds 2800 tons in weight? Counsel for the shipowners contends that in such a case the number of lay days is to be computed by taking

one day for every 500 tons of the cargo. Applying that to the present case, where the cargo was about 3800 tons, counsel for the shipowners says that the lay days are to be arrived at by dividing 3800 by 500, which gives seven and three-quarter days, and that therefore there are seven and three-quarter days allowed for discharging this cargo. On the other hand, counsel for the defendants says that that is not the true construction of the clause. He says that the lay days are to be ascertained by taking one day for every 400 tons up to 2800 and one day for every 500 tons of the quantity in excess of 2800—that is to say, the difference between 2800 and in this case 3800 tons, which was the weight of the whole cargo. This gives seven days for the 2800 tons and two days for the balance (1000 tons) of the cargo at the rate of 500 tons per day—that is, nine days altogether. Whether the plaintiffs' or the defendants' construction of the clause is adopted, the number of the lay days can be ascertained without any difficulty from the bill of lading weights by a simple calculation. At first sight I was much impressed by the contention for the shipowners that the clause must be read as distinguishing between large vessels and small vessels, drawing the dividing line at vessels which carried 2800 tons; and that for small vessels the lay days were to be calculated at the rate of one day for every 400 tons, and for the large vessels at the rate of one day for every 500 tons. The language of the clause is, I think, capable of this construction, and there is no doubt that the explanation of the scale is to be found in the fact that larger vessels, from their construction and appliances, can easily be discharged at a more rapid rate than smaller vessels can. But a closer consideration of the plaintiffs' construction of the clause discloses considerable difficulty. A vessel carrying a cargo of 2800 tons is allowed seven days to discharge; according to the plaintiffs' construction, a vessel carrying a cargo of 2850 tons is allowed five and three-quarter days only, and a vessel carrying 3000 tons is allowed six days only. There would in all probability be no practical difference, so far as facilities for discharging are concerned, between a vessel carrying 2800 tons and a vessel carrying 3000 tons; indeed, the printed form of charter-party used in the present case indicates that in the same vessel it may be uncertain whether the cargo carried will be 2500 or 3000 tons. The charter-party, no doubt, provides for a full cargo, but by clause 22 it is provided as follows under the head of "Capacity": "Owners undertake that the steamer shall not load more than 3960 tons and not less than 3240 tons, English weight, of wheat or maize, the quantity between these limits to be in captain's option." This gives a margin of 720 tons, which may or may not be carried at the master's option. There is no reason to suppose that cargoes of from 2800 to 3500 tons are at all uncommon. It seems very improbable that the scale provided by the clause in question was intended to make such a surprising and inexplicable difference in the number of lay days to be allowed to vessels carrying 2800 tons and to vessels carrying from 2800 to 3800 tons.

On the other hand, if the clause is construed according to the contention of the defendants, it provides for a gradual acceleration of the discharge in proportion to the size of the vessel. For 2800 tons seven days are allowed, which is at the rate of 400 tons a day; for 3800 tons, nine days are allowed, which is at the rate of about 422 tons a day on the whole cargo; for 4800 tons, eleven days are allowed, which is at the rate of about 436 tons a day; for 5800 tons, thirteen day are allowed, which is at the rate of about 446 tons a day. It must be remembered that the clause is not indicating a definite fixed quantity to be discharged each day. If it did, there might be more difficulty in accepting the defendants' construction of it. The clause provides a scale by which anyone who knows the bill of lading weights can readily ascertain the total number of lay days to be allowed at the port of discharge. Whether the plaintiffs' scale or the defendants' scale is adopted, the lay days can be ascertained without difficulty from the bill of lading weights. So far as the language of the clause is concerned, it appears to me at least as capable of the defendants' construction as of the plaintiffs'. Perhaps the use of the word "quantities" in the plural to some extent favours the plaintiffs' construction; but I think that "all quantities" means any quantity, whatever it may be, large or small. On the other hand, the expression "quantities in excess" seems to me very aptly and accurately to describe the quantity by which the total cargo exceeds 2800 tons. On all such excess the discharge is to be at the rate of 500 tons a day. The clause construed according to the contention of the defendants takes into account, in my opinion, not unreasonably the fact that the larger the vessel is usually the greater are her facilities for discharge. I have come to the conclusion that upon this question of construction my judgment must be for the defendants. I ought to mention that my attention has been called to a case in which the Commercial Court at Antwerp had to consider the construction of this same clause, and held that the construction for which the plaintiffs contend was the true construction. I have not lightly, nor without much consideration, arrived at a conclusion which differs from that of a court for which I have the highest respect, but I am, of course, bound to exercise an independent judgment upon the question, the more especially because it is a question as to the meaning of a clause in an English contract.

Judgment for the defendants on the point of law as to the construction of the clause.

Solicitors: for the plaintiffs, *Botterell* and *Roche*; for the defendants, *J.* and *A. A. Tilleard.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 27 *and* 28, 1903.

(Before Barnes, J. and Trinity Masters.)

The Challenge and Duc d'Aumale. (a)

Collision—Tug and tow—Fog — Duty of tug to stop on hearing whistle of approaching steamship — Art. 16 *of Regulations for Preventing Collisions at Sea — Proceedings in foreign courts—Judgment by default—Estoppel.*

Art. 16 *requires a steam vessel hearing apparently forward of her beam, the fog signal of a vessel*

(a) Reported by Christopher Head, Esq., Barrister-at-Law.

the position of which is not ascertained, to, so far as the circumstances of the case admit, stop her engines.

A steam-tug with a vessel in tow, on hearing the whistle of an approaching steamship in a fog forward of her beam, is not justified in proceeding, if she can stop without encountering difficulty with regard to her tow.

The Lord Bangor (73 *L. T. Rep.* 414; 8 *Asp. Mar. Law Cas.* 217; (1896) *P.* 28) *distinguished.*

Where the plaintiffs, in order to prevent the arrest of their vessel in Belgium, gave security to answer any judgment that might be obtained against them in France, and the defendants, having obtained a judgment in France against the plaintiffs in default of appearance, took proceedings in Belgium to have the French judgment made executory there, and the plaintiffs appeared to such proceedings, and the Belgian courts, without inquiring into the merits, declared the French judgment executory in Belgium:

Held, that the plaintiffs were not debarred from bringing an action for damages in respect of the same collision.

ACTION for damage by collision brought by the Marychurch Steamship Company Limited, the owners of the steamship *Camrose*, against the Elliott Steam-tug Company Limited, the owners of the tug *Challenge*, and La Compagnie Maritime Française, the owners of the barque *Duc d'Aumale*.

The *Camrose* was a steamship of 2565 tons gross register, and at the time of the collision was on a voyage from Ibrail to Antwerp with a cargo of grain.

The *Duc d'Aumale* was a French four-masted barque of 2297 tons gross register, and was on a voyage from London to San Francisco, *viâ* Cherbourg, with a part cargo on board, in tow of the tug *Challenge*, a steam-tug of 137 tons gross register.

The collision occurred in a dense fog, about 7.40 a.m. on the 22nd June 1902, in the English Channel, between the *Royal Sovereign* lightship and Dungeness.

The plaintiffs' case was that the *Camrose* was on a course of E. ½ N. magnetic, making from two to two and a half knots an hour through the water, with engines working dead slow, when a prolonged blast, followed by two short blasts, were heard from the tug *Challenge*, apparently about two points on the port bow, and a good distance off. The engines were immediately stopped, and the whistle sounded in reply. Shortly afterwards the helm was ordered to be ported, but, before the order could be effectively carried out, the whistle of the *Challenge* was again heard, apparently more ahead, and at the same time she came into sight between one and two ships' lengths off, and about a point on the starboard bow. The engines of the *Camrose* were at once put full speed astern, and as the *Duc d'Aumale* came into sight between one and two ships' lengths off, and about a point on the port bow of the *Camrose*, the helm was starboarded, but the *Duc d'Aumale* came on across the bows of the *Camrose*, and struck the starboard bow of the *Camrose* with her starboard side about amidships.

The plaintiffs charged the defendants (*inter alia*) with not stopping when the whistle of the *Camrose* was heard forward of the beam, with attempting to cross ahead, and with not stopping and reversing their engines. They also charged them with breach of arts. 16, 19, 22, and 23 of the Regulations for Preventing Collisions at Sea.

The case of the defendants, the owners of the tug *Challenge*, was that the *Challenge* was on a voyage from London to Cherbourg with the *Duc d'Aumale* in tow and a scope of about eighty fathoms of hawser, and was on a course W.S.W. magnetic, making about two knots an hour through the water. In these circumstances the loom of the *Camrose* was seen from two to three points on the starboard bow, and about two cables' lengths distant, and shortly afterwards the *Camrose* collided with the *Duc d'Aumale*.

The other defendants, the owners of the *Duc d'Aumale*, admitted that the whistle of the *Camrose* was heard on the starboard bow, and that the tug continued on her course.

Both defendants charged the plaintiffs (*inter alia*) with not stopping, the owners of the tug *Challenge* also charging them with not stopping and reversing when the whistle of the *Challenge* was first heard forward of the beam, with improperly failing to keep clear, with improperly porting the helm, and with proceeding at too great a speed. They also charged them with breach of arts. 16, 22, and 23 of the regulations.

Art. 16 of the Regulations for Preventing Collisions at Sea is as follows:

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

After the collision the *Duc d'Aumale* was towed by the *Challenge* to Calais for repairs.

On the 25th June, the *Camrose* being at Antwerp, the owners were compelled to give security, in order to prevent the arrest of their vessel under process of *saisie conservatoire*, to answer any judgment which might be obtained against the master of the vessel and which might have legal effect in Belgium, and their agents, Ruys and Co., on behalf of the owners of the *Camrose*, gave security for 250,000 francs.

On the 1st July the owners of the *Duc d'Aumale* commenced an action against the owners of the *Camrose* in the Tribunal of Commerce at Nantes. The owners of the *Camrose* did not appear, and on the 20th Aug. judgment was given against them in default of appearance. The judgment held the *Camrose* liable for the damages sustained by the *Duc d'Aumale* in the collision, and ordered an inquiry as to damages, and judgment was given for the amount at which they were assessed in favour of the owners of the *Duc d'Aumale*.

On the 15th Dec. 1902 proceedings were commenced in the Civil Tribunal, Court of First Instance, at Antwerp against the owners of the *Camrose* and their agents Ruys and Co. to obtain an *exequatur* of the judgment of the Tribunal of Commerce at Nantes. The owners of the *Camrose* appeared in the proceedings, and the court held that the conditions necessary to make a decree of a French court executory in Belgium had been complied with, and decreed, without inquiring

into the merits of the collision, that Ruys and Co., being merely the agents of the owners of the *Camrose*, ought to be dismissed from the suit, and that the decision of the French court was to have full force.

The defendants now contended that the plaintiffs were debarred from recovering in the present action by reason of the proceedings abroad, and that the matter was *res judicata*. They also contended that by appearing in the proceedings at Antwerp the plaintiffs had submitted to the jurisdiction of the foreign courts and were therefore bound by their decisions.

Laing, K.C. and *Balloch* for the plaintiffs.

Aspinall, K.C. and *Batten* for the owners of the tug *Challenge*.

Carver, K.C. and *Noad* for the owners of the *Duc d'Aumale*.

The following cases were referred to in the course of the argument:

The Merthyr, 79 L. T. Rep. 676; 8 Asp. Mar. Law Cas. 475;
The Lord Bangor, 73 L. T. Rep. 414; 8 Asp. Mar. Law Cas. 217; (1896) P. 28;
The Knarwater, 63 L. J. 65, Ad.;
The Delta, 35 L. T. Rep. 376; 3 Asp. Mar. Law Cas. 256; 1 P. Div. 393.

BARNES, J.—This is a case of collision between the plaintiffs' steamship *Camrose* and the sailing ship *Duc d'Aumale*, which was in tow of the steam-tug *Challenge*. The defendants to the action are the Elliott Steam-tug Company Limited, the owners of the *Challenge*, and the Compagnie Maritime Française, the owners of the *Duc d'Aumale*. There have been two defences put in, and a point, partly of fact and partly of law, is taken by the Compagnie Maritime Française, which I will deal with later. The collision took place on the 22nd June 1902, at about 7.40 in the morning, and no doubt a good many of the discrepancies in the evidence are due to the fact that such a long time has elapsed since the collision took place. My experience in this court always has been that unless these cases are tried very soon the nautical witnesses are apt to forget all about the facts in detail, and only remember some of them, the outline of their story. I am sure that is not to be wondered at. They go to sea again, and have other business to occupy them. The collision took place, in very foggy weather, in the English Channel, between the *Royal Sovereign* lightship and Dungeness, five miles west of Dungeness and about seventeen miles from the *Royal Sovereign* lightship. It occurred between the *Camrose* and the *Duc d'Aumale*, the *Camrose* with her stem and starboard bow striking the *Duc d'Aumale* on her starboard side about amidships, at an angle of somewhere about three points. The *Camrose* was proceeding up Channel on a voyage from Ibrail to Antwerp, with a cargo of grain, and her course was E. ½ N. mag. With regard to her speed, the case made for her is that at the time in question she was only proceeding at two to two and a half knots, with engines working at dead slow, and was not exceeding a moderate speed in the circumstances. I do not think it necessary to go over the details of the cases presented with regard to the manœuvres. It is sufficient to deal with the points that are pressed against the *Camrose*, and I will only refer to the fact that the *Challenge* was towing the *Duc d'Aumale* on a voyage from London to Cherbourg—she was going on afterwards to San Francisco—with a part cargo consisting to a large extent of cement. The course which the tug and tow were on was about W.S.W., and that shows, so far as a comparison between the courses of the *Camrose* and the tug and tow is concerned, a difference of one and a half points, possibly a little more, between the opposite courses. Now, the points made against each of these vessels have been very fully and very well argued before me. Substantially they make the same points against each other, with one exception. They each say that the other was going at too great a speed, they each say that the other improperly altered her course, and they each say that the other did not stop. The defendants—the owners of the *Challenge*—further say that the *Camrose* ought in in addition to have reversed her engines. I have very little difficulty in deciding some of the points in this case. With regard to both these vessels—there are three of them, but for the purpose of this case I speak of the two defendants as one—I think both the plaintiffs and the defendants were going at a moderate speed prior to being near to each other. With regard to the helm action, which is charged by the plaintiffs as being an improper starboarding on the part of the tug and tow, and with regard to the helm action of the *Camrose*, which is charged by the defendants as being improper porting, I have come to the conclusion, assisted by the Elder Brethren, that there was no material alteration of the helm on either side which would in any way really influence one's decision in this case, and although I may make a few more remarks about that, I think the principal points are the question of stopping on the one side and stopping on the other, and also the question of the reversing of the engines which is suggested by Mr. Aspinall against the *Camrose*.

Dealing first with the case against the *Camrose*, I have said that I do not think there was any substantial alteration in her course. I cannot help thinking that the angle of the blow practically shows that the vessels had not substantially altered their courses. It is true it is a little larger than the divergence between opposite courses, but it is easy to explain that by the action of the *Camrose* with her engines. There are these further broad considerations, that the effect of the evidence of the defendants' witnesses appears to me to be that the *Camrose* did not substantially alter her course. She appears to have been heading E. by N., according to the master of the *Duc d'Aumale*, when she came in sight, which is practically the same as the course she originally was on. The principal point about the alteration of course is made by minute criticisms of the logs, one or two of which have had additions and alterations made to them. I am not satisfied that they were made at a subsequent time with the intention of making a case. The story told by the captain of the *Camrose* and extracted as far as one can generally from the features of the case and the evidence, appears to me to be that the whistle of the tug was heard sounding a towing signal, and the engines of the *Camrose* were stopped. There is then a confusion about the orders. There seems to have been an order given to port, but almost immediately after that a

second whistle was heard from the tug and the order to port was countermanded and the helm was steadied according to the helmsman without any appreciable porting at all. Then the tug was seen and the engines were reversed and the helm put hard a-starboard. That seems to have been the order of events, and it seems to me in accordance with the more or less independent evidence of the Belgian pilot. So that the case of improper action of the helm on the part of the *Camrose* to my mind fails. I have already said that her speed was moderate. The place of collision seems to me to show that. There is nothing in the damage to the contrary, and, as Mr. Laing reminded me at the last, I think the surveyor, M. Plisson, was not able to say that the damage must have been due to any substantial forward motion on the plaintiffs' vessel as compared with any substantial motion on the other vessel. I do not think he was able to form an opinion. It seems to me, and the Elder Brethren agree, there was nothing in the damage to show immoderate speed or any failure to act properly on the part of the *Camrose*. Now, as to the next point, the stopping. I think there cannot be any doubt that the engines were stopped at the time when the first whistle was heard from the tug. That is in accordance with the whole evidence of the case, and I do not think there has been any real contest about that at all. The point made by Mr. Aspinall was that the engines ought to have been reversed when the first whistle was heard, and the way entirely taken off. The rule does not prescribe that that should be done. She did what is mentioned in the second part of the rule, art. 16, and I have asked the Elder Brethren whether, in the circumstances which the master of the *Camrose* has described, he was called upon to reverse upon hearing the first whistle of the other vessel. Their opinion is that the steamer was not in the circumstances called upon to reverse when the first whistle was heard; that it was enough in the circumstances at first to stop, and then, of course, on the second whistle, to take further action by reversing, if necessary. So it seems to me that the case which was cited, of *The Merthyr* (*ubi sup.*) is a different case from this. I need not explain why. That deals with the case against the plaintiffs. Now I come to a question that I have some little difficulty in determining, and my opinion is based mainly upon the advice that I have received from the Elder Brethren. In the first place, it appears to have been admitted that if the tug is to blame the ship is to blame also. I have already said that I see no reason for imputing any fault to the tug or tow on the ground of speed. They were going at a moderate speed in the circumstances which prevailed. The next point I have, I think, practically dealt with—namely, that the tug and tow improperly starboarded their helms. It is difficult to arrive at an exact conclusion as to what was done, having regard to the conflicting stories told by the master and mate of the tug and the ship's witnesses, but I am not satisfied that the master's account is quite right about this. I do not think I can find as a fact that there was any improper alteration in the courses of the tug and tow by helm action at any time prior to the collision. What was done when the ships were in sight was done *in extremis*. I rather prefer to accept the evidence of the mate of the tug than that of the master, who seemed to me to get rather in a fog in giving his evidence. The real point in the case which I think is important is the question whether the tug ought to have stopped her engines. It is a singular fact in the case that the defence set up by the tug makes no mention of hearing any whistles from the *Camrose* prior to seeing her. The first mention of the *Camrose* is, "In these circumstances those on board of the tug saw the loom of a steamship, which proved to be the *Camrose*, coming from the westward, from two to three points on the starboard bow and about two cables' lengths distant." When evidence was given by the master of the tug he practically admitted that the whistle of the *Camrose* was heard at the same time as she was seen, and when he came to be cross-examined it seemed clear, both from his fuller evidence and from his mate's evidence, that the whistle of the *Camrose* had been heard at an interval before she was seen, and that she was seen and the whistle was heard about the same time. The master said, "We heard two signals from him, one before we sighted him and one when we sighted him; four minutes between the two." I doubt whether his four minutes is right, but he certainly heard one and then another. The mate said, "I heard one blast before we saw her, some distance off. Nothing was done to the helm or engines then. I heard another blast, and then saw the steamer only 600ft. off." That is quite a different story to that pleaded by the tug, and it is, substantially, as I read it, the story told by the *Duc d'Aumale's* witnesses, whose story is that, "In these circumstances the whistle of a steamship was heard by those on board the *Duc d'Aumale* on the starboard bow. The *Duc d'Aumale* was kept on her course, and the whistle of the tug continued to be sounded one long and two short blasts at proper intervals. Soon afterwards the whistle was again heard, and after a short interval a steamship, which proved to be the *Camrose*, came in sight, two or three points on the starboard bow of the *Duc d'Aumale*, and about a quarter of a mile distant." That is substantially what the captain of the *Duc d'Aumale* said. So there seems no doubt that the steamer's whistle was heard, and then there was an interval, and then it was heard again and the vessel was seen. That gives rise to the point whether the tug ought to have stopped her engines in the position which her master and mate described, when their evidence is considered as I have considered it, and when the evidence from the ship is considered. The point made by the defendants is that the tug and tow ought not to have, in the circumstances, stopped at all, but ought to have kept on, as avowedly they did. That they kept on at the speed at which they were going, whether it was two or three knots—possibly it was only two—there is no doubt whatever, practically until the collision took place. The tow-rope was taut all the time, and therefore the ship was making the same progress as the tug was making. The defendants say in these circumstances that they had no reason to stop. The plaintiffs' contention is that the tug ought to have stopped and let the way run off the ship, so that danger of collision or danger of any serious blow might have been averted. Let us first look at the positions of the vessels. The *Camrose* was heading up Channel,

approaching Dungeness on an up-Channel course. The tug and tow were heading down Channel, but heading W.S.W., making for Cherbourg, and, therefore, they were crossing, or rather parting to the southward from the usual Channel course there, and it seems to me that the moment the whistle was heard on the starboard bow the position probably was—almost a certainty—that that steamer was on a crossing course to theirs, and, the whistle being heard on the starboard bow, every movement forward brought those vessels into closer proximity. Therefore the position is such that the greatest precaution should be taken to avoid danger and to minimise it in every way possible. That seems to me absolutely clear, and, when I have listened to the evidence given by the master of the tug and the mate, I cannot see that they have suggested that there was any difficulty whatever in the tug stopping so as to allow the way to run off the ship. I have asked the Elder Brethren their advice on this, which is a nautical question, and I have had some difficulty about it, especially because of what I have been referred to in the case of *The Lord Bangor* (*ubi sup.*). That is why I have pointed out in this case that the circumstances were such that, if it could possibly be done, such action should be taken to avert all danger of collision. The Elder Brethren have advised me that in this case the tug could have stopped without encountering any difficulty with regard to her tow, sufficiently to let the way run off the tow—that the circumstances of the case which I have described admitted of this being done, and in the position of the vessels it would have been proper seamanship to do so. That seems to me to put an end to the matter, because if the ship's way had been taken off by the tug's stopping it is quite obvious that the collision which took place would not have taken place. I do not think that that leaves anything more to consider in connection with the navigation of the vessels. The result is that I find there was no blame in this case on the part of the *Camrose*, but, on the other hand, that the *Challenge* and the *Duc d'Aumale* must be held to blame.

The next point taken by the defendants, the Compagnie Maritime Française, is that there has been a decision between the plaintiffs and the owners of the *Duc d'Aumale* which binds the plaintiffs, so that they cannot proceed with the present case. When the matter is discussed objection is taken by the plaintiffs that the questions at issue, which decide the merits of the case, have never been determined at all between the plaintiffs and the defendants in this case. They certainly never have been determined between the plaintiffs and the tugowners; and it is said they have never been determined in any shape or form between the plaintiffs and the owners of the *Duc d'Aumale*. The matter has been treated in a very summary way before me. I have had nothing handed in except some admissions, a copy of a judgment obtained at Nantes by the owners of the *Duc d'Aumale*, and copies of some pleadings and form of judgment at Antwerp. But giving the best judgment I can on the way the matter has been discussed before me, as I understand, what has taken place is this: The owners of the *Duc d'Aumale* arrested the *Camrose* at Antwerp in order to, if possible, levy upon that ship, or the bail given for it, the amount of a judgment which they might afterwards obtain in Nantes. Proceedings were instituted by them at Nantes subsequent, as I understand, to the time when the ship was arrested at Antwerp, and those proceedings were entered in the Commercial Tribunal at Nantes for the purpose of obtaining a decision that the *Camrose* was to blame for the collision, and liable for the damages which the owners of the *Duc d'Aumale* sought to recover from the owners of the *Camrose*. The owners of the *Camrose* did not appear in that suit, as is recorded in the admission that has been made. They were not at the commencement of the suit, nor at any time subsequently, within the territory of the Republic of France, and not subject to the jurisdiction of the said court, and they never appeared in that suit. The suit was proceeded with, and treated as a suit by default, and a judgment was obtained in the tribunal at Nantes, which, in effect, appears to me to hold the owners of the *Camrose* responsible for damages sustained by the owners of the *Duc d'Aumale*. Then, having obtained that judgment, the plaintiffs in the French proceedings took steps to enforce their proceedings in which they had arrested the *Camrose* at Antwerp. As I understand from the copied judgment before me the Civil Tribunal at Antwerp determined that an *exequatur* of the judgment given by the tribunal at Nantes is to be granted, but they have no jurisdiction as regards Ruys and Co., who have given bail to prevent the arrest of the *Camrose*. The only point that is taken for the present defendants, the owners of the *Duc d'Aumale*, is that by appearing in Belgium to stop their ship being arrested they have in some way assented to the jurisdiction of the French Tribunal at Nantes. I confess I am wholly unable to follow that point at all. It seems to me that the owners of the *Camrose* were in no way bound to submit to the jurisdiction of the court in France. They did not appear and were not there, and they owed no allegiance. It is now said they were bound to appear at Nantes, because their ship had been arrested in Belgium to enforce a judgment not yet obtained at Nantes. It may be that, by not appearing at Nantes, they have left themselves in the position of having this judgment somehow enforced against them in Belgium; but I am not informed at present how that is going to be done. There is no evidence before me of any jurisdiction over the bail, or to try the merits. There is no doubt whatever that the question of the merits has never been tried anywhere; and that being so, as I say, the whole point is that, somehow or other, because the owners of the *Camrose* have appeared, when no suit had been instituted in France, to stop the arrest of the ship in Belgium, they have submitted to the jurisdiction of the tribunal in France. I fail to understand how that is substantiated. It seems to me that that is no bar to the judgment I have pronounced, holding the two sets of defendants to blame.

Solicitors for the plaintiffs *Thomas Cooper* and *Co.*

Solicitors for the defendants the owners of the tug *Challenge*, *Williamson*, *Hill*, and *Co.*, agents for *R.* and *R. F. Kidd*, North Shields.

Solicitors for the defendants the owners of the *Duc d'Aumale*, *W. Crump* and Son.

Oct. 28 *and Nov.* 2, 1903.

(Before BARNES, J. and TRINITY MASTERS.)

THE DUC D'AUMALE (No. 2). (a)

Salvage—Tug and tow—Collision partly due to negligence of master of tug—Rights of crew of tug to be rewarded.

The fact that under a contract of towage the tug is to be considered the servant of the tow does not entitle the tug owners to claim salvage for services to the tow rendered necessary by a collision, partly brought about by the negligence of the master of the tug.

Where a tug has caused damage to the tow through the negligence of the master of the tug, and the assistance of the tug has had to be taken by the tow in order to salve her, the other members of the crew are not entitled to recover salvage.

ACTION for salvage by the owners, master, and crew of the steam-tug *Challenge* against the owners of the French barque *Duc d'Aumale.*

A collision occurred on the 22nd June 1902, in the English Channel, between the steamship *Camrose* and the *Duc d'Aumale*, which at the time was on a voyage from London to Cherbourg in tow of the plaintiffs' tug *Challenge*. The *Duc d'Aumale* was considerably damaged in consequence, and, at the request of her master, was towed by the *Challenge* into Calais for repairs.

At the trial of the collision action brought by the owners of the *Camrose* against the owners of the *Challenge* and the *Duc d'Aumale*, the learned judge came to the conclusion that the collision was solely caused by the negligent navigation of the *Challenge* and the *Duc d'Aumale.*

By the contract of towage entered into by the owners of the *Duc d'Aumale* and the Elliott Steam-tug Company Limited, the owners of the *Challenge*, it was agreed (*inter alia*):

> That the owners of the steam-tugs are not to be answerable or accountable for any loss or damage whatsoever, by collision or otherwise, which may happen to or be occasioned by any of the cargoes on board of the same while such vessel is in tow, whether arising from or occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of them or their servants . . . and that the owner or persons interested in the vessel or craft so towing, or of the cargo on board of the same, shall and do undertake, bear, satisfy, and indemnify the tugowners against all liability for the above-mentioned matters; and especially that to all intents and purposes whatsoever the master and crew of the tug or tugs so towing shall be deemed and considered to be the servants of the owners, master, and crew of the vessel or craft towed, the tugowners being in no way liable for any of their acts or for any of the consequences of the causes above excepted. The acceptance, hiring, or employing of a steam-tug is not to prejudice any claim the steam-tug owners may have to salvage remuneration for any extra services that may be rendered to the ship or cargo from or arising out of circumstances not existing or contemplated at the time of such acceptance, hiring, or employment.

The services consisted in towing the *Duc d'Aumale* after the collision to Calais.

There was a dense fog at the time, and the *Duc d'Aumale* was making water rapidly, and had 6ft. of water in the hold on her arrival at Calais.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

The facts, except as to the alleged depth of water in the hold of the *Duc d'Aumale* after the collision, and the danger of her sinking, were admitted by the defendants, but it was contended that the plaintiffs were not entitled to salvage at all as they had themselves been guilty of negligence in causing the collision.

It was agreed between the plaintiffs and defendants that the negligence of the tug was that of the master alone.

Aspinall, K.C. and *Nelson* for the plaintiffs.—It is submitted the plaintiffs are entitled to salvage. Under the towage contract those on the tug were the servants of the tow, and the right to claim salvage was expressly reserved. Apart from contract, the tug is the servant of the tow:

> *The Romance*, 83 L. T. Rep. 488; 9 Asp. Mar. Law Cas. 149; (1901) P. 15.

There was no breach of duty between the tug and the tow, and the owners of the tug are not to be deemed to be wrongdoers:

> *Milburn* v. *Jamaica Fruit Company*, 83 L. T. Rep. 321; 9 Asp. Mar. Law Cas. 122; (1900) 2 Q. B. 540.

As between the tug and her tow, there was no negligence on the part of those in charge of the tug. They were merely obeying the orders of the tow, and they were bound to obey them:

> *The Altair*, 76 L. T. Rep. 263; 8 Asp. Mar. Law Cas. 224; (1897) P. 105.

The parties have agreed that the owner of the tow shall be responsible, and the master is for all such purposes his servant. The tug must continue to perform her contract if possible, but on salvage terms:

> *The Minnehaha*, 4 L. T. Rep. 810; 1 Mar. Law Cas. O. S. 111; Lush. 335.

In *The Five Steel Barges* (63 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 580; 15 P. Div. 142) the tug was bound to stop and rescue the barges, but it was held she was entitled to salvage for so doing. Even if the owners cannot claim salvage owing to the collision having been partly caused by the negligence of the master, the crew are entitled to do so. The point has never been argued, and it seems to have always been assumed that they are identified with the wrongdoing of the ship. This is no longer good law:

> *The Bernina*, 58 L. T. Rep. 423; 6 Asp. Mar. Law Cas. 257; 13 App. Cas. 1.

If there has been no personal wrongdoing on the part of the claimants, it is submitted they are entitled to be rewarded.

Carver, K.C. and *Noad* for the defendants *contra*.—The accident did not put an end to the towage contract. A man who has been negligent and rendered salvage necessary cannot claim salvage, and nobody ought to profit by his own wrongdoing:

> *The Cargo ex Capella*, 16 L. T. Rep. 800; 2 Mar. Law Cas. O. S. 552; L. Rep. 1 A. & E. 356;
> *The Robert Dixon*, 42 L. T. Rep. 344; 4 Asp. Mar. Law Cas. 246; 5 P. Div. 54.

Here the court has expressly found that there was negligence on the part of the tug, and it has

been agreed between the parties that the negligence of the tug was that of the master alone:

The Alairt (*ubi sup.*).

No doubt there are cases where the crew can make a claim and the shipowners cannot:

The Maria Jane, 14 Jur. 857;
The Sappho, 24 L. T. Rep. 795; 3 Mar. Law Cas. O. S. 521; L. Rep. 3 P. C. 690.

All that the crew did in this case was what they would be bound to do under their contract of service. Where salvage is claimed, it must be shown that the person claiming it was under no duty to do the work, and, in order to be entitled to claim salvage, the crew must show that they have done something outside their ordinary duties:

The Cargo ex Capella (*ubi sup.*).

The following cases and authority were also referred to in the course of the argument:

The Glenfruin, 52 L. T. Rep. 769; 5 Asp. Mar. Law Cas. 413; 10 P. Div. 103;
The President Ludwig, Shipping Gazette, May 16, 1901;
The Glengaber, 27 L. T. Rep. 386; 1 Asp. Mar. Law Cas. 401; L. Rep. 3 A. & E. 534;
Kennedy on Salvage, pp. 72 and 94.

BARNES, J.—In this case the Elliott Steam-tug Company and others, the owners, master, and crew of the steam-tug *Challenge*, are seeking to recover salvage for services rendered to the *Duc d'Aumale*, her cargo, and freight. The facts in the statement of claim are admitted, except that "6ft." shall be subtituted for "13ft." of water in par. 4, and that the probability of the vessel sinking shall be judged of by the court, subject to the evidence of the defendants' master and his documents. It was admitted also that what was decided in the previous case which I heard—the suit between the *Camrose* and the *Challenge* and the *Duc d'Aumale*—namely, that the collision which took place was caused by the negligence both of the *Challenge* and of the *Duc d'Aumale*, and that the negligence of the *Challenge* was that of her master. That has been admitted in this present case, so that the facts are not in dispute. They give rise to certain questions of law. The *Challenge* and the *Duc d'Aumale* were somewhat to the west of Dungeness when the collision took place, and after the collision the *Challenge* towed the *Duc d'Aumale* to Calais. The services for which salvage is claimed consisted in what was done subsequent to the collision and up to the time when the vessel was left at Calais. It is said, first of all, that the plaintiffs, the owners, master, and crew of the *Challenge*, can recover no salvage remuneration at all because the collision and what happened afterwards, as a consequence of it, were due to the negligence which I have referred to on board the *Duc d'Aumale* and on board the tug. I deal for a moment with the general question, because a second question has been discussed—namely, whether the crew or the owners of the tug—anybody other than the person who was the actual negligent person—can recover salvage. The first point appears to me to depend upon the decisions and principles which have guided this court in arriving at its judgments on the subject of salvage services. There is only one matter to refer to further before dealing with this case. Mr. Aspinall, for the plaintiffs, relies on the towage contract which was entered into between the owners of the *Duc d'Aumale* and the Elliott Steam-tug Company, under which the *Duc d'Aumale* was to be towed from London to Cherbourg. There are conditions on the back of it which he says affect the present case. Those conditions are very long. I have read them carefully, and I take the view presented by the defendants in connection with the exceptions referred to—namely, that they really are exceptions which excuse the owners from liability, but do not affect this present question of salvage services. The question of the general position where what has happened is due to the negligence both of the tug and of the tow has been discussed in one or two cases, amongst others in *The Minnehaha* (*ubi sup.*), in which that well-known judgment, which is set out in so many subsequent cases, and in the text-books, is to be found. There is one passage in it which is of importance (4 L. T. Rep., at p. 812; 1 Mar. Law Cas. O. S., at p. 112; Lush., at p. 348): "If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage." It has been said that such observations do not apply where both tug and tow are negligent, but in my judgment that cannot be said in face of such a case as *The Altair* (*ubi sup.*). There a tug was held responsible for the direction of the course, and having been found negligent in respect of it and in not taking soundings, her claim for salvage was dismissed. There was in that case a counter-claim by the defendants. It was also dismissed, because their master was held guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather. There was negligence of both tug and tow, and both claim and counter-claim were dismissed. *The Robert Dixon* (*ubi sup.*) has been cited to me, but I do not think there was any point there of negligence on the part of both tug and tow. But one part of the judgment of the late Lord Esher, then Brett, L.J., is very important, where he says: "The plaintiffs, being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position, that it lies on them to show that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs—that is, both that there was an inevitable accident beyond their control and that they showed no want of skill." It appears to me, apart from the question of individuals, with which I will deal in a moment, that where there is an occurrence—I will not use the word accident—which requires services of a salvage nature, and that occurrence has originated in the negligence of both tug and tow, the tug cannot claim any salvage for services afterwards rendered in extricating the ship from the difficulty in which she has been placed by that joint negligence.

The next point which has been taken is that at any rate those persons on the tug who were not negligent, and even her owners, because they were not negligent personally, can recover for salvage services. Mr. Aspinall argues for the crew, other than the master, on this point, and for the owners. As far as the owners are concerned, it seems to me that this point depends partly upon this contract which he has referred to and which to my mind does not affect the question of salvage at all; and that they really stand or fall by the negligence of their master, and cannot recover, for the reasons I have already given, for salvage services. I do not think it true in this case to say, as he contended, that the tug was under no obligation whatever afterwards to do anything for the ship. It seems to me not carrying out the principles to be found in *The Minnehaha* (*ubi sup.*), in that part of the judgment set out 4 L. T. Rep., at p. 811; 1 Asp. Mar. Law Cas. O. S., at p. 112; Lush., at p. 347. I cannot regard the tug, in a case of this kind, as released from all duty towards the tow. It seems to me that after the accident happened she was not relieved from all obligation towards the ship, but that if salvage services were performed in getting the ship out of difficulty, there would be, to use the language of the Privy Council, "services of a different class and bearing a higher rate of payment," and it would be "held to be implied in the contract that the tug" should be "paid at such higher rate." But in this case there would be no payment for reasons I have already given, because there was negligence on the part of the master contributing to the situation from which the ship had to be relieved. So I cannot accept the view that the tug was under no obligation whatever to the tow, as contended for by the plaintiffs. A good deal seems to me to follow from that, because I have no doubt whatever, for the reasons I have given, that the tugowners and the master cannot recover in this case, because of the negligence of the master. But the contention further is that the crew at any rate can recover—those, I mean, who are not responsible for this disaster. So far as I know it is the first time this point has been raised, so as to endeavour to separate the crew from the master or the negligent person in a case of this kind, of tug and tow. There have been one or two cases which have practically no bearing, to my mind, upon this particular question. There is first of all *The Sappho* (*ubi sup.*), where services were performed to ships belonging to the same owner, and the master and crew were held entitled to salvage. There is also the case of *The Glengaber* (*ubi sup.*), where by the improper navigation of a steam-tug a vessel at anchor was sent adrift and placed in jeopardy. Another steam-tug, the *Warrior*, rendered assistance to the drifting vessel, and it was held that the owners of the *Warrior* were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. Sir R. Phillimore, in giving judgment in that case, said (27 L. T. Rep., at p. 387; 1 Asp. Mar. Law Cas., at p. 402; L. Rep. 3 A. & E., at p. 535): "With regard to the *Warrior*, it has been contended that that vessel is not entitled to be considered as a salvor, because it appeared in evidence that some of her owners were also owners of the *Black Prince*. This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the *Warrior* who are not owners of the *Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessell wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief. I shall therefore hold that the *Warrior* is entitled to salvage reward." That judgment, in the part which I have read, showed the difference between the claim of the crew and the claim of those owners who were not owners of the *Black Prince*, and he allowed the whole claim—at least he allowed, as I understand, salvage for all. But that case differs from the view expressed by Butt, J. in *The Glenfruin* (*ubi sup.*), where it was held that the master and crew were entitled to salvage. The headnote to that case is as follows: "A steamship, laden with cargo, became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. Her cargo was shipped under bills of lading which contained among the excepted perils, 'all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind.' Another vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, master, and crew of the salving vessel against the owners of cargo on the salved ship: Held, that the master and crew were entitled to salvage, but that the owners were not, for that there was an implied warranty by them that the vessel was seaworthy at the beginning of the voyage." He awarded salvage to one owner who was not owner of the ship under contract, and he awarded some to the master and officers and crew of the other ship. I can quite understand that where the vessel which renders salvage services is entirely unconnected with the ship that is salved, persons, like the master and crew or owners, who are in no way owners of the ship that is salved, or under no liability to persons on board that ship, can recover salvage. But I do not think that applies to the case of a tug and her tow. I cannot help thinking one must consider a little more fully upon what principle the court proceeds in awarding salvage. The court is guided—I am speaking generally and without that minute consideration which I should give if I were writing my judgment—by due regard to the benefit conferred, combined with due regard to the general interests of ships and commerce; I mean the policy of what is to be done comes into consideration as well as the mere benefit received. It seems to me that both as a principle and matter of good policy it would not be desirable to encourage a crew to recover a salvage reward in such cases of tug and tow where their master had been one of the causes of the disaster from which the ship to which salvage service had been rendered was rescued. There is a case which supports that view—the case of the *Cargo ex Capella* (*ubi sup.*). In that case Dr. Lushington said (16 L. T. Rep., at p. 800; 2 Mar. Law Cas. O. S., at p. 552; L. Rep. 1 A. & E., at p. 357): "In my mind the principle is this, that no man can profit by his own wrong. . . . The rule would bar any claim for services rendered to the other ship

which was a co-delinquent in the collision; but the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent." That, therefore, was a claim by the master and crew of one of the colliding vessels. In the case of *The Glenfruin* (*ubi sup.*), to which I have referred, the people on the salving vessel had nothing whatever to do with the accident that happened to the salved vessel. In the case of *The Glengaber* (*ubi sup.*), the steam-tug which came up and rendered assistance had nothing to do with the accident which originally brought about the difficulty; and it is a remarkable fact, I think, that no case has been cited to me in which any similar suggestion has been made of the crew in a towage case recovering salvage where the master and owners could not. The point must have arisen. It was capable of being made in the *Cargo ex Capella* (*ubi sup.*). It was capable of being made in *The Altair* (*ubi sup.*) and in other cases. But it has never been suggested, and it seems to me that it may be that the right view to take is this, that the tugowners are not relieved entirely from their contract by what has happened, and when they proceeded to render services afterwards they were extricating themselves and their ship from a difficulty in which both had been placed by joint negligence. In this case what the tug did was, in fine weather, to tow the ship to Calais. The owners and master could not recover, and the crew did nothing more than their ordinary duties on the tug, without any risk, that I can see. They did nothing more than, it seems to me, their ordinary duties towards their owners and master. It may very well be that there might be a case of joint negligence producing a disaster to a tow, where a man might be put on board the tug, or required to perform services entirely outside the ordinary duties of tug and tow. When such a case arises it can be dealt with. But this case, I think, can be dealt with on that argument alone with which I have already dealt. It seems to me it would be bad policy to encourage sailors to hope and expect that their master might get the ship he was towing into danger, so that they would have to render services for which they could recover. I think that would be introducing something extremely novel into this court, and what seems to me to be a dangerous kind of policy. On the whole, although this matter has been very fully discussed, and I have given judgment without reserving it, it seems to me that I am right in holding that no salvage award can be recovered in this case by anybody connected with the tug. One word more. I only wish to refer to the cases of *The Bernina* (*ubi sup.*) and *Milburn v. Jamaica Fruit Company* (*ubi sup.*). They appear to me to have nothing whatever to do with the present case. My judgment, therefore, must be that the suit of the plaintiffs is dismissed. I think, in the circumstances under which the case has come before the court—they are peculiar—the proper order is that each should pay their own costs.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

Tuesday, Nov. 3, 1903.

(Before BARNES and BUCKNILL, JJ.)

THE PRINCE LLEWELLYN. (a)

Practice—Salvage—Appeal—Reduction of award—Costs.

There is no hard-and-fast rule as to the costs of a successful appeal in a salvage action.

Where the defendants succeeded on appeal in getting the amount of the award considerably reduced:

Held, that they were entitled to the costs of the appeal, the costs in the court below remaining as they were.

APPEAL from a judgment of the County Court judge of Pembroke Dock, sitting with Nautical Assessors, in an action for salvage brought by the owners, master, and crew of the steamship *Bessie Barr* against the owners of the schooner *Prince Llewellyn.*

The *Bessie Barr* was a steamship of 406 tons gross register, manned by a crew of eleven hands all told, and at the time was on a voyage from Garston to Bristol with a cargo of coal.

The *Prince Llewellyn* was a small schooner, and at the time the services were rendered was on a voyage from Treport to Amlwch with a cargo of 170 tons of phosphate. While on her voyage she met with bad weather, sprung a leak, and lost some of her sails, and on the 16th Jan. 1903 she was about three miles N.E. of the Bishop's Light, when, in response to her signals of distress, the *Bessie Barr* took her in tow, and brought her safely into Fishguard Bay, where she came to anchor.

The distance towed was about sixteen miles, and there was a gale of wind blowing at the time.

The value of the *Prince Llewellyn* at the time the services were rendered was 100*l.*, of her cargo 85*l.*, and of her freight 31*l.* 15*s.*, making the sum of 216*l.* 15*s.* in all.

The learned County Court judge, on the advice of his assessors, awarded the sum of 160*l.* to the salvors.

The defendants appealed.

Batten and *Samson* for the appellants.

Bailhache and *Rogerson*, for the defendants, *contra.*

The court allowed the appeal, and reduced the amount awarded to 70*l.*

Batten submitted that, on the authority of *The Kilmaho* (16 Times L. Rep. 155), the successful appellants were entitled to the costs of the appeal.

Bailhache contra.—The general rule of practice is not to allow costs. See

The Gipsy Queen, 72 L. T. Rep. 454; 7 Asp. Mar. Law Cas. 586; (1895) P. 176.

The Court of Appeal there refused to give the successful appellants in an action for salvage the costs of the appeal.

BARNES, J.—It is clear there is no hard-and-fast rule as to costs, but in the present case the successful appellants ought to have the costs of the appeal. The costs in the court below will remain as they are.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Solicitor for the appellants, *Newton G. Driver*, agent for *Smith, Davies*, and *Co.*, Aberystwith.

Solicitors for the respondents, *Botterell* and *Roche*, agents for *Jones-Lloyd*, Pembroke Dock.

Nov. 9 and 17, 1903.

(Before BARNES, J.).

THE CORDILLERAS. (*a*)

Collision—Limitation of liability—Foreign vessel — Foreign certificate of registry — Order in Council—Double bottom—Water ballast—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 81, 84, 543, 745.

In an action for limitation of liability by owners of a French steamship, the French certificate of registry supported by affidavit giving the gross tonnage exclusive of double bottom, and the Order in Council of the 5th May 1873, *extending the provisions of the Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63) *as to measurement to French vessels, were put in. A further affidavit was filed alleging that the double bottom for water ballast was not used for the purpose of carrying cargo, stores, or fuel.*

Held, that this was sufficient evidence, and that it was not necessary that the certificate of a Board of Trade surveyor under sect. 81 *of the Merchant Shipping Act* 1894 *should be also adduced.*

The Zanzibar (68 *L. T. Rep.* 297; 7 *Asp. Mar. Law Cas.* 258; (1892) *P.* 233) *followed.*

ACTION by the plaintiffs, the Société Anonyme des Chargeurs Réunis, owners of the French steamship *Cordilleras*, to obtain a decree of limitation of liability under the provisions of the Merchant Shipping Act 1894, in respect of a collision between the *Cordilleras* and the steamship *Poplar*.

The collision occurred on the 8th Feb. 1902 in the River Thames, and in consequence the *Poplar* was considerably damaged, and was abandoned by her crew, and subsequently came into collision with the steamship *Morocco* and seven barges, doing further damage.

On trial of the action the *Cordilleras* was found alone to blame for all the collisions, and her owners now sought to limit their liability in respect of the damages.

The tonnage of the *Cordilleras* without deduction for engine-room space was 3262·26 tons, and the sum of 26,098*l.* 1*s.* 7*d.* was paid into court, being the amount of the plaintiffs' liability calculated on the basis of 8*l.* a ton.

In support of their case the plaintiffs filed an affidavit by a director of the company, and also put in the certificate of French nationality and registry of the *Cordilleras*. From this it appeared that the tonnage of the *Cordilleras* for the payment of the subsidies allowed by the law of the 30th Jan. 1893 was 3353·72 tons. From this 91·46 tons were deducted for the space between the inner and outer plating of the double bottom of the vessel occupied by the water ballast tanks, leaving the gross tonnage at 3262·26 tons.

It was contended by the plaintiffs that the Order in Council of the 5th May 1873 extending the provisions of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) as to the registry of French vessels made it no longer necessary that they should be remeasured in England, and that the certificate of nationality, supported by an affidavit, was sufficient; further, that the space occupied by the double bottom for water ballast was not included in the measurement of the gross tonnage and that it had been properly deducted.

The Order in Council of the 5th May 1873 is as follows:

Whereas by the Merchant Shipping Act Amendment Act 1862 it is enacted that whenever it is made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal Act have been adopted by the Government of any foreign country, and are in force in that country, it shall be lawful for Her Majesty by Order in Council to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in the certificate of registry or other national papers, and thereupon it shall no longer be necessary for such ships to be remeasured in any port or place in Her Majesty's dominions, but such ships shall be deemed to be of the tonnage denoted in their certificates of registry or other papers in the same manner and to the same extent and for the same purposes in, to, and for which the tonnage denoted in their certificates of registry or other papers in the same manner, to the same extent, and for the same purposes in, to, and for which the tonnage denoted in the certificates of registry of British ships is to be deemed the tonnage of such ships. And, whereas it has been made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships now in force under the Merchant Shipping Act 1854 have been adopted by the President of the French Republic and are in force in the French dominions, Her Majesty is hereby pleased, by and with the advice of Her Privy Council, to direct that the ships of France, the certificates of French nationality and registry of which are dated on or after the first day of June one thousand and seventy-three, shall be deemed to be of the tonnage denoted in the said certificate of French nationality and registry.

The material sections of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) are as follows:

Sect. 81. In the case of a ship constructed with a double bottom for water ballast, if the space between the inner and outer plating thereof is certified by a surveyor of ships to be not available for the carriage of cargo, stores, or fuel, then the depth required by the provisions of Rule 1 relating to the measurement of transverse areas shall be taken to be the upper side of the inner plating of the double bottom, and that upper side shall, for the purposes of measurement, be deemed to represent the floor timber referred to in that rule.

Sect. 84 (1). Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being remeasured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner to the same extent upon the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship.

Sect. 503 (2). (*a*) The tonnage of a steamship shall be her gross tonnage without deduction on account of engine room . . . (*b*) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement, shall, for the purpose of this section, be deemed to be her tonnage. (*c*) Where a foreign ship has not been and cannot be measured according to British law, the Surveyor-General of ships in the United Kingdom, or

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

the chief measuring officer of any British possession abroad, shall, on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

Sect. 745 (1). (*a*) Any Order in Council, licence, certificate, by-law, rule, or regulation made or granted under any enactment hereby repealed shall continue in force as if it had been made or granted under this Act.

Laing, K.C. and *Stubbs* for the plaintiffs.—The Order in Council of the 5th May 1873 was made under sect. 60 of the Merchant Shipping Act Amendment Act 1862, and continued in force under sect. 745 of the Merchant Shipping Act 1894. Sect. 84 of the Merchant Shipping Act 1894 covers this case. The *Cordilleras* must therefore be deemed to be of the tonnage denoted in her French certificate. The measurement of the space occupied by water ballast tanks has never been included in the measurement of her gross tonnage, and the plaintiffs ought not, therefore, to be made to include it now.

Batten for the owners of the *Poplar*.

D. Stephens for the owners of the *Morocco*.—The owners of the *Cordilleras* are not entitled to the deduction of the 91·46 tons in respect of the space occupied in the double bottom by water ballast. The certificate produced is not sufficient. *The Zanzibar* (68 L. T. Rep. 297; 7 Asp. Mar. Law Cas. 258; (1892) P. 233) does not support the plaintiff's contention. They must produce a certificate of a surveyor of ships appointed by the Board of Trade, showing that the space is not available for the carriage of cargo, stores, or fuel. See

The Merchant Shipping Act 1894, ss. 81, 724 (2) and sched. 2, r. 1 (2).

Sect. 21 (2) of the Merchant Shipping Act 1854 provided for the measurement to be to the upper side of the floor timber. Sect. 5 of the Merchant Shipping (Tonnage) Act 1889 (52 & 53 Vict. c. 43) provided that in the case of a ship with a double bottom for water ballast the upper side of the inner plating of the double bottom was to be taken to represent the floor timber, but under it the certificate of a surveyor appointed by the Board of Trade was necessary in order to show that the space was not available for the carriage of cargo, stores, or fuel. Sect. 503 of the Merchant Shipping Act 1894 provides the mode of measurement for a foreign ship. Although sect. 84 provides for the acceptance of a foreign certificate of registry, that does not override the provisions of sect. 81, and the result is that the Act cannot be complied with by the owners of a foreign ship:

The Cathay, 82 L. T. Rep. 823; 9 Asp. Mar. Law Cas. 100.

It was there held that the owners of a Danish ship could not avail themselves of the provisions of sect. 503, sub-sect. 2 (*a*) of the Merchant Shipping Act 1894 with regard to the crew space, as they were unable to produce the required certificate under sched. 6 of the Act.

Balloch for owners of cargo on board the *Morocco*.

Laing, K.C. in reply.—*The Cathay* (*ubi sup.*) is not in point. There it was held that the owners of a foreign ship were not entitled to make any deduction from the gross tonnage because the certificate under sched. 6, par. 3, of the Merchant Shipping Act 1894 had to be given by a surveyor of ships to the collector of customs at the time when the ship was registered. No deduction is sought to be made from the gross tonnage in the present case. In ascertaining the gross tonnage under the Act, the space occupied in the double bottom by water ballast is always deducted. The effect of the Order in Council is to prevent the necessity for remeasurement, and the tonnage denoted in the certificate of registry of a foreign ship must be deemed to be the tonnage of the ship. It is submitted that if this evidence is produced the requirements of the Act are satisfied.

On conclusion of the arguments the learned judge adjourned the case in order that a copy of the Order in Council might be produced, and affidavits filed showing that no loss of life or personal injuries had resulted from the collisions, and that the space used in the double bottom was not available for the purpose of carrying cargo, stores, or fuel.

Nov. 17.—BARNES, J.—The plaintiffs in this action are the owners of the *Cordilleras*, and seek to limit their liability in accordance with the 503rd section of the Merchant Shipping Act 1894, which applies to the owners of a ship, whether British or foreign. There seems no doubt that, subject to certain points which have been discussed, they are entitled to the usual decree of limitation of liability. Although there is a somewhat complicated claim in the first paragraph of the claim, I think that a decree in the ordinary form will be adequate to provide for all claims—there being no question raised, as I understand, of all these claims we have heard of being dealt with in the present suit. If anything is heard of these there will be liberty to apply. The points discussed turn on the question of the tonnage upon which the owners of the *Cordilleras* are to be held entitled to limit their liability. According to the section to which I have referred, the tonnage of a steamship shall be her gross tonnage without deduction on account of engine room. This was a steamship, and according to the affidavit of M. de Clermont, one of the directors of the plaintiff company, the *Cordilleras* is a steamship of the gross tonnage, without deduction on account of engine room, of 3262·26 tons. Annexed to the affidavit is the certificate of French nationality, with a translation. The translation is before me, and in that I find that the gross measurement, according to what is referred to as the 1889 decree, is mentioned as the figure which I have referred to. The only points that really are material, upon which this case stood over from last motion day, were—first, that the affidavit did not adequately negative the fact that there was not any loss of life or personal injury. But there have been two affidavits, one by the pilot and one by the solicitor, who has made inquiries, showing there was no loss of life or personal injury caused by these collisions. The tonnage which is mentioned in the affidavit and certificate was arrived at after deducting from a larger figure the measurement of the water ballast tanks which were in the bottom of this ship. The director of the company says in his

affidavit that those water ballast tanks are 91·46 tons.

Now, it was contended, first of all, that under sect. 503 this ship ought to be measured according to British law, either under sub-sect. (*b*), where she has been and can be measured, or under sub-sect. (*c*), where she has not been and cannot be measured, but provision is made as to what is to be done. It is, however, contended by the plaintiffs that there is no necessity to have the ship measured under British law, because the 84th section of the Act of 1894 provides that: [His Lordship then read the section.] It is said, we have here the tonnage certificate of this ship measured in France under the Order in Council of the 5th May 1873, by which Her Majesty directed that the ships of France, the certificates of French nationality and registry of which are dated on or after the 1st June 1873, shall be deemed to be of the tonnage denoted in the said certificates of French nationality and registry; and the 745th section (1) (*a*) of the Act of 1894 provides that: [His Lordship then read the section.] So it was contended that by virtue of the 84th section of the Act of 1894 and the Order in Council, the tonnage certificate of this ship, which was granted on the 27th Feb. 1896, and therefore long after the date mentioned in the Order in Council, was adequate for the purpose of this limitation suit. It was objected that at any rate that certificate did not show compliance with the 81st section of the Act of 1894 with regard to the space in the water ballast tanks. As I understood from the last argument, counsel for the owners of the *Morocco* was quite satisfied that the present case should go through on the certificate produced, if there was sufficient evidence to show, as a matter of fact, that the water ballast spaces were not available for cargo. Accordingly, affidavits have been made to show that the water ballast tanks in this ship were not and cannot be used for the carriage of cargo of any kind, and the question is whether the court will act upon the certificate obtained in France and produced here, coupled with these affidavits. The case of *The Zanzibar* (*ubi sup.*) was referred to, and I think it is tolerably clear that the learned President in that case was of opinion, dealing as he was with the sections of the Acts of 1854, 1862, and 1889, that the words of the Act of 1854 would never have allowed the measurement of these water ballast tanks to be included in the gross tonnage. But he said that at any rate in that case the Act of 1889 had made the point quite clear, and that the space was to be excluded in accordance with one or other of the Acts. Now, all that he had before him appears to have been a copy of the register, fortified by affidavits. So he had nothing to show that the 5th section of the Merchant Shipping (Tonnage) Act 1889 had been complied with by obtaining the certificate of a surveyor appointed by the Board of Trade. It seems to have been taken for granted that when the certificate of a British ship was put in, showing the gross tonnage, that gross tonnage would be taken as practically certified, and that all that was necessary to be dealt with in arriving at it had been dealt with by proper certificates. No point seems to have been taken that there was no certificate specially brought before the court. So it seems to me that in an ordinary limitation suit where the certificate of registry is put in and supported by affidavit, the gross tonnage will be taken in the ordinary way, and the limitation amount calculated upon that certificate without the necessity of adducing at the hearing the certificate of a surveyor under sect. 81 of the Act of 1894. So that for two reasons, apparently, one may say that there ought to be no difficulty in dealing with a British ship. First, because by the construction of the measurement sections and schedules the water ballast tanks ought never to have been included at all, as the learned President indicates — though there is possibly a difficulty about that because of the words in the second schedule, "subject, however, to the provisions of this Act in the case of a ship constructed with a double bottom for water ballast." But if that be not correct, there is the *primâ facie* evidence of the certificate, showing the tonnage, and the inference that what has been necessary to show that tonnage properly has been complied with. Then we come to the case of a foreign ship and the application of sect. 84 of the Act of 1894. Here, again, we get a denotation of the gross tonnage—the amount I have already referred to; and I see no reason why I should not hold that that may be treated, for the purpose of limitation proceedings, just in the same way as the denotation of tonnage in the certificate of registry of British ships. The result will be the usual decree of limitation of liability. Pending actions will be stayed upon payment being made into court in the usual way, and upon security for the costs of the defendants to the limitation suit and for the costs of the cargo-owners of the *Morocco* being given to the satisfaction of the registrar. I am asked to limit the time for advertisements, and I think two months will be adequate. The plaintiffs must pay all the costs of the limitation suit.

Solicitors for the plaintiffs, *Stokes* and *Stokes*.

Solicitors for the owners of the *Poplar*, *Deacon*, *Gibson*, *Medcalf* and *Marriott*.

Solicitors for the defendants, the owners of the *Morocco*, *Thomas Cooper* and *Co.*

Solicitor for the defendants, the owners of cargo on board the *Morocco*, *C. E. Harvey*.

Monday, Dec. 7, 1903.

(Before BARNES, J.)

THE MADELEINE AND ANDRÉ THÉODORE. (*a*)

Admiralty—Practice—Action in personam—*Specially indorsed writ — Judgment by default—Order XIII., r.* 3.

The practice of the Admiralty Division as to the procedure in default actions under Order XIII., r. 3, *is the same as in other divisions. Where, therefore, the plaintiffs issued a specially indorsed writ in an action* in personam *in the Admiralty Division:*

Held, that they were entitled to enter final judgment on the expiration of the time allowed to the defendants to appear.

MOTION for judgment by default in an action by the Elliott Steam-tug Company to recover the

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

sum of 300*l.* against the Société de Navigation du Sud-Ouest of Bordeaux.

By two contracts dated the 15th Dec. 1902 and the 16th Jan. 1903, and made between the plaintiffs and R. W. Leyland and Co., as agents for the defendants, the plaintiffs agreed to tow the defendants' two sailing ships *Madeleine* and *André Théodore* from Havre to Antwerp, and thence to a position abreast of Falmouth for 150*l.* respectively. The plaintiffs duly carried out the contract, and rendered accounts to the defendants; but these were not paid. The defendants carried on business at Bordeaux, and on the 15th Oct. 1903 the plaintiffs applied to Bucknill, J. in chambers, and obtained leave to serve notice of an intended writ out of the jurisdiction, and the learned judge fixed the time for appearance to be within twelve days of the service of the writ. On the 16th Oct. a specially indorsed writ was issued, and notice of it was duly served on the defendants on the 19th Oct. The defendants did not appear, and the time for appearance having elapsed, the plaintiffs applied in the Admiralty Registry to enter judgment under Order XIII., r. 3, for the amount claimed. The registrar, however, refused to do so on the ground that no book was kept in the Admiralty registry in which judgment could be signed in the ordinary course, as in other divisions. The plaintiffs therefore moved the court for judgment.

Order XIII., r. 3, of the Rules of the Supreme Court 1883 is as follows:

Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) or (if no rate be specified) at the rate of 5 per cent. per annum to the date of the judgment, and costs.

Nelson for the plaintiffs.—It is submitted we are entitled to enter judgment under Order XIII., r. 3. A doubt has been expressed as to what is the practice of the Admiralty Court in actions *in personam* on p. 334, note (*n*), of the third edition of Williams and Bruce's Admiralty Practice. Two cases—*The County of Salop* and *The County of York* (Adm. Div., May 14, 1889)—are there cited. Neither of these cases are reported; but from the report it appears that they were two actions of co-ownership *in personam* to which the defendants did not appear, and the court refused to grant the plaintiffs' application to enter judgment, and intimated judgments would not be given in such actions unless the statements of claim were supported by evidence. In *The Hulda* (58 L. T. Rep 29; 6 Asp. Mar. Law Cas. 244), however, the plaintiff in a default action *in rem* for necessaries, where the writ, though not specially indorsed, contained particulars of the claim, was allowed to enter judgment.

BARNES, J.—It seems to me a book ought to be kept in the registry. I cannot see why the expense of coming into court should be necessary. I think Order XIII., r. 3, applies to this case. There will be judgment for the plaintiffs for 300*l.* and costs.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Dec. 3, 4, 5, *and* 10, 1903.

(Before BUCKNILL, J. and TRINITY MASTERS.)

THE SUNLIGHT. (*a*)

Collision—River Mersey—Vessel coming out of dock—Duty to keep out of the way—Regulations for Preventing Collisions at Sea, art. 19.

A steamship coming out of Prince's Dock into the river Mersey came into collision with another steamship coming down the east side of the river in tow of two tugs.

Held, that art. 19 *of the Regulations for Preventing Collisions at Sea did not apply, and that there was no duty under the article on the down-coming vessel to keep out of the way of the vessel leaving the dock.*

Observations on the powers of a dockmaster in the Mersey.

ACTIONS for damage by collision brought by the owners of the steamship *Maiorese* against the owners of the steamship *Sunlight*, and for negligence by the owners of the *Sunlight* against the Mersey Docks and Harbour Board.

About 11.15 p.m. on the 22nd Sept. 1903 a collision occurred in the river Mersey, off the north end of the Liverpool landing-stage, between the steamships *Maiorese* and the *Sunlight*.

The *Maiorese* was a screw steamship of 1739 tons gross register, and at the time was being moved from the Herculaneum Graving Dock to her loading berth at the Wellington Dock in charge of the two tugs *Stormcock* and *Fighting Cock*, she herself having no steam.

The *Sunlight* was a screw steamship of 388 tons gross register, and at the time had just left Prince's Dock, being about to proceed on a voyage from Liverpool to Swansea with a general cargo.

The weather was fine and clear, the wind moderate from the S.E., and the tide flood of the force of four to five knots an hour.

The plaintiffs' case in the collision action was that the *Maiorese* was proceeding down the river, keeping well to the eastward of mid-channel, and making about three to four knots over the ground, and that her tugs at intervals, as they passed the entrances to the various docks, were sounding their whistles. The regulation lights were being duly exhibited, and the *Maiorese* was in charge of a duly qualified pilot.

Under these circumstances, when the *Maiorese* was about off the north end of the stage, and about 300 to 400 yards from it, the masthead light of a steamship, which proved to be the *Sunlight*, was seen in the Prince's Half Tide Dock entrance.

The *Sunlight* was immediately afterwards heard to blow a long blast, and rapidly came out from the entrance, showing her masthead and red lights and heading about west.

As soon as the masthead light was seen, both tugs were ordered to stop their engines, and the helm of the *Maiorese* was put hard-a-port, but the *Sunlight* came on, and, although the hawsers of the tugs were slipped, she struck the starboard side of the *Stormcock* with her stem, and then cleared her and struck the stem of the *Maiorese* with her port side.

The plaintiffs charged the defendants (*inter alia*) with failing to give proper and sufficient

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

notice of their intention of coming out of the dock, and with failing to keep clear of the *Maiorese* and her tugs. They also charged them with breach of art. 29 of the Collision Regulations.

The defendants' case was that between 10 and 11 p.m. the *Sunlight* was being undocked under the direction and control of the servants of the Mersey Docks and Harbour Board, and was brought from her berth in the Trafalgar Dock to the entrance to Prince's Dock, where she was directed to wait. She was shortly afterwards ordered by the dock officials to let go and come ahead so as to proceed into the river. The ropes were thereupon let go, and a long warning blast was sounded on her whistle, and she proceeded out at full speed under a hard-a-port helm. As she cleared the entrance the towing lights and green lights of the two tugs that were towing the *Maiorese* were seen broad off on the port bow, and about 200 to 250 yards off. As she was unable to do anything to avoid a collision, the *Sunlight* kept her course and speed, blowing a short blast to indicate how her helm was, but the tug *Stormcock* and the *Maiorese*, instead of keeping clear of her, collided with her.

The defendants charged the plaintiffs (*inter alia*) with neglecting to keep clear, not stopping and reversing, with improperly attempting to cross ahead of the *Sunlight*, and with navigating too close to the dock entrances. They also charged them with breach of arts. 19, 22, and 23 of the regulations, and counter-claimed for the damages suffered by their own vessel.

Arts. 19, 22, and 23 of the Regulations for Preventing Collisions at Sea are as follows:

Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

By the statement of claim in the action against the Mersey Docks and Harbour Board it was alleged that those on board the *Sunlight* were bound to and did obey the orders of the dock officials, that they had been under their orders throughout the operation of undocking, and that the collision was caused by the negligence of the officials in ordering her to proceed out into the river when they knew, or ought to have known, that it was not safe for her to do so.

The Mersey Docks and Harbour Board denied that the *Sunlight*, at the time in question, was acting under the orders of the dock officials or other of their servants, and pleaded that if any such orders as alleged were given, they were not within the scope of the authority of their servants. They also alleged that if it was not safe for the *Sunlight* to proceed out into the river, those on board of her were guilty of negligence which caused or contributed to the collision by casting off and proceeding out, although warned by the dockmaster to look out or the *Maiorese* and her tugs, and by failing to take any, or timely, or sufficient steps to avoid the collision.

Sect. 49 of the Mersey Dock Acts Consolidated Act 1858 (21 & 22 Vict. c. 92) is as follows:

Any harbour-master, dockmaster, or piermaster may direct the time and manner of any vessel coming into or going out of any dock, and also the time of opening or shutting the dock gates; and if the master of any vessel shall act contrary to the directions or neglect to obey the orders of such harbour-master, dockmaster, or piermaster, in relation to the manner of coming into or going out of such dock, or shall obstruct or hinder him in the opening or shutting of any dock gate, such master shall for every such offence be liable to a penalty of not exceeding twenty pounds.

By sect. 53 power is also given to the harbour-master to remove vessels from the entrances to the dock.

Pickford, K.C. and *Glynn* for the plaintiffs.

Laing, K.C. and *Bateson* for the owners of the *Sunlight*.—It was the duty of the *Maiorese* and her tugs to keep out of the way of the *Sunlight*. She was on their starboard hand, and art. 19 applied.

Aspinall, K.C. and *Maurice Hill* for the defendants the Mersey Docks and Harbour Board.

Cur. adv. vult.

Dec. 10.—BUCKNILL, J.—On the 22nd Sept., between eleven and twelve o'clock at night, a collision occurred in the river Mersey between the steamships *Maiorese* and *Sunlight*. An action was commenced on the 27th Sept. by the owners of the *Maiorese* against the *Sunlight*, and on the 28th Sept. an action was begun by the owners of the *Sunlight* against the *Maiorese*. Those actions were consolidated. On the 20th Oct. a statement of claim was delivered by the owners of the *Maiorese*, and on the 27th Oct. a defence and counter-claim were put in by the owners of the *Sunlight*. On the same day a letter was written by the solicitors for the owners of the *Sunlight* to the solicitor for the Mersey Docks and Harbour Board, drawing attention to the fact that it was alleged that improper orders had been given by the dock board's officials to those on board the *Sunlight* to proceed into the river, and asking what course the Mersey Docks and Harbour Board proposed to take in the matter. That was answered the next day by the solicitor to the harbour board denying liability. On the same day that that letter was received the owners of the *Sunlight* commenced an action against the Mersey Docks and Harbour Board. The case of the *Maiorese* is that she was being moved by two tugs, the *Stormcock* and the *Fighting Cock*, from the Herculaneum Graving Dock to her loading berth at the Wellington Dock. The tugs were on either bow, the *Maiorese* herself having no steam up, and the tide was flood of the force of about five knots. The pleaded case is that the *Maiorese* was being towed down well to the eastward of mid-stream, making about three to four knots over the ground. Then the pleadings allege that when the *Maiorese*, in charge of a compulsory pilot, was about off the north end of the Liverpool landing stage, about 300 to 400 yards off it, the masthead light of the *Sunlight* was seen in the Prince's Half Tide Dock entrance; that then a long blast was heard from the *Sunlight*, whose red light was seen, and which rapidly came out

from the dock entrance, heading about west, that the tugs of the *Maiorese* were told to stop, and they did so and cast off, but a collision took place between the *Sunlight* and the *Stormcock*, and then the port side of the *Sunlight*, about in the way of the engine-room, was struck by the stem of the *Maiorese*, which penetrated so far into her as to leave her in a condition in which she might soon have sunk had she not been towed ashore. The defence set up by the owners of the *Sunlight* is that the *Sunlight* was in the entrance to the Prince's Dock. having been stopped there by the dock officials; that she was ordered by the dock officials to let go and come ahead; that she thereupon blew a long blast, and under a hard-a-port helm proceeded out into the river at full speed; that as soon as she cleared the entrance the towing and green lights of the tugs towing the *Maiorese* were seen broad off on the port bow, and about 200 to 250 yards distant; that the *Sunlight* kept her course and speed, blowing a short blast to indicate how her helm was, and the collision took place. In the defence the charges made against the owners of the *Maiorese* are that the *Maiorese* and her tugs neglected to keep clear of the *Sunlight*, and also to slacken their speed or to cast off the tow ropes or stop or reverse their engines. Then it is charged that the *Maiorese* and her tugs neglected to avoid crossing ahead of the *Sunlight*, and negligently navigated too close in to the dock entrances. It is further said that if the *Sunlight* came out of dock improperly, it was in obedience to the orders of the dock officials, whose orders those on the *Sunlight* were bound to obey. Now, as to the claim by the owners of the *Sunlight* against the docks and harbour board. The statement of claim alleges that the *Sunlight* was stopped by the authorities in the place where we know she was lying; that throughout the operation of undocking she was acting under the orders of the dock officials, which orders those on the *Sunlight* were, pursuant to the Mersey Dock Act, bound to obey; and that the collision was caused by the negligence of the dock officials in ordering the *Sunlight* to proceed out into the river at a time when they knew, or ought to have known, that it was not safe for her to do so. That is denied by the docks and harbour board in their defence.

The first question I have to decide is, Where in fact did this collision take place in regard to mid-channel? The river off the landing-stage may be said, roughly, to be 1100 to 1200 yards wide, and on the part of the *Maiorese* it is said that she was proceeding down the river—that is to say, to the northward — in tow of these two tugs, which were ahead of her, about 300 yards off the eastern shore, or off the stage. I find as a fact that this vessel was going down with her tugs, I will not say exactly 350 to 400 yards, but very much further off the stage than the witnesses of the *Sunlight* allege they were. If I may put it roughly, I should say they were going down about one-third of the width of the river off, perhaps a little less, from the stage—that is to say, I believe the story told by the *Maiorese*. It is also probable that the hopper went down about ahead of the *Maiorese*, or, putting it in another way, the *Maiorese* went down in the wake of the hopper, which was said to have been 300 yards off the landing-stage, and that has not been denied. But there is a stronger point than that which leads me to this conclusion, and that is that the hopper had rounded and gone down inside the *Maiorese* and then got ahead of her. All this shows that there was much more room than the *Sunlight* alleges between the *Maiorese* and the landing-stage. The second question is, Where was the collision with regard to the bearing of the dock gates? Now, the dock gates are not in a line with the landing-stage, because at the northernmost part of the landing-stage the jetty runs N.E., and inside the line of the landing-stage and not quite N.E. of this line are the so-called two islands at the entrance to the Prince's Half Tide Dock. I am satisfied on the evidence that the collision took place about off the north end of the landing-stage, and a little northerly of that—that is to say, if a line is drawn from the jetty about one-third of its way up and taken about west, that would be about the place where the collision happened. The third question is this: Could those on the *Sunlight* have seen the lights of the tugs or tow whilst the *Sunlight* was still in the half-tide gateway? This has been a very important question to decide—one not free from difficulty, and one upon which a great deal depends. The matter stands in this way: The *Sunlight*, which is 194ft. long or thereabouts, had been stopped by the dockmaster in what I may call the first position—that is to say, she would be further in, or further from the river, than in the second position. Could those on the *Sunlight*—that is, anybody in authority at the moment for the purpose of looking out—the master on the bridge, or the look-out man forward—have seen in the first position the lights either of the tugs or one of them, or of the tow, or the lights of all three? If either the master on the bridge or the man forward could have seen the towing lights of one of the tugs, or the side-lights of one of the tugs, or the starboard side-light of the *Maiorese*, that would be quite enough, because he would be able to see there were moving lights in the river coming towards the north. In spite of what has been said by the dockmaster, who was not sure whether in the first position the look-out man on the forecastle head, or the master on the bridge, could have seen these lights, I am of opinion that one of them could have seen them; in other words, I find that in position No. 1 all the lights of the tugs and tow would not be concealed from both the look-out man forward and the master on the bridge. They might be concealed from one, but they would be open to the other, and it must be remembered that the lights on the jetty, &c., which have been referred to, would be stationary, and these lights of the tugs and tow were all moving; and it is clearly the duty of the master or the look-out man of a vessel which is in dock and about to go out into the river to watch for moving lights. But that does not conclude the case at all, because there is the position No. 2 of the *Sunlight*, when the *Sunlight* had come more towards the river, but not into it, with her starboard check-rope made fast to the third or fourth bollard, and there was a moment when that rope led aft. If the *Sunlight* is put into that position and is stationary, with her engines still at rest, I am satisfied beyond all doubt that then the look-out man on the *Sunlight* must have seen, if he had looked, the lights of the tugs, or, at all

events, of the *Stormcock*, and, I believe, the starboard light of the *Maiorese*. He saw nothing. I find as a fact they could have been seen. They were seen by others. The dockmaster says he saw them himself, but he is not quite certain of the position in which he was when he saw them, and therefore I do not place much weight upon his evidence on that point. But I find as a fact that the man who was placed on the corner of the knuckle to the northward of the dock entrance did see, and did report, not only the lights of the hopper, but the lights of the vessels which were coming down astern of her. The master of the *Sunlight* said that if the down-coming ship, the *Maiorese*, and her tugs were where it is alleged by the plaintiffs they were—that is to say, not 150 yards, but between 300 and 400 yards off the landing-stage—those on the *Sunlight* ought to have seen them. Finding, as I do, that these vessels coming down were from 300 to 350 yards off, and that their lights were reported by the look-out man on the knuckle, I have come to the conclusion of fact that those on board the *Sunlight* could have seen the lights of the down-coming ship. It does not follow that they did not see them, though they said they did not. The next question is, Could the *Sunlight* have avoided the collision after she was in the river? This is a question with regard to which I rely upon the judgment of those who sit here to assist me on nautical matters. I have asked the Elder Brethren this question, Could the *Sunlight*, by the exercise of reasonable care and skill, have avoided this collision? I am advised by them, and I have no doubt of it myself, that by the exercise of reasonable skill the *Sunlight* might have avoided the collision after she got into the river. There was, in my opinion, and I am so advised, ample room and opportunity for the collision to have been avoided if, instead of keeping on full speed ahead under hard-a-port helm, the engines had been stopped and reversed, and the helm not kept hard-a-port, but eased off, so that she would have been then drifting up, broadside, to the southward. There would have been plenty of room between her and the down-coming ships. I am also advised that she might have done something else. After she came out into the river her head was N.W. by W., and when she struck the *Stormcock* her head was W. by S., so that she had altered four points. If, instead of keeping on under hard-a-port helm, she had hard-a-starboarded her helm and had altered two or three points, she would have been able to have gone, the tide being with her, up river to the southward, and in all probability clear of the *Maiorese* and her tugs. But I am not so firm on this point as I am on the first. I am advised that there were two ways in which the collision could have been avoided; but I prefer to put my judgment upon the first. Not taking such steps was negligence on the part of the master of the *Sunlight*, who in all probability thought that the starboard-side rule applied, and that he was justified in keeping on full speed ahead under hard-a-port helm, and that it was the duty of the other vessel to keep out of his way. I do not consider that art. 19—that is, the starboard-side rule—applied. I find that the *Sunlight* was negligently navigated, and had a bad look-out, which contributed to the collision. But did it not cause it entirely? I am of opinion that it did. It is alleged in the pleadings that the *Maiorese* might have done something to avoid the collision, but I find as a fact that she could not have done anything more than was done. Those in charge of the *Maiorese* ordered the tugs to stop, and they did stop as soon as they saw this other vessel coming down.

The next question I have to determine is whether the excuse pleaded by the *Sunlight* is good in law or in fact. The owners of the *Sunlight*, having made the dock board defendants to the action brought by them, allege that if the navigation of the *Sunlight* was negligent it was the fault of the dockmaster in ordering the vessel out into the river at a time when he ought not to have done so. That is a mixed question of fact and law. I have no doubt that the dockmaster had, under the Act of Parliament, power to order a ship, which has paid her dues and is ready to go, to leave the premises of the dock board. But, though that is the legal position, looking at it generally, one must apply the facts in each particular case. First of all, as a fact, did he order the *Sunlight* out? I am satisfied that the dockmaster did not order the vessel out, or say anything which amounted to an order. I find that, in fact, no order was given by the dockmaster to the *Sunlight* to go out, and that the master of the vessel went out at his own risk, and navigated his own ship out—not against the order of the dockmaster, the dockmaster could not stop him; but he cast off his own rope, by his own men, who were there for the purpose, by his order; and I find as a fact that the dockmaster did point out to him and warn him of the lights of the down-coming ship. The probable solution of this case is that the master of the *Sunlight* wanted to get to sea and miscalculated the strength of the tide, and, having cleared the hopper, satisfied himself that he could clear the other vessel too, and so ran the risk. The result must be that the *Sunlight* as against the *Maiorese* is solely to blame, and that the owners of the *Sunlight* must lose their case against the dock board because they have not made good the allegations contained in their statement of claim.

Solicitors for the plaintiffs, the owners of the *Maiorese*, *Hill, Dickinson, Dickinson, Hill*, and *Roberts*, Liverpool.

Solicitors for the defendants, and plaintiffs in the second action, the owners of the *Sunlight*, *Collins, Robinson*, and *Driffield*, Liverpool.

Solicitors for the defendants in the second action, the Mersey Docks and Harbour Board, *W. C. Thorne*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Jan. 25, 1904.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R., and ROMER, L.J.)

BORTHWICK *v.* ELDERSLIE STEAMSHIP COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading — Construction — Exceptions — Damage to goods — Unseaworthiness — Liability of shipowner.

Frozen meat was shipped on a steamer under a bill of lading, which contained two clauses relating to exceptions. The first clause, printed in Roman type, provided: "Neither the ship nor her owners shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any cause whatsoever, whether existing at the commencement of the voyage or at the time of shipment of the goods or not." The second clause, printed in small italics, provided: "The act of God . . . and loss or damage resulting therefrom or from any of the following causes or perils are excepted—viz. . . . or from any accidents to or defects, latent or otherwise, in hull . . . or otherwise (whether or not existing at the time of the goods being loaded or the commencement of the voyage) . . . if reasonable means have been taken to provide against such defects and unseaworthiness."

The vessel, being tainted with carbolic acid, was not in a fit condition to carry the meat when it was shipped, and the meat was thereby damaged during the voyage. If reasonable care had been taken to cleanse the ship before the meat was shipped the damage would not have occurred.

Held (reversing the judgment of Walton, J.), that, reading the two clauses together, the shipowner was not exempted from liability for damage caused by the unfit condition of the vessel.

APPEAL of the plaintiff from the judgment of Walton, J., at the trial of the action without a jury.

The plaintiff brought this action to recover from the defendants damages for breach of contract and of duty in and about the carriage of frozen meat by sea.

The meat was shipped on the defendants' steamship *Nairnshire* at Melbourne, Australia, to be delivered at London, under several bills of lading, all in the same form, by which it was acknowledged that the meat had been shipped in good order and condition.

The plaintiff was the indorsee of the bills of lading.

The *Nairnshire* was fitted with refrigerating chambers for the purpose of carrying frozen meat. Before the voyage in question she had made two voyages with cargoes of horses. For the purpose of cleansing the vessel whilst she was carrying the horses, and in order to disinfect her for the purpose of carrying frozen meat, a quantity of carbolic acid was used.

The bills of lading were headed "Refrigerating Bill of Lading," and contained two clauses relating to exceptions.

The first clause was printed in Roman type and was as follows:

Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default, or error of judgment of the masters, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever, and steamer shall be at liberty to jettison the whole of the goods, or any part thereof, considered necessary on account of decomposition or otherwise.

The second clause was printed in small italics and was as follows:

The act of God, the King's enemies, pirates, robbers or thieves on land or sea (but not pilferage), arrests or restraints of princes, rulers, or people, riots, strikes, lock-outs, or other labour disturbances, or delay or hindrance caused directly or indirectly thereby and loss or damage resulting therefrom or from any of the following causes or perils are excepted—viz., insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, drainage, sweating, evaporation, or decay, resulting from bad stowage or otherwise, or from the breakage or flow of or from contact with the urine, manure water, or drainage from horses, cattle, sheep, or other animals carried on the said ship or from their stalls, however caused, or otherwise howsoever; injurious effects of other goods, whether arising from bad stowage or otherwise; effects of climate, insufficiency of ventilation, or temperature of holds; risk of craft, of transhipment, and of storage afloat or on shore; fire on board, in hulk, in craft, or on shore; rain, hail, snow, frost, or ice; explosion, barratry, jettison; collision, whether with another ship or any other obstacle; stranding, lying upon, or touching the ground; perils of the seas, rivers, or navigation of whatever nature or kind, or howsoever caused; whether or not any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the owners or charterers; whether on board the said ship or on shore, or on board any other ship belonging to or chartered by them, or for whose acts they would otherwise be liable whether such act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage, or any other causes beyond the control of the owners or charterers or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness.

The plaintiff contended that the clause in Roman type must be read with and be limited by

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

the clause in small type, and that the defendants were not protected from liability because reasonable means had not been taken to provide against unseaworthiness.

The defendants contended that the clause printed in Roman type protected them from any liability for the damage to the meat caused by the vessel being tainted with carbolic acid, and that it was not limited by the clause in small type.

The action was tried before Walton, J. without a jury.

J. A. Hamilton, K.C. and *Loehnis* for the plaintiff.

Carver K.C. and *D. C. Leck* for the defendants.

Cur. adv. vult.

March 9, 1903.—WALTON, J.—This is an action in which the plaintiff asks for a declaration that he is entitled to recover damages in respect of damage to a certain cargo of frozen meat which was shipped under bills of lading which are dated in Dec. 1901, and of which the plaintiff is indorsee, and he alleges the property in the goods passed to him by the indorsement. The case raises a question of construction of the bill of lading and a question of fact, and although my decision in this case will not depend upon my findings of fact, it will, no doubt, be convenient, as I have heard the evidence, to state what conclusion I have arrived at upon the question of fact. The cargo was shipped on the defendants' steamer called the *Nairnshire* at Melbourne. and was, as I have said, a shipment—not a full cargo —of frozen mutton. On the two voyages preceding the voyage in question upon which the mutton was carried, the *Nairnshire* had carried horses for the Government to South Africa, one voyage, I think, from Fiume to South Africa, and the second voyage from Australia to South Africa. On those voyages the horses were carried in different parts of the ship, but, amongst other parts, in the 'tween decks. For the purpose of those voyages a quantity of carbolic acid had been shipped before the commencement of the first of the voyages. The quantity was admitted—there were eighty five-gallon drums shipped, and of those drums a considerable quantity was made use of. After completing the second voyage with the horses the vessel went to Australia, and got orders on arrival in Australia to load frozen meat at various Australian ports. At Sydney the holds and the 'tween decks were cleaned out, and for this purpose a quantity of carbolic acid and chloride of lime was used to sweeten or disinfect the bilges. At any rate it is admitted by the defendants that it was used to an extent for that purpose. On the two voyages with horses it is also admitted by the defendants that carbolic acid to some extent—to what extent we do not know—had been used for the purpose of sweetening or disinfecting the stalls or spaces which were occupied by the horses, and, as I have said, horses were carried in the 'tween decks. The vessel was cleaned out at Sydney and then proceeded to other ports in Australia before going to Melbourne, where the frozen meat, the damage to which is in question in this case, was shipped. At Townsville, which was one of the ports at which the vessel called, all the carbolic acid that was left on board the vessel was landed with an exception—two or three drums (I think three) were kept on board by the chief engineer for the purpose of sweetening the engine-room. These three drums were kept during the voyage in question—that is the voyage home with frozen meat—in the engine-room, and I think it is reasonably clear, and I do not think it is disputed, that those drums had nothing to do with the damage which it was afterwards found the frozen meat had sustained. More than twenty drums of carbolic acid had been used for one purpose or another in the course of the two voyages with horses, or in cleansing and disinfecting the ship at Sydney before the frozen meat was shipped. With the exception of the three drums in the engine-room and what was actually in the ship, that is what remained in the bilges or wherever else the carbolic acid may have been used, no carbolic acid was left on board the vessel. The vessel proceeded to Melbourne, and at Melbourne the frozen meat in question was shipped. With that frozen meat and other cargo the vessel made her voyage from Australia to this country, calling at the Cape, and at Durban, and at Cape Town discharged a quantity of cargo. I do not think it is necessary for me upon this question of fact to go very much further into the details. I have considered the evidence which I have heard and I have considered all that was said on both sides upon this question, and it seems to me that there is nothing to show that any kind of accident occurred during the voyage to cause the frozen meat to become tainted by the smell of carbolic acid. I am satisfied that if the frozen meat was tainted by the smell of carbolic acid it must have arisen from a taint in the ship or from carbolic acid in the ship at the time the ship sailed from Melbourne. I know there are some difficult things to explain; I do not need to dwell upon them; I have not forgotten them, but it is sufficient for me to say that I have arrived at the conclusion that nothing happened in the course of the voyage, independently of the condition of the ship at the commencement of the voyage, to cause a taint to the frozen meat, or to cause the damage which is complained of in this action. The vessel arrived, and I find as a fact that the meat in question on arrival was found to be tainted with the smell of carbolic acid and was damaged. I have not to say anything as to the amount of damage, but I find as a fact that the meat was damaged by having become tainted during the voyage with the smell of carbolic acid. I find, as I have said already, that that arose from the condition of the ship at the commencement of the voyage, and I further find that if proper care, skill, and attention had been paid to the cleansing and preparation of the ship before she started on her voyage from Melbourne, the damage would not have occurred. I think that sufficiently disposes of the questions of fact, and expresses the conclusions at which I have arrived upon the material questions so far as they are questions of fact.

As I have said, there is another question. and that is a question of construction of the bill of lading under which the frozen meat in question was shipped. It is a bill of lading which is headed "Refrigerator Bill of Lading," and it contains two clauses which may be called exception clauses—one of them is in larger

print, and the other in smaller print. I do not attach much importance to the difference of type. I will only say this, that the clause which is in larger print, and is more legible, is not of the less importance at any rate on that account. But I deal with the clauses themselves. The clause in the larger type is a very far-reaching clause. It contains exceptions of the widest possible kind, and it seems to me to be perfectly plain and easy to understand. It says this: "Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever, and steamer shall be at liberty to jettison the whole of the goods, or any part thereof, if considered necessary on account of decomposition or otherwise." Applying that to the present case, the damage here arose from a defect; that is to say, a defect existing at the commencement of the voyage, the defect being the taint in the ship—the fact that the ship was impregnated with the smell of carbolic acid, or was carrying carbolic acid in such a way as to taint the cargo and, therefore, I think the damage comes clearly within the words of this clause in the larger type. It was damage to the cargo arising, not from failure or breakdown of machinery, insulation or other appliances, but certainly within the words, "or from any other cause whatsoever," and it arose from a defect which existed at the commencement of the voyage, or at the time of shipment of the goods. It was the consequence of a neglect or default on the part of the crew, notwithstanding that it was a defect arising at the commencement of the voyage. And, the defect arising from the neglect or fault of the crew, it seems that if this clause in the larger type stood alone it would be perfectly plain that the shipowners had in unambiguous language protected themselves from liability arising from such defect. But now it is said that the clause in the larger type must be read together with the clause in the smaller type, and that the effect of reading the two clauses together is to qualify and cut down the extent and effect of the first clause, which is the clause in the larger type. Coming to the clause in the smaller type, in the first place, reading it through, one is struck with this—that it refers to a great many things, possible causes of damage and matters which do not seem at any rate very appropriate to a bill of lading for the carriage of carcases of mutton. It is a very long clause; it is very much more verbose than the clause in large type. It contains a longer enumeration of excepted perils in detail, and then that enumeration of excepted perils—which I need not read, and which is very long—is followed by these words: "Whether or not any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers, or other persons whomsoever in the service of the owners or charterers, whether on board the said ship, or on shore, or on board any other ship," and so on. I just stop to observe that in this long clause in the smaller type the negligence clause, to begin with, is much more limited than the negligence clause in the larger type, because the negligence clause in the smaller type is a negligence clause which is limited to the negligence of the persons in the employment of the ship bringing about any of the enumerated perils which are enumerated separately and particularly; whereas the negligence clause in the larger type is a perfectly general one, applying to loss arising in consequence of any negligence of persons in the employment of the shipowner. Returning to the clause in the small type, after the negligence clause, which is limited in the way I have mentioned, there come certain general words which add something to the perils which have been enumerated in detail, and they are these: "Or any other causes beyond the control of the owners or charterers." I may say in passing I cannot find that the negligence clause in the small type refers to these other causes; it seems to refer only to perils which are enumerated in detail. I only point that out as going to show that the negligence clause in small type is more limited than the negligence clause in the larger type. With regard to these general words, I may point out that in the small type the general words which sweep in other causes are these: "Any other causes beyond the control of the owners or charterers." In the clause in the larger type the general words are not so limited at all, but they are: "Loss arising from any other cause whatsoever." Then comes the clause with regard to the seaworthiness, in the small type: "Or by or from any accidents to or defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigeration or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage) or insufficiency of coals at the commencement, or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness." So that the exception with regard to seaworthiness in the small type is no doubt qualified in that way—that is to say, the shipowner is not to be liable for defects or other losses arising from defects existing at the commencement of the voyage if reasonable means have been taken to provide against such defects and unseaworthiness. So it is obvious that the clause in small type, although, as I have said, much longer, is in reality very much narrower and much more limited than the clause in the larger type. The question is whether I am to restrain the plain sense of the first clause, the more general one, by reading with it the longer clause in small type—whether I am to say that the wider clause is to be cut down by the narrower clause, or whether I am to say that the narrower clause is to be extended by the more extended clause. It seems to me the plain common sense is that the clause in the larger type has been put in for the express purpose of giving a wider scope to the narrower clause in the small type. It seems to me a most unnatural reading of this bill of lading to say that the clause in large type is cut

down by the clause in the smaller type—I am not saying on account of the size of the type, but for the reasons which seem to me fairly obvious. The shipowner has had his doubts about this very long and somewhat complicated clause in small type, and to make the matter clear he has inserted a perfectly plain, intelligible, but very far-reaching clause, which is the clause in the larger type, and I think that must prevail. That being so, as the loss does fall within the exception expressed in the clause in the larger type, which I think is the governing clause, I think the shipowners are exempt from liability in this case, and therefore there must be judgment for the defendants.

Judgment for the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C. and *Loehnis* for the appellant.—The decision of the learned judge, that the defendants were protected from liability by the provisions of the large print clause was wrong. Even if that clause stood alone in the bill of lading, it would not protect the shipowner from liability for this damage. The learned judge has found as a fact that the damage was caused by the unseaworthy condition of the vessel at the time the meat was shipped, and not by any failure or breakdown of the machinery or insulation. The *primâ facie* construction of that clause is that it applies only to something happening during the voyage and that it does not protect the shipowner from liability caused by the ship being unseaworthy at the commencement of the voyage. The shipowner is bound to provide a ship which is seaworthy at the commencement of the voyage, and this clause does not exempt him from that obligation:

Steel v. *State Line Steamship Company*, 37 L. T Rep. 333; 4 Asp. Mar. Law Cas. 516; 3 App. Cas. 72;

Tattersall v. *National Steamship Company*, 50 L. T. Rep. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297.

The words "or from any other cause whatsoever" in this clause must be construed as referring to matters *ejusdem generis* with the specifically enumerated perils—that is, failure or breakdown of machinery, &c.—and not as wide general words intended to include every kind of peril:

Richardsons and Samuel and Co., Re an Arbitration between, 77 L. T. Rep. 479; 8 Asp. Mar. Law Cas. 330; (1898) 1 Q. B. 261.

The large print clause and the small print clause must be read together as far as possible, and, when they are so read together, the true construction of the document plainly is that the shipowner is not exempt from liability for damage caused by unseaworthiness unless reasonable means have been taken to provide against unseaworthiness. The learned judge has found as a fact that reasonable means were not taken to provide against unseaworthiness, and therefore the defendants are not protected. The vessel was not in a fit condition to receive and carry a cargo of this kind, and therefore was not seaworthy:

Owners of Cargo on Ship Maori King v. *Hughes*, 73 L. T. Rep. 141; 8 Asp. Mar. Law Cas. 65; (1895) 2 Q. B. 550.

If a shipowner wishes to except the implied warranty of seaworthiness, he must do so in clear and unambiguous language:

Price and Co. v. *Union Lighterage Company*, 88 L. T. Rep. 428; 9 Asp. Mar. Law Cas. 398; (1903) 1 K. B. 750;

Rathbone Brothers and Co. v. *MacIver, Sons, and Co.*, 89 L. T. Rep. 378; 9 Asp. Mar. Law Cas. 467; (1903) 2 K. B 378.

It cannot be said that, in any view of this bill of lading, the shipowner has clearly protected himself against this liability.

Carver, K.C. and *D. C. Leck* for the respondents.—The learned judge rightly held that the large print clause was the governing clause, and was not cut down or qualified by the small print clause. The small print clause only limited the liability of the shipowner for unseaworthiness in a qualified manner, and it was a very long clause not too clearly expressed. The shipowner, therefore, inserted the large print clause in order to clearly protect himself by using the widest possible language. The clause containing the lesser protection cannot control or qualify the clause which gives the larger protection. By the large print clause the shipowner is protected from liability for "loss or damage arising from . . . or any other cause whatsoever." Those words clearly cannot be intended to refer only to matters *ejusdem generis* with breakdown or failure of machinery. They are clear and unambiguous words, exempting the shipowner from liability for any damage arising from anything existing at the commencement of the voyage. Even if the words of the large print clause are to be construed as referring only to breakdown or failure of machinery, &c., this damage was caused by failure of the insulation, for if the meat had been properly insulated it could not have been tainted.

J. A. Hamilton, K.C.—The learned judge ha found that there was no failure or breakdown of the insulation. If there had been. the meat would have become putrid instead of being tainted with carbolic acid.

Lord ALVERSTONE, C.J.—With all deference to the weighty opinion of Walton, J. in a case of this kind, I have come to the conclusion that in this case he has overlooked and not given effect to certain broad considerations which must, I think, be borne in mind in construing commercial documents, and, indeed, all documents which have to be considered from a legal and business point of view. In my opinion, it is true in the case of a bill of lading, as in the case of other documents, that where there are a number of clauses they are as far as possible to be read together, as being consistent with one another, and that a clause is not to be treated as being mere surplusage, or as inoperative, unless the language of the document leads to the conclusion that it cannot be read consistently with rest of the document. There is one other general rule of construction to which I think the learned judge did not give sufficient attention, which I will state in the language of Williams, L.J. in his judgment in the case of *Rathbone Brothers and Co.* v. *MacIver, Sons, and Co.* (89 L. T. Rep. 378; 9 Asp. Mar. Law Cas. 467; (1903) 2 K. B. 378). In that case Williams, L.J. said: "With reference to the carriage of goods by sea, the law implies certain warranties on the part of the shipowner. It

puts upon him certain obligations which will always bind him, unless there are in the contract clear and express words which without ambiguity relieve him from that which I may call his common law obligations." I think that Romer, L.J., in that case, was referring to that principle when he said: "Shipowners have been for a long time endeavouring to limit the general liability cast upon them by law as carriers by sea by inserting special exceptions, without going the length of excepting their liability in respect of the warranty of seaworthiness, and they have been, as I understand, from time to time extending the special exceptions. I think, however, I am right in saying that as a principle of construction the warranty of seaworthiness will be held not to have been excepted unless it plainly appears that it was intended to except it. In other words, the court will not readily infer an exception of that warranty." It seems to me that those statements in the judgments in the Court of Appeal lay down in the clearest possible language the principles which were applied in many earlier cases. In the present case I think that the learned judge has not given sufficient effect to the fact that the small print clause undoubtedly deals with unseaworthiness. Mr. Carver has argued that the small print clause leaves the matter of unseaworthiness where it was, except to the extent to which it limits it. In other words, there being a warranty of seaworthiness, the small print clause provides that the shipowner excepts damage caused by or from any "accidents to, or defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness." Therefore I accede to the first part of Mr. Carver's argument, that the small print clause leaves the warranty of seaworthiness where it was except to the extent that it affords further protection to the shipowner by providing that, if reasonable means have been taken to prevent unseaworthiness, the shipowner shall be protected. I am, however, unable to follow the other part of Mr. Carver's argument, that the large print clause, in the construction of which there is undoubtedly considerable difficulty, is intended to be an overriding clause exempting the shipowner from liability for unseaworthiness, whether existing at the commencement of the voyage or not, and that by reason of the words, "from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage, or at the time of the shipment of the goods or not," the shipowner is protected in this case notwithstanding the limited protection given to him by the small print clause. I am unable to come to the conclusion that, construed fairly and with every wish to give the fullest possible effect to the exception, the large print clause further limits the warranty of seaworthiness beyond the limitations contained in the small print clause. I will not repeat the reasons which have been given why the two clauses should as far as possible be read together as being consistent with each other and operative. The large print clause says: "Neither the steamer, nor her owners, nor her charterers shall be accountable for the condition of goods shipped under the bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention." Then, it is very material to observe that the clause proceeds: "Nor for the consequence of any act, neglect, default, or error of judgment of the master officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever, and steamer shall be at liberty to jettison the whole of the goods or any part thereof." It is, therefore, quite plain that this clause cannot be considered as having been framed to put in the words, "or from any other cause whatsoever," so as to completely get rid of any liability for unseaworthiness. We find those words, "or from any other cause whatsoever," whether existing at the commencement of the voyage, &c., following the words which relate specially to failure or breakdown of machinery, insulation, or other appliances, and I have no doubt that we ought to read those words, "or from any other cause whatsoever," as relating to the subject-matter there dealt with and not to read them as a general clause exempting the shipowner from the consequences of unseaworthiness. I read this clause, therefore, in this way—that the shipowner is protected from liability from loss or damage arising from failure or breakdown of the machinery, &c., or from any other cause whatsoever, whether arising from a defect in the machinery, &c., which existed at the commencement of the voyage or at the time of shipment of the goods or not. I adopt the argument of Mr. Hamilton that those words were intended to widen the exception, which was put in for the purpose of protecting the shipowner, and relates to breakdown of machinery, &c.

That being so, I have now only to deal with the argument for the respondents that, even if that view of the clause ought to be adopted, and they are wrong in their contention that the clause was intended to cover unseaworthiness however occasioned, and whether existing at the commencement of the voyage or not, yet this was a defect of insulation. I think that that point was not really raised in the court below. I cannot think that Walton, J. would have dealt with the case in the way in which he did deal with it if that point had been really raised. I think that this was not a defect or breakdown of machinery, insulation, &c., within the meaning of this clause. The learned judge has found, as I understand, that the ship was tainted with carbolic acid, and was, therefore, unfit to carry a cargo such as frozen meat, independently altogether of the particular chamber in which the meat was being carried, and independently of any function which the insulation, as insulation, had to fulfil. That being so, I think that the facts do not bring this case within the narrower and proper construction of the large print clause; and, inasmuch as that clause cannot be construed as a general exception protecting the shipowner from liability for the consequences of unseaworthiness, I think that, in the words of Williams and Romer, L.JJ., which I have quoted,

he has failed to indicate in plain language that the warranty of seaworthiness is cut down to any greater extent than by the small print clause. Therefore, I have come to the conclusion that this appeal must be allowed.

COLLINS, M.R.—I am of the same opinion, and I think that I cannot usefully add anything to the reasons given by the Lord Chief Justice.

ROMER, L.J.—I agree.

Appeal allowed.

Solicitors for the appellant, *Waltons, Johnson, Bubb*, and *Whatton*.

Solicitors for the respondents, *Lowless* and *Co.*

Thursday, Jan. 28, 1904.

(Before Lord ALVERSTONE, C.J., COLLINS, M.R., and ROMER, L.J.)

LONDON TRANSPORT COMPANY LIMITED *v.* TRECHMANN BROTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Freight at per ton shipped payable on right delivery — Lump sum freight —Loss of part of cargo by jettison—Payment by consignees of bill of lading freight—Rights of charterers against shipowners.

By a charter party it was agreed that a ship was to load at Fiume a full and complete cargo of sugar in bags, and therewith proceed to Boston and there deliver the cargo agreeably to bills of lading, on being paid freight at the rate of 10*s.* 6*d. per ton gross weight shipped, payable on right and true delivery of the cargo in cash; charterers' liability to cease when cargo was shipped and bills of lading signed, provided all the conditions called for in the charter had been fulfilled, but vessel to have a lien for freight, dead freight, and demurrage; the master to sign bills of lading at any rate of freight as presented, without prejudice or reference to the charter, any difference between the charter-party and the bills of lading freight to be settled at Fiume on clearance of vessel, if required by master.*

The charterers had previously agreed with an American company at Boston to ship by the vessel named in the charter-party, a cargo of sugar in bags from Fiume to Boston at 10*s. per ton.*

On the vessel being loaded, the difference between the charter-party and the bills of lading freight —i.e., 6*d. per ton—was paid, and bills of lading were signed.*

In the course of the voyage the vessel went aground and part of the cargo was jettisoned. On the arrival of the vessel the remainder of the cargo was delivered, and the consignees thereupon paid to the shipowners the bill of lading freight payable on the gross weight shipped.

In an action by the charterers against the shipowners to recover so much of the freight paid by the consignees to the ship owners as represented the freight upon the cargo which was not delivered.

Held (by Lord Alverstone, C.J. and Collins, M.R., Romer, L.J. dissenting), that the shipowners were not entitled to a lump sum freight, and that the charterers were entitled to recover the sum claimed.

Judgment of Walton, J. affirmed.

APPEAL by the defendants from the judgment of Walton, J. at the trial of the action without a jury.

The action was brought by the charterers of the steamship *Wilster* against the owners to recover a sum of 545*l.* 8*s.* 3*d.*, part of the freight paid by the consignees of the cargo under the bill of lading, which the charterers claimed had been collected by the shipowners for the charterers' use.

On the 11th Dec. 1901 the plaintiffs entered into a contract with the American Sugar Refining Company of New York, by which they undertook to ship from 3000 to 3150 tons of sugar in bags, quantity at steamer's option, by the steamship *Wilster*, "Fiume to Boston, at 10*s.* per. ton of 1000 kilogrammes gross weight shipped."

On the 16th Jan. 1902 an agreement for the chartering of the steamship *Wilster* was entered into between the plaintiffs as charterers and the defendants as owners.

A printed form of charter-party was made use of, some of the printed words being struck out, and other words being written in. In the following copy of the material parts of the charter-party, the words within brackets are the printed words that were struck out, and the words that are in italics are those that were put in in writing.

London, 16th Jan. 1902.—It is this day mutually agreed between Messrs. Trechmann Brothers, of the good steamship called the *Wilster* of the measurement of 1332 tons, net reg., classed 100 A1. and 30 *min.* 3150 *max.* tons deadweight cargo capacity guaranteed now *Fiume* discharging . . . that the said steamer . . . shall . . . sail and proceed to *Fiume* . . . and there load . . . a full and complete cargo of *sugar in bags* [lawful merchandise] in the customary manner [including the usual deck cargo] which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture [but charterers having the full reach of the holds and spare bunkers, the same as if the steamer was loading for owner's benefit], and being so loaded shall therewith proceed immediately to Boston . . . and there deliver the cargo agreeably to bills of lading on being paid freight in full of all port charges, wharfages, consulage, pilotages, and other charges customarily paid by steamers [for the full reaches and burden of the steamer's hold and every available space, the lump sum of or] at the rate of *ten shillings and sixpence* per ton of 20cwt. gross weight *shipped* [delivered], payable on right and true delivery of the cargo *in cash* at the current rate of exchange for sixty days' sight bills on London. [In the event of steamer not carrying the guaranteed dead weight as above, or owners failing to prove to the satisfaction of charterers that the steamer can carry same, owners to be responsible for the consequences thereof, and the above-mentioned lump sum to be reduced in proportion.] If required by master, one-third of freight payable here less 3 per cent. to cover interest and insurance. . . . The ship to be addressed at port of destination to charterers' agents on usual terms paying 2½ per cent. address commission on signing bills of lading. Charterers' liability to cease when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage. The master or person appointed by him shall sign bills of lading, at

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

any rate of freight as presented without prejudice or reference to this charter; and, if required, he is to give charterers' agents in *Fiume* written authority to sign them for him in accordance with mate's receipts; any difference between this charter-party and bills of lading freight shall be settled at *Fiume* on clearance of vessel it required by master; if in charterers' favour by captain's draft payable three days after arrival at port of discharge, if in steamer's favour, in cash, less 3 per cent. for all charges. . . .

The bills of lading signed by the plaintiffs' agent contained the words "freight and other conditions as per agreement."

The agreement there referred to was the agreement of the 11th Dec. 1901 between the plaintiffs and the American Sugar Refining Company.

The vessel was loaded at Fiume with a cargo of 31,025 bags of sugar.

Bills of lading were signed, and the difference between the charter-party and the bills of lading freight—viz., 6*d.* per ton—was paid to the shipowners at or about the time when the vessel sailed from Fiume.

When close to Boston the vessel went aground, and there was very considerable difficulty in floating her.

Part of the cargo was jettisoned, and many of the bags of sugar were damaged by water, so that on the arrival of the ship at Boston only 27,743 bags out of the 31,025 that had been shipped were delivered to the consignees; and out of these 27,743 bags 7716 were empty.

The consignees of the sugar, the American Sugar Refining Company, paid to the defendants the whole of the bill of lading freight, that is to say, freight upon the whole cargo shipped at shipping weights, amounting to 1551*l.* 5*s.* 1*d.*

The plaintiffs alleged that under the charter-party they were not liable to pay full freight upon the whole cargo shipped at shipping weights, but were only liable to pay freight on the cargo actually delivered, and they brought this action to recover from the defendants the sum paid to the defendants by the consignees as freight in respect of the sugar which was not delivered, amounting to 545*l.* 8*s.* 3*d.*

At the trial of the action without a jury the following judgment was delivered:—

WALTON, J. (after stating the facts his Lordship continued:)—Now the question of the charterers' liability for freight must, of course, depend upon the terms of the charter-party. The shipowners say to the plaintiffs, the charterers: "We are entitled to the full freight which has been paid because we have just the same rights as you say you have under your bill of lading against the consignees." Under the charter-party the shipowners say: "We are entitled to recover the freight upon the total weight shipped, whether delivered or not, and therefore we are entitled to keep the 1551*l.* which we have in fact collected; it is not your freight, it is not a balance of freight over and above what we as shipowners are entitled to; we are entitled to the whole of it; we did not collect it for you the charterers." In support of that contention Mr. Carver referred to a number of cases, the last of which was the case of *Merchant Shipping Company* v. *Armitage* (29 L. T. Rep. 809; 2 Asp. Mar. Law. Cas. 51, 185; L. Rep. 9 Q. B. 99). The headnote in the Law Reports is this: "By charter-party a ship was to load at Colombo or Cochin from the charterers' agents a full and complete lading and proceed to London and discharge there, fire and other dangers of the sea excepted, a lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House. Part of the cargo loaded in accordance with the charter-party was lost by fire without any default of the master or crew and the remainder was delivered in London. Held, that the shipowner was entitled under the charter-party to the full sum of 5000*l.*" In that case the freight was a lump sum of 5000*l.* indivisible. The cargo was shipped and the whole of it was not delivered. Part of it was lost by fire, and it was there contended that the shipowner was not entitled to the lump sum of 5900*l.*, but only to some part of it. It was held that he was entitled to the full freight. Lord Bramwell, then Baron Bramwell, in giving judgment, said this: "The claim is 'a lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two month's after the date of the ship's report inwards at the Custom House.' Now, Mr. Williams says that until the ship is discharged and there is a right delivery of the cargo the lump sum is not due. It may possibly be that verbally he is right. If so, what is the meaning of 'the cargo.' In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped but which she is not bound to deliver, which the shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her. Now, there is a cogent argument in favour of this construction. Suppose that 5*l.* worth of these goods had been stolen by the crew, that would not be within the exceptions; then would it have been possible to have said that the whole lump sum was lost? Would not the common rule have applied? The defendants would have had to pay the freight and seek their remedy by a cross action. If that is so, is it not very odd that the shipowner is worse off, because he is not subject to an action than if he had been subject to an action — that is to say, he is worse off because fire has caused the loss than he would have been if it had been owing to a depredation of the crew? I venture to think some interpretation must be put upon the clause to preclude the entire delivery of the whole cargo being a condition precedent." Therefore in that case the court felt that it would be so unreasonable to say the shipowner must lose the whole of his lump sum freight if he failed to deliver any part, however small, of the cargo, that they were driven to put the construction upon the contract that the entire delivery of the whole cargo was not, and could not have been intended to be, a condition precedent. No doubt, then, if this charter-party were a charter-party for a lump sum freight as in that case I should be governed of course by that case, and I have no desire to distinguish it in any way, and should follow it. The question really is whether this charter-party is a charter-party similar to that which the court had to construe in the case of *Merchant Shipping Company* v. *Armitage*

(*ubi sup.*). It seems to me that the reasoning upon which that judgment was arrived at depended essentially upon the fact that the freight payable was a lump sum freight in this strict sense, that it was an indivisible freight. I am not at all certain that if in that case the freight had been, not an indivisible lump sum, but a sum to be arrived at at a rate per ton upon the cargo shipped—and the delivery of the cargo intended to be carried and intended to be delivered under the bill of lading was prevented by some of the excepted perils—that the judgment would have been the same, I doubt whether in such a case as that, even though the freight was to be a freight payable upon the weight shipped, and in that sense perhaps a lump sum freight, it would have been regarded as an indivisible freight, and whether the court would have felt itself constrained, as it did in that case, to treat the words which correspond to the words of this charter-party, "payable on right and true delivery of the cargo" as something not amounting to a condition precedent. However, it is necessary to look at the clauses of this particular charter-party and see what is a fair construction of them with regard to the freight payable. I do not know that there are any clauses other than what I have read which really help in coming to a conclusion upon this matter. There is this clause which I have referred to which provides that: "Any difference between this charter-party and bills of lading freight shall be settled at Fiume on clearance of vessel, if required by master." That does seem to contemplate an adjustment at Fiume. It seems to contemplate that the freight payable under the charter-party is such a freight that at Fiume it would be possible to compare it with the bills of lading freight, and to settle once for all whether there is any difference either one way or the other, and if there is any difference it seems to contemplate that that difference should be paid at Fiume, whether it is in favour of the shipowners or the charterers. That, no doubt, as far as it goes, is rather in favour of the view put forward on behalf of shipowners by Mr. Carver, because if you cannot tell until the cargo is delivered in a case of this kind what the freight payable is going to be, and assuming the bill of lading bears the construction which is put upon it by the charterers, then it would be impossible to adjust the difference of freight at Fiume. I think to that extent, and to that extent only, does that clause throw any light on the matter. At the hearing I was rather inclined to think it might be carried further, but now I do not think it can. I think that the most that can be said about that clause is that it does appear to contemplate that any adjustment or difference of freight can be settled at Fiume. Of course it is to be observed that that clause is subject to this. The difference is to be settled at Fiume on the clearance of the vessel, "if required by master," and only if required by the master; so that it is not absolute, and one is really thrown back upon the very words of the clause which provided for the payment of freight. That clause provides that the vessel being loaded as required is to proceed to Boston "and there deliver the cargo agreeably to the bills of lading on being paid freight," I leave out some words, "at the rate of 10*s.* 6*d.* per ton of 20cwt. gross weight shipped payable on right and true delivery of the cargo in cash at the current rate of exchange." The cargo as provided in the charter-party is a "cargo of sugar in bags," and I have looked through the bills of lading and I find mentioned in each bill of lading the number and the weight of the bags for which that bill of lading is given. I have gone through them, and I find that the weight per bag in all the bills of lading, although the quantities differ, is uniform. Therefore, I come to the conclusion, that in the ordinary course of things at Fiume, when a shipment is made of sugar in bags and bills of lading are given in the way they were given in this case, the weight of each bag is approximately ascertainable. It is taken to be a uniform weight, and according to these bills of lading it is 100 8 kilogrammes. In some of the documents it is treated as 100; but at any rate, whatever it may be, it is uniform. Therefore we have this. It is a shipment of sugar in bags, the weight of the bags being ascertained by the bills of lading. So that you have the shipping weight of the parcels which are shipped. That is certain. That being so, what is the meaning of the clause saying that the cargo is to be delivered "on payment of freight at the rate of 10*s.* 6*d.* per ton of 20cwt. gross weight shipped payable on right and true delivery of the cargo." Does that mean that the freight is to be paid on the cargo which is rightly and truly delivered, or does it mean that freight is to be paid which shall be equal to 10*s.* 6*d.* per ton on the total weight shipped, and in that sense a lump sum not depending or referable in any way to the quantity of cargo delivered? I do not think that the cases which I have been referred to really help one very much. Those cases all proceed on the assumption, or rather upon the fact, that in those cases the freight was a lump sum freight. Is it a lump sum freight here? It is by reading the words as one must read words of the English language that one finds out the intention of the parties, unless there is some strict rule of construction which one must follow. Taking the words which make the cargo deliverable "on being paid freight at the rate of 10*s.* 6*d.* per ton of 20cwt. gross weight shipped payable on right and true delivery of the cargo," and reading those words in their natural sense, I cannot help thinking that the only proper meaning which can be given to them is that freight is to be paid upon the cargo which is delivered. I do not find much difficulty with regard to the words "per ton of 20cwt. gross weight shipped." I think they are quite satisfied and quite naturally interpreted as meaning that there is to be no dispute about weight. The weight is to be the weight as shipped. There is no need to alter the words at all, merely to interpret them, and it seems to me that, although no doubt it is expressed briefly and not quite fully, the meaning is that the freight is to be paid at shipping weights upon the cargo which is delivered. There might be a difference in the weighing of the bags at Boston and Fiume. The bags might have become wet and the sugar might have drained away and disputes might have arisen one way or the other. I think this charter-party fixes the weight per bag, and that weight is to be the shipping weight, and is to be ascertained and can be ascertained from the bills of lading. Therefore I think with regard to this point that the contention of the charterers must be accepted.

Now, so far I have gone upon the mere language of the charter-party as it stands; but I think that to some extent I am confirmed in that view by noticing this. The charter-party is a printed form which has been adapted by certain alterations to the particular case, and I observe that the printed form itself is so framed that the form can be used, by striking out various passages, either for a lump sum freight or for a freight which is not a lump sum freight. That appears, for instance, in the sentence which fixes the freight. The printed form runs thus: "And there deliver the cargo agreeably to bills of lading, on being paid freight in full of all port charges, wharfages, consulage, pilotages, and other charges customarily paid by steamers for the full reaches and burden of the steamer's hold, and every available space, the lump sum of or at the rate of per ton of 20cwt. gross weight delivered, payable on right and true delivery of the cargo." So that the printed form may be adapted either to a lump sum freight, or to a freight which is at so much per ton on the cargo delivered, and here those parts of the form which are appropriated to a lump sum freight are struck out. For instance, the clause "but charterers having the full reach of the holds and spare bunkers, the same as if the steamer was loading for owner's benefit," is struck out. That is a clause which is put in to entitle a charterer, who pays a lump sum, to the full use of the ship, and is not appropriate in a case where a full cargo is to be shipped and to be paid for at so much per ton. Then in the clause which relates directly to the freight, the words "for the full reaches and burden of the steamer's hold and every available space, the lump sum of or" are struck out. So this printed form which can be adapted either to a lump sum charter-party or to a charter-party at so much per ton on the cargo delivered, is altered for the purposes of this case so as not to make it a lump sum charter, but a charter of a different kind. I do not say that is conclusive, because they might have made out a charter of a different kind, and yet such a charter that the freight would be payable on the whole quantity shipped, notwithstanding that some of it was lost, but it does point to this, that the parties did not intend it to be a lump-sum charter such as that which the court had to deal with in the case of *The Merchant Shipping Company* v. *Armitage* (*ubi sup.*). I only mention that as a matter confirming me in the view which I have arrived at on merely reading the words and giving them what I believe to be their natural and proper sense. Therefore, I come to the conclusion that this sum of 545*l.* 8*s.* 3*d.* is a freight which the shipowners are not entitled to keep. It was freight which was not payable by the charterers to the shipowners under the charter-party. If that is so I do not see how I can hold, having regard to the way in which business is done under a charter-party like this, that it was not collected by the shipowners from the charterers. It was collected under and upon the bills of lading from the holders of the bills. I am assuming that the consignees under the bills of lading were bound to pay it. I am not deciding that; I am expressing no opinion about it. They did, in fact, pay it, and it was a sum which, if I am right in my view of this charter-party, was not payable by the charterers, although it was receivable by the charterers under their bills of lading. Therefore, if I am right in my construction of the charter-party, and, indeed, whether the consignees were or were not strictly bound to pay it, I think that it was a sum received by the defendants under the bills of lading. It was paid on the bills of lading, and it is not chartered freight, which I think the shipowners are entitled to retain, and I think they have collected for, and must account for it, to the charterers. The consignees do not appear to have intervened in any way or to have attempted to get this money back, and as, in the present case, I am not dealing with their rights, I do not say whether they are entitled to get it back. Whether the consignees were bound to pay or not I think the plaintiffs are entitled to recover the money from the defendants. I ought to have said a word about the empty bags, because Mr. Carver said as to those empty bags, on 7716 at any rate, the freight was payable, because, even although the bag was empty you must take it as weighing the shipping weight. I appreciate what there is to be said in favour of that, but I think the freight was to be payable on the sugar in bags. No doubt the weight of the bag was to be included, but where there was no sugar in the bags I do not think that any sugar was delivered, and therefore the freight is not payable on the empty bags.

Judgment for the plaintiffs.

From this judgment the defendants appealed.

Carver, K.C. (*Leck* with him) for the defendants. —This case turns on the question whether upon the construction of the charter-party the freight payable is a lump sum freight, or whether it is to be paid upon the delivery of the cargo at the rate of the amount of sugar shipped. I submit that the freight is a lump sum freight, and if so the shipowners are entitled to retain all the freight which they collected from the consignees under the bills of lading. The charter-party freight is not payable with reference to the number of bags, but with reference to the number of tons shipped. The freight was therefore fixed as soon as the cargo was put on board, and it was in fact, according to the true construction of the charter-party, a lump sum freight. This view is supported by the provision that any difference between the chartered freight and the bills of lading freight was to be settled at Fiume. The governing case here is the decision of the Exchequer Chamber in

> *Merchant Shipping Company* v. *Armitage*, 29 L. T. Rep. 809; 2 Asp. Mar. Law Cas. 51, 185; L. Rep. 9 Q B. 99.

In that case Bramwell, B. said: "What is the meaning of 'the cargo'? In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped, but which she is not bound to deliver, which the shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her." In that case the court approved of the decision in

> *The Norway*, 13 L. T. Rep. 50; 2 Mar. Law Cas. O. S. 254; 3 Moo. P. C. N. S. 245;
> *Robinson* v. *Knights*, 28 L. T. Rep. 820; 2 Asp. Mar. Law Cas. 19; L. Rep. 8 C. P. 465.

He referred also to

Blanchet v. *Powell's Llantwet Collieries Company*, 30 L. T. Rep. 28; 2 Asp. Mar. Law Cas. 224; L. Rep. 9 Ex. 74;

Hansen v. *Harrold Brothers*, 70 L. T. Rep. 475; 7 Asp. Mar. Law Cas. 464; (1894) 1 Q. B. 612.

J. A. Hamilton, K.C. and *A. M. Talbot* for the plaintiff.—The cases cited are cases of lump sum freight. But the question here is whether under this charter-party the freight is a lump sum freight. It is to be observed that the parts of the printed form which are specially applicable to a case of a lump sum freight have been struck out. Freight is *primâ facie* a sum which is not earned until the cargo for which it is demanded has been delivered That is well established:

Dakin v. *Oxley*, 10 L. T. Rep. 268; 2 Mar. Law Cas. O. S. 6; 15 C. B. N. S. 646.

That *primâ facie* rule, that freight is only payable on delivery of the cargo, may be altered by the parties by some special agreement, but the burden of showing that the general rule is not applicable in any particular case lies on the person who contends that the rule does not apply. There are difficulties in the construction of this charter-party, but that is not enough to take the case out of the rule of *Dakin* v. *Oxley*. In the case of lump sum freight there is no relation between the freight paid and the nature of the cargo delivered. The clause here "at the rate of," &c., is irreconcilable with the freight being a lump sum freight. In the court below a case which turned on the words in a charter-party, "freight payable on deals and sawn lumber on the intake measure of quantity delivered," was cited for the defendants:

Spaight v. *Farnworth*, 42 L. T. Rep. 296; 4 Asp. Mar. Law Cas. 251; 5 Q. B. Div. 115.

But I submit that the decision of Bowen, J. is really in favour of the plaintiffs.

Carver, K.C. in reply.

Lord ALVERSTONE, C.J.—This case is one, to my mind, of very great interest, and at the same time presents very great difficulty; but after the interesting and able arguments we have heard I have come to the conclusion that the judgment of my brother Walton is right. Now the terms of the contract must be carefully looked at, in order to ascertain what are the real rights of the parties in this case. I say, carefully looked at, because, it seems to me, that the real point in this case depends upon whether the contract in the case can be treated as a lump sum contract —that is to say, a contract for the use of the ship, and whether the argument as to a full cargo for a lump sum applies to this contract or not. Now, I think it is convenient that I should, in the first place, construe the contract and then see within what category it falls. It is a contract that the charterers are to load a full and complete cargo of sugar in bags which the charterers bind themselves to ship, and the ship being so loaded shall proceed to Boston and there "deliver the cargo agreeably to bills of lading on being paid freight in full of all port charges"—so far it is a contract which contemplates the payment of the freight on delivery of the cargo—"at the rate of 10*s.* 6*d.* per ton of 20cwt. gross weight shipped, payable on right and true delivery of the cargo in cash at the current rate of exchange for sixty days' sight bills on London." I pause there, for the purpose of pointing out that the words "deliver the cargo on being paid freight in full of all port charges," "at the rate of," and the words "payable on right and true delivery of the cargo in cash," all indicate an ordinary contract for payment of freight upon delivery of the cargo. The difficulty arises because after the words "at the rate of" you have "at the rate of 10*s.* 6*d.* per ton of 20cwt. gross weight shipped. Now, the real question we have to consider is this: Does the fact that the rate of freight is to be fixed solely with reference to the gross weight of the cargo shipped justify the defendants in turning this into, or in saying that this is, a contract which is subject to the incidents of a contract for a lump sum freight? It seems to me that there is another class of contract from which we must distinguish it, having regard to the principle we have to apply, before we can say it must be a lump sum contract, and that class of contract is one of which *Spaight* v. *Farnworth* (*ubi sup.*) is an instance, where the freight is said to be freight payable on delivery and freight payable on right and true delivery, but at a rate to be fixed according to the weight of cargo shipped. As in the timber case, there was a contract to pay freight on delivery at the rate of the weight or quantity of the timber shipped, so it seems to me quite possible that in a sugar case, as this is, you may have a contract to pay freight on delivery at the rate of the weight of cargo shipped, and the real difficulty in this case is within which class of contract this contract falls. Does it fall within the class of contract which is subject to the conditions which attach to a lump sum contract, or does it fall within that class of contract where the freight is payable upon delivery, but at a rate to be fixed on the weight shipped? The only two other clauses that have any bearing are these ordinary clauses: "Charterers' liability to cease when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage." Then the other clause is: "Any difference between this charter-party and bills of lading freight shall be settled at Fiume," that is the port of loading. "on clearance of vessel if required by master; if in charterers' favour by captain's draft, payable three days after arrival at port of discharge, if in steamer's favour in cash, less 3 per cent. for all charges."

At first I thought that was a very strong argument in favour of Mr. Carver's view, because it seemed to contemplate the ascertainment of the actual payment due from the one party to the other in respect of the cargo of the ship at the time that the vessel was loaded and left, but I think that I have attached too much importance to that, and for these reasons: It is quite plain that might apply to either class of contract, because it is merely for the purpose of adjusting the rights of the parties at the time. *ex hypothesi* there is a difference between the bill of lading freight and the charter-party freight, either in favour of one side or the other, which has to be adjusted, but when it has to be adjusted the only matter to be dealt with will be the balance between the two parties. The rest will remain at the same risk as before; in other words, the ship-owner, though he has received the extra 6*d.*, will

still have to insure, and may be liable to lose his freight if he does not fulfil the conditions of the contract; and on the other side it is a clause which must be, or which may be, made use of in favour of the charterer, who will have got the bill of lading from the captain, and still the shipper will have to look for delivery of his cargo to get back that money, part of which he has already paid, and part of which he expects to repay himself when he has delivered the cargo. I therefore come to the conclusion, in accordance with the view of the learned judge, that it is open on this contract to say it is a contract whereby the cargo is to be delivered on being paid freight; or, in other words, the time of payment of freight is to be when the cargo is delivered, and it is to be paid on right and true delivery of the cargo at the rate of the sugar when it is put on board. I am fully alive to the difficulties in actually ascertaining what is to be paid when a cargo arrives short in quantity; but I cannot help thinking that these were the very difficulties which were pointed out by Bowen, J., and for the reasons which I will give in a moment, I do not think that the difficulty in the application of the contract justifies us in bringing it within the category of those contracts which are for lump sums. Now, why do I say that I think, at any rate in this court, we ought to hold that this language is not sufficient to turn this into or make it equivalent to a contract for a lump sum? I do not refer again to the provisions beyond saying that they are the ordinary provisions for payment on the chartering of a ship—freight to be payable upon delivery—except the one condition that it is at the rate of 10*s.* 6*d.* per ton gross weight shipped. Ever since *Dakin* v. *Oxley* (*ubi sup.*), which was decided in 1864, I think that it has been recognised that Willes, J. laid down the law correctly when he said that "The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried and freight is payable in respect of the part carried unless the charter-party make the carriage of the whole a condition precedent to the earning of any freight." Under what circumstances is that departed from? I believe it is accurate to state, as has been stated in the course of the arguments by both of the learned counsel, that, as far as authority goes, that rule has never been departed from, except in the case of lump freight, or, in other words, freight paid for the use of the ship, and which would be due however much cargo the charterers put on board the ship. It is quite true that in the *Merchant Shipping Company* v. *Armitage* (*ubi sup.*) you have the same words: "A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of cargo," and it was held that that 5000*l.* was due because it was a lump sum, and that the right delivery of the whole cargo could not defeat or could not prevent the shipowner being entitled to receive that lump sum. That was following the cases of *The Norway* (*ubi sup.*) and *Knights* v. *Robinson* (*ubi sup.*), and therefore if, as I have said, the only reasonable construction to put on this charter-party is that it is to be a charter-party for a lump sum, which lump sum is to be ascertained by paying 10*s.* 6*d.* per ton upon every ton shipped—if that is the true construction of this charter-party, of course the principle of the *Merchant Shipping Company* v. *Armitage* (*ubi sup.*) would apply. But I think it does require special words in order to deprive the word "freight" of the meaning which has been attached to it by the law of England for so many years, and I think that the mere fact that there would be difficulties in ascertaining what is due, because when the cargo arrives it has to be measured by the weight at shipment, is not sufficient, but only brings the case within that category of contract where freight in the ordinary sense of the word has to be measured, not by the weight of the goods when they arrive, but by the weight of the goods when they are shipped. I fully recognise the difficulties there are in working out the contract, but those are difficulties in application, and must not be allowed to prevent us applying the rules of law; and I think, although the case does present very considerable difficulties, this contract is in its terms an ordinary contract for payment of freight at a rate to be so ascertained, and is not a contract which has the incidents of a lump sum freight. For that reason I think my brother Walton has come to the right conclusion on the construction of the contract. With regard to the other point, in my opinion it does not arise, because I think the charterers were, on the construction I put upon the charter-party, only liable to pay to the shipowner the rate of freight which Walton, J. has assessed. If the case could be argued on the basis that the other sum of money, the larger sum of money, was not due from the consignees to the charterers, different considerations might have arisen; but it seems to me, to the extent to which they received the money beyond that which was due from the charterers to them, they certainly did receive it by virtue of their position under the charter-party and as agents for the charterers. I therefore think this appeal must be dismissed.

COLLINS, M.R.—I am of the same opinion, and I have very little to add, because I not only agree with the judgment delivered by the Lord Chief Justice, but also with that of Walton, J. It seems to me that the basis of the whole question here is, what is the right of the shipowner to freight? It is perfectly clear law that *primâ facie* freight is not payable except upon delivery of the cargo. You have to find some special provisions sufficiently clearly expressed in the contract between the parties to oust that *primâ facie* presumption. Therefore, in approaching this case, you must start with supposing that where freight is stipulated for, it is a condition precedent to the earning of that freight that the goods should be carried to their destination. Now, what do I find here on the face of this charter-party? To begin with, it is not a contract written out *de novo* between the parties, but it is a contract based upon a printed form, some parts of which are allowed to stand, and some parts of which are excluded, and on the face of this printed form there is a provision for agreeing distinctly for what is called a lump sum freight,

and there is also a provision for the ordinary agreement of ordinary freight, *i.e.*, freight to the earning of which delivery is a condition precedent. The contract is to load a full and complete cargo and deliver it at a certain place agreeably to bills of lading, on being paid freight in full, and then, "At the rate of 10*s.* 6*d.* per ton of 20cwt. gross weight shipped, payable on right and true delivery of the cargo in cash, at the current rate of exchange for sixty days' sight bills on London?" Is there anything in those terms incompatible with the *primâ facie* obligation to deliver the cargo before you can earn your freight? The only thing that can be suggested as incompatible with it is that the rate at which the freight is to be paid is the rate per ton of the gross weight shipped. What is there inconsistent with that in the obligation to deliver the cargo before you have earned your freight? It seems to me nothing. It is a convenient way of measuring that which is to be paid for—the freight—and it is convenient in this way, that for many causes the weight may be altered during the course of transit without any fault on the part of the shipowners, and therefore it is thought a fair provision that they should have a perfectly indisputable weight, the weight when the cargo is shipped, as the basis on which the freight was to be paid; and if it should happen that that weight is diminished by causes outside the shipowners' responsibility, they are not to suffer in that respect, but are to be paid on the weight of the cargo shipped, not on the weight of the cargo delivered, which may be less. That is a very intelligible provision, and one which the parties might perfectly well have in mind when they made the stipulation, without any intention whatever to qualify the always underlying obligation to deliver your cargo before you earn your freight. Now, that being what I should myself treat as the *primâ facie* inference from the word "freight," I find that it is considerably strengthened in the particular circumstances of this case. In the printed form used for this charter-party I find after the provision for the delivery of the cargo on payment of freight, a clause "for the full reaches and burden of the steamer's hold, and every available space, the lump sum of." That provision, which would have supported the contention of the shipowners that the contract was for a lump sum freight, was scratched out, and what is left in is the clause beginning "at the rate of," which is the other and alternative form, which indicates freight in the ordinary way. So it is not merely a case, as I have said already, of writing out the contract as if was written out on a new sheet of paper; but it was a deliberate deletion of that part of the printed contract which would have formed the obligation which the shipowner now sets up as the one between him and the charterer. The Lord Chief Justice has gone through the rest of the charter-party and referred to the leading authorities on the matter, and I not think it is necessary to repeat anything that he has said. I agree in all he has said as to the right of the charterer to recover back from the shipowner the surplus which he has received over and above the freight to which he alone has any right—namely, the freight payable on the cargo actually delivered. I agree therefore with the learned judge, and I think that this appeal fails.

ROMER, L.J.—I am extremely sorry that I feel obliged to form an opinion which differs from that of my Lords and from that of Walton, J. Inasmuch as the question involved in this appeal is one concerning charter-parties, I need scarcely say that I differ with the greatest diffidence, for I have no doubt that in all human probability my opinion is wrong. At the same time, I have formed that opinion, and my duty is, sitting here, when I have formed an opinion to express it. I have come to the conclusion, stating the matter somewhat briefly, that the case before us cannot be distinguished in principle from that which was decided in the case of *Merchant Shipping Company Limited* v. *Armitage* (*ubi sup.*), and the cases there cited. To my mind, when this charter-party is looked at it will be found in effect that the cargo which is the subject of it is treated as one cargo, not as something broken up into portions, and that in substance the amount that is to be payable for freight is in effect a lump sum though it is not called so. The cargo which is to be loaded under this charter-party, is a full and complete cargo; and the tonnage of the ship and its carrying capacity is stated. That cargo, of course, might vary by a few tons either way, according to the minimum or maximum capacity of the ship, but it was to be a full and complete cargo; and then you find that the freight was to be estimated with regard to that cargo at so much per ton. That appears to me to have been a short way of arriving at the amount of the freight directly the cargo was shipped and the ship was ready to depart. The method of ascertaining the sum that had to be paid for freight was, of course, fixed by reference to tonnage, because, as I have pointed out, the exact amount of the tonnage contained in the full and complete cargo could not be ascertained until the whole cargo was on board. Then when I come to the part of the charter-party which states as to when the freight is payable, how do I find the question of payment is dealt with with reference to the cargo? Is is dealt with with reference to tonnage, or anything of that sort; or is it dealt with with reference to the cargo as a whole? It is clearly dealt with with reference to the cargo as a whole. It is payable on the right and true delivery of the cargo in cash. Then it is stated that in substance this is to be treated as a provision for payment of the freight according to the tonnage of the cargo, or according to the bags in which that cargo was packed at the moment of delivery, so that you can only ascertain the freightage payable by seeing what tonnage is delivered or how many bags are handed over. Now let me first consider the question of tonnage. Is it a natural inference or a proper inference from this charter-party that it was contemplated that the freight would be payable according to the tonnage of the goods as delivered? In what shape was this sugar to be shipped? On the face of the charter-party, it was to be shipped in bags. Those bags, on the face of the charter-party, might be of any size; they might be of any weight. I find, nevertheless, that the freight is to be ascertained with reference to the gross weight of the cargo shipped, which would include the weight of the bags. You could not ascertain, then, with regard to this cargo, except by weighing it as a whole, what portion of it would be delivered on arrival of the

ship, if any portion of it was lost. If the freight was payable according to tonnage on delivery (which is one of the views put forward by the respondents on this appeal) let me see what would have to be done. Could it be contemplated by this charter-party that there would have to be a re-weighing of the cargo on delivery? How could you properly re-weigh it if the whole cargo did not arrive—properly weigh it when it has been delivered in such bags as I have indicated? You could not possibly do it, nor do I think it could have been contemplated that the weight on arrival was supposed to be a matter on which the payment of freight depended; and, when you bear in mind that sugar must of necessity change in weight, it seems to me almost inconceivable that they could have supposed that the amount of freight payable on this charter-party had to be considered with reference to the weight of the sugar on arrival, especially, as I have said, when you bear in mind that it would be impossible to tell from the cargo, when it arrived, if the whole did not arrive, how much had been wasted, or what was the tonnage of the cargo that arrived when it was shipped. Of course, if I had come to a conclusion in other respects as to the true meaning of this charter-party, and thought that it did not come within the principle laid down in *Merchant Shipping Company Limited* v. *Armitage* (*ubi sup.*), I should not be deterred by difficulties of that sort from trying to do what was right between the parties, but I do point out the difficulties as showing that it could not have been contemplated in this case, as it appears to me, that there should have been any sort of re-assessment of this cargo with reference to tonnage in order to ascertain the freight which is payable.

Then I come to the next suggestion, which, I think, really was the main suggestion of the respondents on this appeal—namely, that a charter-party has to be construed as if it were a provision for payment of freight according to delivery of the bags in which the sugar was. I have already pointed out that there is nothing in this charter-party which says anything about the size or weight of the bags, and, except in saying that the cargo is to come in bags, there is nothing in this charter-party to show that the bags had anything whatever to do with the freight, and if it had been contemplated that the payment of the freight would have depended on the number of bags that arrived more or less filled with sugar, nothing could have been more easy than to have said so in this charter-party. If the freight was to depend upon the number of bags which were delivered it appears to me difficult to see why the charter-party, in dealing with the question of freight, referred at all to the gross weight of the cargo as it was shipped. It appears to me, therefore, that to hold that this charter-party means that the freight is payable only on the cargo in bags as per bag when delivered, is to do violence to this charter-party, and to put upon it a construction which it really will not bear. Then I may point, as supporting the view that I am taking, to one of the later clauses in this charter-party. I refer to the clause about what is to happen when the master signs the bill of lading, and the rate of freight in the bills of lading differs from that in the charter-party. That provision, to my mind, points to this: that it is contemplated that the freight which is payable under this charter-party is a sum then ascertainable and which can be finally adjusted, if there is a difference between the bill of lading and the charter-party, by a sum in cash then ascertainable. It appears to me, therefore, that this charter-party, when looked at as a whole, is, in substance, a charter-party for a cargo as a whole, not split up into items which can be separately identified, and in respect of which you can fairly put on them a separate rate of freight. It is, therefore, as I have said, as it appears to me, within the principle of the cases I have referred to. Now, I will only say with reference to *Spaight* v. *Farnworth* (*ubi sup.*) that that really is no authority whatever in the present case, nor has it, to my mind, any material bearing upon it. There there was no question of the construction of a charter-party. There it was admitted that the freight was payable according to the timber delivered, and the only question was with reference to a provision as to the measurement of the timber, with reference to the kind of measurement adopted at the port of shipment. If that case is looked at, as I have said, it is no authority at all on the present question. Given the respondents in this case were right in the construction of the charter-party, I should not hesitate to carry out that construction merely because it occasioned difficulties, but I do think, apart from all other considerations, the construction contended for by the respondents in this case does lead to almost incredible results—at any rate, to me, incredible. It would really appear from their contention, if they are right as to the bags, that in a case of jettison, if the parties had only jettisoned portions of the sugar—three parts of the sugar out of every bag—they would be able to say that the whole freight was payable, but that if they jettisoned the whole of the sugar out of a certain number of bags, then they could be entitled to say the freight was only payable in respect of the remaining bags which contained the sugar. At any rate, that does not seem to be a result that could be desirable, nor does it appear to me to be a result which ought to follow from the charter-party. I have expressed my opinion, but I do so with very considerable diffidence.

Carver, K.C.—Your Lordship has not dealt with the point of the 7716 bags which were empty. The learned judge has taken the bags delivered as that on which the freight has to be paid. I have submitted, but your Lordships have not dealt with the matter, that the freight ought to be paid on those as well as on the others.

Lord ALVERSTONE, C.J.—A point arises, as I understand it, on this passage at the end of the judgment of Walton, J.: "I ought to have said a word about the empty bags, because Mr. Carver said as to those empty bags, on 7716 at any rate, the freight was payable, because even although the bag was empty you must take it as weighing the shipping weight. I appreciate what there is to be said in favour of that, but I think the freight was to be payable on the sugar in bags. No doubt the weight of the bag was to be included, but where there was no sugar in the bags I do not think that any sugar was delivered, and therefore the freight is not payable on the empty

bags." Your claim is in respect of the bags being taken to be empty for this purpose?

Carver, K.C.—Yes.

Lord Alverstone, C.J.—We need not trouble you, Mr. Hamilton, I am sorry I did not notice the point yesterday; I ought to have done so, especially after it was clearly mentioned by Mr. Carver. We must take it for this purpose that the bags were empty. On the view that the Master of the Rolls and I take of this agreement, confirming Walton, J., Walton, J. had to find how much sugar in bags was delivered at the weight which that sugar in bags was shipped; and he has gone through some calculation and arrived at that. It is said that ought to be increased, because in addition to what he has found for that, 7716 empty bags were also delivered. I think that was not sugar in bags, and, therefore, on the principle on which we have decided this case, whether we are right or wrong, Walton, J. was right in excluding those.

Carver, K.C.—Might I state that the learned judge did not make any calculation?

Lord Alverstone, C.J.—We have had no argument on the question whether he arrived at the right figure or not. We are here to discuss the important question of law.

Appeal dismissed.

Solicitors for the plaintiffs, *Woodhouse, Davidson* and *Co.*

Solicitors for the defendants, *W. A. Crump* and *Son*, agents for *Turnbull, Tilley*, and *Co.*, West Hartlepool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Nov. 18 *and Dec.* 7, 1903.

(Before Walton, J.)

Apollinaris Company Limited *v.* Nord-Deutsche Insurance Company. (a)

Marine insurance—Deck cargo—Inland voyage by canal or river—Damage to cargo stowed on deck—Liability of underwriters under policy.

The rule which exempts underwriters from liability for the loss of deck cargo under an ordinary policy on goods for a voyage by sea where there is no well-known usage to carry such cargo on deck does not apply to inland voyages by canal or river contemplated by the policy, on which voyages it has been the usage and practice to carry cargo on deck; and consequently, if in such a case the goods stowed on deck be damaged or lost by perils insured against in the policy, the underwriters will be liable for the loss.

Commercial cause tried before Walton, J.

The action was brought upon a policy of marine insurance, underwritten by the defendants, to recover a loss caused by the destruction or damage to certain bales of corks which were stowed on the deck of a Rhine steamer, called the *Amsterdam*, for carriage by canal and river to the plaintiffs' spring in Germany, and which were, as the plaintiffs contended, covered by the policy at the time of the loss.

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

The facts and the material terms of the policy, which was dated the 21st Aug. 1902, are sufficiently set out in the judgment.

Scrutton, K.C. (*Leck* with him) for the defendants.—At the time of the loss of the corks they were stowed on deck, and were deck cargo, and for that reason they were not covered by the policy:

Phillips on Insurance, vol. 1, sect. 460.

That section shows that before the underwriters can be made liable under the policy for the loss or damage to deck cargo there must be a usage for underwriters to pay for it when so carried, as well as a usage to carry it. The reason of the exemption of the underwriters from liability in such a case is that the risk is greatly enhanced by the goods being on deck. But there might be a usage proved to carry particular goods on deck, in which case the underwriters would be liable for their loss:

Da Costa v. *Edmunds*, 4 Camp. 142.

There was no evidence of any usage here to carry corks on the deck of a Rhine steamer:

Royal Exchange Shipping Company v. *Dixon*, 56 L. T. Rep. 206; 6 Asp. Mar. Law Cas. 92: 12 App. Cas. 11;
Arnould on Marine Insurance, 7th edit., ss. 60, 225.

They also referred to

Neale and Wilkinson v. *Rose and others*, 3 Com. Cas. 236.

J. A. Hamilton, K.C. (*Loehnis* and *A. M. Talbot* with him) for the plaintiffs.—The corks were stowed on deck only for their carriage by canal and river to the Apollinaris spring. The case is, therefore, wholly different from that of deck cargo on an ordinary voyage by sea. The defence set up is that the corks were at the time of the loss stowed on deck. There are two ways of meeting that defence. In the first place, there was a regular practice to carry these goods on the deck of the Rhine steamers; and, secondly, there is no authority for saying that the rule which exempts underwriters from liability for damage to cargo stowed on deck in the case of an ordinary voyage by sea applies to river traffic. In the case of canal or river traffic, goods on deck are covered by the policy. The reason why goods stowed on deck on an ordinary sea voyage are not covered by a policy in the ordinary form is that the risk to goods on deck in such cases is much greater than if they were properly stowed:

Blackett v. *Royal Exchange Assurance Company*, 2 C. & J. 244;
Ross v. *Thwaite*, 1 Park on Marine Insurance, 7th edit., p. 26;
Miller v. *Titherington*, 3 L. T. Rep. 893, 9 L. T. Rep. 231;
Arnould, ss. 225, 860;
Phillips, s. 460.

That reason does not apply to traffic by canal or river. Where it is the usual course to put goods on deck the underwriters are liable:

Stewart v. *Bell*, 5 B. and A. 238.

The plaintiffs are, therefore, entitled to judgment.

Cur. adv. vult.

Dec. 7. 1903.—Walton, J. read the following judgment:—This is an action upon a marine policy, underwritten by the defendant company, under which the plaintiffs, the Apollinaris Com-

pany Limited, claim to be indemnified against a loss which they have suffered by the destruction or damage by fire of certain bales of corks which were, as the plaintiffs allege, covered by the policy at the time of the loss. The policy was upon "corks, bottles, and other goods by steamer or steamers and conveyances, including parcel post, at or from London to Rotterdam and (or) Antwerp and (or) Cologne, and while there and thence by any conveyance or conveyances to Remagen or the Apollinaris Company's spring Neuenahr, or by any other route whatsoever, including all risks on quays or elsewhere during transit or until warehoused and (or) safely delivered into the hands of the consignees." The corks were shipped in London by steamers belonging to the Holland Steamship Company under through bills of lading, by which the Holland Steamship Company undertook, in consideration of the payment to them of a through freight, to deliver the corks safely at Amsterdam, when the responsibility of the Holland Steamship Company as carriers was to cease, and to have them dispatched from Amsterdam to Neuenahr, in Germany, at the expense of the Holland Steamship Company, but at the risk of the shippers, the Apollinaris Company. The goods arrived safely at Amsterdam, and were there shipped on board a Rhine steamer called the *Amsterdam III.* for carriage by canal and river to Remagen or some landing-place on the Rhine, whence they would be forwarded to the Apollinaris spring. There is no evidence before me which enables me to ascertain the contract under which the bales of cork were shipped by the Holland Steamship Company on the *Amsterdam III.* Apparently no bill of lading for these goods was signed by the master or by any person on behalf of the owners of that steamship. A printed form of bill of lading was put in at the trial which appears to be a common form in use for shipments made by the Holland Steamship Company on steamers of the Rhine Steamship Company, who were, as I understand, the owners of the *Amsterdam III.* This form of bill of lading is intended to be signed by the shippers as well as by the master, and bears the printed signature of the Holland Steamship Company as shippers. By the first of its conditions the Rhine Steamship Company reserve to themselves, among other liberties, the right to load goods on deck. But there is no evidence upon which I can find that the corks were shipped under the terms of this bill of lading. The corks were shipped at some time between the 15th and 17th Jan. 1903. They were stowed on deck with the intention that, so stowed, they should be carried to their destination on the Rhine. On the night of the 17th Jan., while the *Amsterdam III.* was still lying at Amsterdam, a fire broke out on board by which some of the bales of cork were destroyed and some damaged. The amount of loss is admitted to have been 102*l.* 16*s.* 10*d.* The facts as I have stated them are admitted, and the only defence pleaded by the defendants is that "at the time of the loss the goods were stowed and carried on deck and were not covered by the policy." This case cannot, of course, be disposed of upon any technical point of pleading. But it is not irrelevant to observe that in 1842 the Court of Queen's Bench, in *Milward* v. *Hibbert* (3 Q. B. 120), held that a plea substantially in the form of the defence here pleaded by the present defendants did not disclose a good defence in an action upon a marine policy for a loss caused by the jettison of deck cargo. The claim there was by the owner of the ship under a policy on the ship for the amount of the ship's contribution to general average in respect of some pigs which were carried on the ship's deck and were jettisoned. The defendant pleaded that the pigs were carried on deck. The plaintiff replied that there was a custom to carry pigs on deck on the voyage on which the ship was engaged. To this replication the defendant demurred. Although the question arose upon a demurrer to the replication, the judgment of the court proceeded upon an exception to the validity of the plea, and the court held that the plea was bad. The technical point actually decided is not important, but the judgment is useful, as it was necessary for the court, from the nature of the question before them, to consider the principle upon which the earlier decisions as to the carriage of deck cargo were founded. The judgment was delivered by Lord Denman. After referring to the early authorities to the effect that goods should not be stowed on deck and to a passage in the 5th edition of Lord Tenterden's book on Shipping, in which it was pointed out that there are exceptions to the rule, as where usage has sanctioned the practice, and where the master has the merchant's consent, the Lord Chief Justice says (at p. 136): "Now, it is obvious that there may be other and valid reasons for stowing goods on deck; indeed, some goods could be stowed in no other place, such as timber, and on some voyages live animals; and they may certainly be there stowed with proper skill and care, so as not to be in the way of the crew in their operations." The Chief Justice was here referring to one of the reasons for forbidding the stowage of cargo on deck which was relied on by Valin and others who wrote at a time when navigation by steam had not been invented. He proceeds: "These matters of fact may vary with every different trade, or, even, with every single adventure," and in conclusion he says that "the mere fact of stowing them (the goods) on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed there according to the usage of the trade and so as not to impede the navigation or in any way increase the risk." Without pushing the decision in *Milward* v. *Hibbert* (*ubi sup.*) too far, it certainly seems to point to this—that the question whether stowage on deck is improper is strictly and properly a question of fact, and, apart from express contract, must be decided, whether as between different owners of goods in the same vessel or as between assured and underwriters, according to the circumstances of each case, having regard especially to the nature of the voyage and of the cargo and to the usages of the trade. It is, however, quite clear from all the authorities upon this question that it is a fact which has long been well recognised by all who are interested in maritime adventures, and by our courts, that on ordinary voyages by sea goods which are carried on deck are exposed to peculiar and extraordinary danger. It follows from this, for reasons which are clearly analogous to those upon which the implied warranty of seaworthiness in contracts of marine insurance depends, that, under an ordinary policy on goods for a voyage by sea, where there

is no well-known usage to carry on deck goods such as are described in the policy on the voyage thereby insured, underwriters are not liable for the loss of deck cargo. Where, from the description of the goods or the voyage, or both, it is apparent that, in accordance with a well-known practice or usage of trade, the goods will or even probably may be carried on deck, then, even in the case of voyages by sea, where goods so carried are necessarily exposed to peculiar dangers, still the underwriters will be deemed to have consented to take this risk, and will be liable for any loss of deck cargo by perils insured against.

The question which arises as to the right to contribution in cases of general average where deck cargo has been jettisoned is very similar to the question between assured and underwriters as to the loss of deck cargo. The questions are not identical, because the obligations in the two cases are different in their nature and origin. But the underlying and governing principle applicable to each is the same. In the ancient collections of customs of the sea, such as the Consolato del Mare, and in the earlier codes, such as the Ordonnance de la Marine of 1681, the question is dealt with in connection with general average. Valin, in his commentary on that article of the Ordonnance which enacts that the owner of deck cargo which has been jettisoned cannot claim contribution in general average, says that it does not apply to boats or small vessels going from port to port where the custom is to load goods on deck as well as below. He is in this passage obviously referring to small coasting craft—sailing vessels, of course—which make short trips from port to port. Emerigon follows Valin, and adopts the same exception to the general rule of the Ordonnance. The same view has been recognised in our own courts. Thus in *Wright* v. *Marwood* (45 L. T. Rep., at p. 299; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div., at p. 67), in the year 1881, Lord Bramwell, referring to the general rule which requires contribution to be made in general average for cargo jettisoned and to the exception to such rule in the case of deck cargo jettisoned, says: "There are two exceptions (to the exception) which perhaps resolve themselves into one—viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade and perhaps also from the port." The exception of coasting vessels, apart from custom, is intelligible only on the ground that in the short trips made by coasting vessels deck cargo is not exposed to peculiar danger, at all events to an appreciable extent. And when Lord Bramwell says that the two exceptions resolve themselves into one I think he means that when the voyage is such that the cargo is carried on deck without peculiar risk it will in practice be so carried whenever it is convenient. I have considered the authorities at some length, and endeavoured to arrive at the principle upon which they rest, because I have to deal with a question which, so far as I know, has not been considered in any reported English case—the question, that is to say, whether there is any general rule exempting underwriters on cargo from liability for loss of goods stowed on deck upon an inland voyage by canal and river. As it is well known that there is a great trade upon inland waters in the United States of America, I have thought it desirable to look into the American cases. I am afraid that my investigation has not been exhaustive nor quite up to date. The decisions of the American courts are not, of course, in any sense binding authorities, but we read them with respect, and they afford useful illustrations. In a case of *Harris* v. *Moody* in the Court of Appeal of the State of New York (30 N. Y. C. of A. 266) I find it was decided that the rule that underwriters are not liable for the loss of deck cargo is not applicable to vessels which navigate smooth land-locked waters—in that case it was Long Island Sound — and where deck cargo can be carried without extraordinary peril. This case is cited as an authority by Parsons in his well-known treatise on insurance. The American decisions, however, are not altogether uniform. The decision of the Supreme Court of Massachusetts in *Taunton Copper Company* v. *Merchants' Insurance Company* (39 Mass. 108) is not perhaps consistent with the judgment in *Harris* v. *Moody* (*ubi sup.*). But it proceeded upon different considerations, and is not approved by Phillips (see Insurance, vol. 1., sect. 460). The true view of the matter appears to me to be that the rule against carrying goods on deck is really involved in and depends on a larger and wider rule, which is that goods carried on a vessel should not be stowed so as to be exposed to unnecessary and extraordinary peril during transit. Every one admits that on an ordinary voyage by sea deck cargo is exposed to peculiar and extraordinary danger, and it follows that cargo should not upon such voyages be stowed upon deck. Where, however, the voyage is not by sea, but is a voyage of a very different kind, other considerations may apply. In order to apply the principle to be gathered from the authorities to the present case I must add something as to the evidence and facts. On the part of the plaintiffs evidence was called to show that it is the usage and practice to carry deck cargo on the Rhine steamers. As against this a Dutch lawyer, who practices also as an average adjuster, was called, who referred to certain articles of the Dutch code by which the owner of a vessel is liable to the shipper for all damage of goods carried on deck without the written consent of the shipper. He said that these articles applied to a steamer such as the *Amsterdam III.* carrying goods by canal and river. I assume that this is a correct account of the Dutch law. The Dutch code has a hard-and-fast rule which, though intended primarily, as I am satisfied, to apply to sea-going vessels, is wide enough to include river steamers. The effect of this is to impose a certain liability on the ship-owner. But the same gentleman who proved the Dutch law also proved that deck cargoes are very commonly carried on the Rhine steamers. I understood from his evidence that the usual form of bill of lading used by the Rhine steamer gives express liberty to stow cargo on deck. The form of bill of lading of the Rhine Steamship Company to which I have referred is an example of this, and the Dutch law explains why such form provides for signature not only of the captain, but also by the shippers. I have come to the conclusion that it is, and has been for many years, the practice and usage to carry deck cargoes on Rhine steamers plying from Amsterdam. This is a fact which is not altered by the

Dutch code. The fact that the shipowners undertake a greater liability for cargo on deck than for cargo carried under deck does not appear to me to affect the question as between the assured and the underwriters. If there is such a liability in the present case the underwriters are entitled to the benefit of it. Mr. Scrutton relied upon certain letters written by the plaintiffs to the Holland Steamship Company, in which they maintained that the goods ought not to have been carried on deck. These letters were written with the knowledge and approval of the underwriters, who quite properly desired to make the shipowners pay for the loss if they were liable for it. I do not think that they ought to affect my decision. I may add that if the goods had been shipped under a bill of lading in the form which was produced, by which liberty was given to stow the goods on deck, the defendants would, in my opinion, have been liable under the clause in the policy, "Including all liberties and exceptions as per bills of lading." It could not have been said that the bill of lading was not in an ordinary form. In that case the defendants would have had no right over by subrogation against the shipowners. But there is, as I have said, no evidence that the goods were shipped under any such bill of lading. There is only one other point which ought perhaps to be mentioned. It was said that even on an inland voyage goods on deck were exposed to a greater danger of fire, at all events than were goods under deck. I do not think that this is well founded Goods on deck in case of fire have certain advantages and certain disadvantages as compared with goods under deck. I am not sure on which side the balance of advantage lies. But there is certainly no peril from fire or other causes to goods carried on the deck of a Rhine steamer which is in any way comparable with or similar to the peculiar and extraordinary peril to which deck cargo is exposed at sea. I am by no means satisfied that the rule which exempts underwriters from liability for the loss of deck cargo applies to inland voyages by canal or river. I am satisfied that it does not apply to an inland voyage by canal and river plainly contemplated by the policy on which voyage it is and has been for years the practice and usage for steamers and other vessels to carry cargoes on deck. There must, therefore, be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *Bannatyne* and *Son*.

Dec. 7 and 8, 1903.

(Before Lord ALVERSTONE, C.J., LAWRANCE and KENNEDY, JJ.)

REED (app.) v. GOLDSWORTHY (resp.). (a)

Pilotage—Port of Bristol—Compulsory pilot—Vessel bound from Newport to Bristol—Vessel in Newport pilotage district, but within port of Bristol—Necessity of Bristol pilot—Bristol Wharfage Act 1807 (47 *Geo.* 3, *sess.* 2, *c. xxxiii.*), *s.* 9—*Bristol Channel Pilotage Act* 1861 (24 *&* 25 *Vict. c. ccxxxvi.*), *ss.* 4, 29—*Pilotage Order Confirmation* (*No.* 1) *Act* 1891 (54 *&* 55 *Vict. c. clx.*), *schedule, s.* 3.

By the Bristol Wharfage Act 1807 *it was provided in sect.* 9 *that all vessels navigating or passing up, down, or upon the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, should be piloted and navigated by pilots licensed by the Bristol Corporation.*

By the Bristol Channel Pilotage Act 1861 *it was provided in sect.* 4 *that so much of the* 9*th section of the Bristol Wharfage Act* 1807 *as related to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the ports of Cardiff, Newport, or Gloucester should be repealed, and by the same Act pilotage boards and pilotage districts—which in some cases overlapped the port of Bristol—were created for the ports of Cardiff, Newport, and Gloucester, and power was given to these boards to license pilots for their districts.*

By the Pilotage Order Confirmation (*No.* 1) *Act* 1891 *it was provided that, notwithstanding anything contained in the Bristol Wharfage Act* 1807, *a vessel navigating or passing up or down the Bristol Channel to or from the port of Bristol should be exempted from all obligation to be piloted by pilots licensed by the Bristol Corporation, except when within the limits of that port, which were therein defined.*

Held, that the Act of 1861 *was not intended to deal with and did not deal with or include vessels going to or from the port of Bristol, although such vessels were bound from or to one of the ports of Cardiff, Newport, or Gloucester, and that therefore in the case of a vessel which is not exempt from compulsory pilotage in the port of Bristol there is still the obligation under the Bristol Wharfage Act* 1807 *to have a compulsory pilot licensed by the corporation of Bristol when the vessel, bound to the port of Bristol, gets within the limits of that port, although the vessel may be bound from Cardiff, Newport, or Gloucester, and may still be within one of those three pilotage districts which overlaps the port of Bristol. Consequently, when a vessel on her voyage puts into Newport, and then proceeds from Newport with a Newport pilot on board to the port of Bristol, as soon as the vessel gets within the limits of the port of Bristol the Newport pilot is bound to give up the charge of the vessel to a Bristol pilot demanding such charge, although the vessel is still within the Newport pilotage district, and within the district for which the Newport pilot is licensed.*

CASE stated by justices of the peace in and for the city of Bristol.

At a petty sessions held in the city of Bristol

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

on the 31st Jan. 1903 an information was preferred by John Reed (the appellant) under the statute 47 Geo. 3, sess. 2, c. xxxiii., s. 9, against Henry Goldsworthy (the respondent), for that the respondent on the 29th Jan. 1903, within the limits of the port of Bristol, unlawfully continued in charge of a certain steamship or vessel, called the *Beacon Grange*, not exempted from compulsory pilotage navigating within the port of Bristol, after a pilot licensed by the Lord Mayor, aldermen, and burgesses of the city of Bristol,—namely, the appellant—had offered to take charge of the steamship or vessel, contrary to the form of the statute in that case made and provided.

The information was heard and determined by the justices on the 19th Feb. 1903, when they dismissed the same.

By an Act of Parliament 47 Geo. 3, sess. 2, c. xxxiii. (the Bristol Wharfage Act 1807), being an Act for (amongst other things) "the better regulation of pilots and pilotage of vessels navigating the Bristol Channel," it was provided as follows:

Sect. 9. And be it further enacted that, from and after the first day of October next after the passing of this Act, all vessels sailing, navigating, or passing up, down, or upon the Bristol Channel to the eastward of Lundy Island, except coasting vessels and Irish traders, shall be conducted, piloted, and navigated by pilots duly authorised and licensed by the mayor, burgesses, and commonalty of the said city of Bristol, by warrant under their corporate seal; and that the master, owner, or owners of every ship or vessel which shall be navigated in the limits aforesaid, without a pilot licensed as aforesaid, shall forfeit double the sum which would have been demandable for the pilotage of such ship or vessel, together with five pounds for every fifty tons burthen of such ship or vessel.

Sect. 11. And be it further enacted, that no person shall take charge of any vessel or in any manner act as a pilot, or receive any compensation for acting as a pilot within the limits aforesaid, unless authorised by licence under the seal of the said mayor, burgesses, and commonalty (which licence it is hereby declared shall express the name of the pilot so acting and the district aforesaid); and no such pilot shall act without having his licence at the time of his so acting in his personal custody, ready to be produced, which shall actually be produced to any person who shall lawfully require to see the same, or shall act in the British seas out of the limits expressed in his licence, on pain of forfeiting a sum not exceeding ten pounds, for the first offence, and for any second or subsequent offence any sum not exceeding twenty pounds.

Sect. 14. Provided always, and be it further enacted, that it shall be lawful for any licensed pilot to supersede any person not licensed as a pilot in charge of any ship or vessel within the limits aforesaid; and every master who shall within the limits aforesaid continue any person not licensed as hereinbefore mentioned after any pilot licensed as aforesaid to act within the said limits shall have offered to take charge of such ship or vessel, and every person assuming or continuing in the charge or conduct of any ship or vessel within the limits aforesaid, without being duly licensed as hereinbefore mentioned, after any other pilot licensed as aforesaid shall have offered to take charge thereof, shall respectively forfeit for every such offence a sum not exceeding ten pounds.

By the Bristol Channel Pilotage Act 1861 (24 & 25 Vict. c. ccxxxvi.)—which was "an Act for establishing a separate system of pilotage for the several ports of Cardiff, Newport, and Gloucester in the Bristol Channel"—after reciting in the preamble the 9th section of 47 Geo. 3, sess. 2, c. xxxiii., and also reciting that "owing to the great extension of trade in the several ports of Cardiff, Newport, and Gloucester since the passing of the said Act it is expedient that a separate system of pilotage should be established in the Bristol Channel in connection with those respective ports, under the supervision of local boards for each of such ports," it was provided:

Sect. 4. From and after the first Wednesday in the month of January next after the passing of this Act, so much of the ninth section of the said Act of the second session of the forty-seventh year of King George the Third, chapter thirty-three, as relates to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the said ports of Cardiff, Newport, or Gloucester, shall be and the same is hereby repealed.

By sects. 5, 6, and 7 pilotage boards for Cardiff, Newport, and Gloucester respectively were appointed.

Sect. 8. The district over which the Newport board shall have jurisdiction shall be that portion of the Bristol Channel which lies eastward of Lundy Island up to and including Kingroad, and the river Usk as far as the Caerleon Bridge.

Sect. 23. Subject to the provisions of the Merchant Shipping Act 1854 the board may from time to time license and appoint such number of proper persons to act as pilots within the pilotage district and to or from the port for which such board may have been appointed as they may think necessary, and may remove or suspend the licence of any such pilot at their pleasure, and may establish such rates and fees to be levied and paid for the risk, trouble, and labour of such pilots as to such board shall from time to time seem just and reasonable; and if any person shall pretend or hold himself out to be a licensed pilot, or in any manner act as a pilot without having been so licensed, or after his licence may have been revoked or suspended, he shall be liable to a penalty of not exceeding fifty pounds.

Sect. 29. The master of every vessel bound from any of the ports of Cardiff, Newport, or Gloucester may, if he shall think it expedient so to do, require the assistance of any pilot licensed by the board for that port, and on being so required any pilot shall take on himself the charge of such vessel, and shall pilot the same for such distance within the pilotage district for which he may be licensed as the master of such vessel shall require, and any pilot who shall in any such case refuse to pilot such vessel to any such distance as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also, at the discretion of the board by whom he may have been licensed, be suspended or deprived of his licence.

Sect. 3 [the interpretation clause]. The word "pilot," shall mean any person licensed under this Act to act as a pilot for piloting vessels into or out of the port for which such licence has been granted.

By the Pilotage Order Confirmation (No. 1) Act 1891 (54 & 55 Vict. c. clx.)—an Act to confirm a provisional order made by the Board of Trade under the Merchant Shipping Act Amendment Act 1862, relating to the pilotage district of Bristol—it was provided (in sect. 1) that the order set out in the schedule should be and the same was thereby confirmed. The order was an "order for exempting from compulsory pilotage, except within the port of Bristol, vessels bound to and from that port," and was called the Bristol Pilotage Order 1891.

Clause 3 of this order provided:

Notwithstanding anything contained in the Bristol Wharfage Act 1807, the masters and owners of all

vessels sailing, navigating, or passing up or down the Bristol Channel to or from the port of Bristol shall be and they are by this order exempted from all obligation to be conducted, piloted, or navigated by pilots authorised or licensed by the mayor, aldermen, and burgesses of the city of Bristol, except when within the limits of that port, which limits are as follows—namely, from the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust in the county of Gloucester, and from the said Holms southward athwart the channel to Uphill, and from thence along the coast eastward in the counties of Somerset and Gloucester to Aust aforesaid, and also from Holesmouth in Kingroad up the Avon to the city of Bristol, together with the several pills lying on the said river.

Clause 4. All existing by-laws, rules, and orders of the mayor, aldermen, and burgesses of the city of Bristol relating to pilotage shall be read and have effect in accordance with the provisions of the Bristol Wharfage Act 1807, as amended by this order.

The appellant was a pilot duly licensed by the Lord Mayor, aldermen, and burgesses of the city of Bristol by warrant under their corporate seal, pursuant to the Act of the second session of 47 Geo. 3, c. xxxiii., s. 9.

The respondent was a pilot duly licensed by the pilotage board for the port of Newport, pursuant to the Bristol Channel Pilotage Act 1861.

On the 29th Jan. 1903, the steamship *Beacon Grange* was in course of a voyage from Liverpool to the River Plate *viâ* Newport and Avonmouth Dock, which is in the port of Bristol, and in the prosecution of her voyage the steamship entered the port of Newport for the purpose of taking in a portion of her cargo and coal for bunkering purposes, and was piloted into the Newport Dock by the respondent. Upon leaving Newport the steamship was piloted out of Newport Dock by the respondent, and proceeded on her voyage towards Avonmouth.

The appellant offered his services to pilot the vessel to Avonmouth Dock, which is in the port of Bristol, but his services were not accepted until Kingroad was reached, and with the permission of the master the appellant remained on board the steamship, and after entering the port of Bristol (but within that portion of the Bristol Channel which lies to the eastward of Lundy Island up to Kingroad) the appellant again offered his services with all proper formalities, and claimed to supersede the respondent. The respondent, however, claimed to pilot the steamship to Kingroad, and the master allowed him to do so.

Upon arriving at Kingroad, which is an anchorage immediately outside the mouth of the river Avon, the respondent gave up charge of the steamship, and the appellant took her into the Avonmouth Dock.

The steamship was not a coasting vessel or an Irish trader, and when within the port of Bristol was not exempt from compulsory pilotage.

On the part of the appellant it was contended: (1) That, inasmuch as the vessel had commenced a voyage under foreign articles from Liverpool to the River Plate and only touched at Newport in the performance of such voyage, she was not bound "from" Newport within the meaning of the Bristol Channel Pilotage Act 1861. (2) That the Bristol Channel Pilotage Act 1861 does not in any case contemplate a vessel as bound "from" Newport when she is proceeding from that port to Bristol. (3) That after entering the port of Bristol the steamship was then (even if not previously) a vessel bound for Bristol, and that the Bristol Channel Pilotage Act 1861 left all vessels bound for Bristol subject to the provisions of the Act 47 Geo. 3, sess. 2, c. xxxiii. (4) That the Pilotage Order Confirmation (No. 1) Act 1891 confirmed the rights of the appellant and other pilots licensed by the Lord Mayor, aldermen, and burgesses of Bristol.

On behalf of the respondent it was contended: (1) That from and after the first Wednesday in the month of Jan. 1862, so much of sect. 9 of the Act 47 Geo. 3, sess. 2, c. xxxiii., as related to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the ports of Cardiff, Newport, or Gloucester, was repealed. (2) That the steamship came from Liverpool without any cargo to the port of Newport on the 25th Jan. 1903, for the purpose of taking in a portion of her cargo and coal for bunkering (that is, for her own steaming purposes), and left the port of Newport for Bristol on the 29th Jan. 1903, and was therefore a vessel bound "from" Newport within the provisions of sect. 29 of the Bristol Channel Pilotage Act 1861, and might, if the master thought it expedient, be piloted within the district of the Newport Pilotage Board (which extends to Kingroad) by the respondent. That, the master having required the assistance of the respondent, the respondent was entitled to pilot the steamship up to Kingroad. (3) And, further, that if the respondent had refused to pilot the steamship he would have rendered himself liable to forfeit all his pilotage fee, and, at the discretion of the Newport Pilotage Board, might have been suspended, or deprived of his licence. (4) That the Pilotage Order Confirmation (No. 1) Act 1891 was merely an Act for exempting from compulsory pilotage, and did not repeal, and was not intended to repeal, sect. 4 of the Bristol Channel Pilotage Act 1861. (5) That the steamship was under the circumstances in question as much bound from Newport as she was bound for Bristol.

All the provisions of the Acts of Parliament and Pilotage Order, so far as applicable to the circumstances, were deemed part of the case.

The justices held that, upon the facts as found and stated in the case, the respondent had not, in point of law, committed an offence, and they therefore dismissed the information.

The question for the opinion of the court was whether, upon the facts above stated, the justices came to a correct determination in point of law. If so, their determination was to stand; if otherwise, the case was to be remitted to the justices with the directions of the court thereon.

After the Act of 1807, already referred to, came the Bristol Dock Act 1848 (11 & 12 Vict. c. xliii.) which provided:

Sect. 66. The corporation [that is, the corporation of Bristol] may from time to time hereafter appoint and license any persons, duly qualified for that purpose, to be and officiate as pilots within the port of Bristol, and, at their discretion, suspend and discharge such persons from being pilots; and if any person, not being so appointed and licensed, shall take or hold the charge of or attempt to pilot any vessel within such port, unless such vessel be in distress, and there be no such pilot in sight, or shall otherwise act or attempt to act as such pilot within such port, and also if any person having the

charge or pilotage of any vessel within such port, but not being such pilot, shall not, upon the approach of any such pilot, shorten sail for and take on board such pilot, and resign to him the charge or command of such vessel, every person shall for every such offence forfeit any sum not exceeding ten pounds.

Scrutton, K.C. (*Clavell Salter* with him) for the appellant.—The justices were wrong in refusing to convict the respondent. Sect. 9 of the Bristol Wharfage Act 1807 requires that all vessels, except those which are there exempted, passing up or down the Bristol Channel shall be piloted by Bristol pilots duly licensed by the corporation; and sect. 66 of the Bristol Dock Act 1848 gives the corporation power to license duly qualified persons to act as pilots within the port of Bristol, and that section imposes a penalty upon any person, not being a duly licensed Bristol pilot, who takes charge of or pilots any vessel within the port of Bristol when there is a Bristol pilot available. So that under those Acts pilotage by a Bristol pilot was compulsory for all vessels (except exempt ships) passing up or down the Bristol Channel, eastward of Lundy Island. Then came the Bristol Channel Pilotage Act 1861, which in sect. 4 exempts from the operation of sect. 9 of the Act of 1807 vessels passing up or down the Bristol Channel, bound to or from one of the three ports of Cardiff, Newport, or Gloucester, and the only effect of that section is to cut out from the previous compulsion, vessels bound to or from these three ports. Then came the Pilotage Order, &c., Act 1891, which in clause 3 of the order extended the exemption still further, and provided that vessels passing up or down the Bristol Channel to or from the port of Bristol should be exempted from all obligation to be piloted by Bristol pilots, "except when within the limits of that port." This exception is important as showing that, although vessels are exempted from taking Bristol pilots on board when going to or from the port of Bristol, they are not so exempt when within the limits of the port of Bristol. The limits of the port of Bristol are there defined, and it is not disputed that this vessel was within the port of Bristol. Upon the construction of these statutes it is contended that sect. 4 of the Act of 1861 does not apply to this case, and there is no exemption in this case from the operation of sect. 9 of the Act of 1807. The repeal of sect. 9 of the Act of 1807 by sect. 4 of the Act of 1861 is a repeal only in so far as it relates to vessels bound to or from the three specified ports, and does not affect vessels bound to or from the port of Bristol. Here the vessel was not bound "from" Newport within the meaning of sect. 4; she was bound — at all events after entering the port of Bristol—"for" Bristol. The Legislature, in passing the Act of 1861, had not in their minds the port of Bristol, and were dealing with the ports of Cardiff, Newport, and Gloucester only, and that legislation leaves untouched the case of vessels going to or from the port of Bristol. Then the Act of 1891, while granting still further exemption from the obligation to have Bristol pilots on board under the Act of 1807, by exempting from that obligation vessels going to or from the port of Bristol, was careful to say "except when within the port of Bristol." The justices expressly find that this vessel when within the port of Bristol was not exempt from compulsory pilotage. Therefore this vessel was not a vessel bound "from" Newport within sect. 4, and, even if she were bound from Newport, at all events when she came within the port of Bristol she was bound to have a Bristol pilot. The decisions of the Court of Appeal in *The Charlton* (73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29, affirming 72 L. T. Rep. 198; 7 Asp. Mar. Law Cas. 569) and of the Exchequer Chamber in *General Steam Navigation Company* v. *British Colonial Steam Navigation Company* (20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 327; L. Rep. 4 Ex. 238) show that a compulsory pilot was necessary in this case as soon as the vessel entered the port of Bristol, and that that pilot must be one licensed by the corporation of Bristol.

J. A. Hamilton, K.C. (*Evans Austin* with him) for the respondent.—The justices were right in dismissing the information. The Act of 1861 recites that owing to the great extension of trade in the ports of Cardiff, Newport, and Gloucester it was expedient to establish a separate system of pilotage for those ports, and the scheme of that Act was to create new pilotage areas or districts for those places. By sect. 4 of that Act the 9th section of the Act of 1807 is repealed as regards those vessels which were bound to or from those three ports. The vessel in the present case was at the time in question a vessel bound "from" Newport, and she was none the less bound from Newport because she happened to be going to Bristol. The object of sect. 4 of the Act of 1861 was to exempt a vessel from the obligation imposed by sect. 9 of the Act of 1807 to take a Bristol pilot on board when the vessel was bound to or from Cardiff, Newport, or Gloucester. The pilotage areas of some of these districts overlap, and that of Newport overlaps part of the port of Bristol. At the time when the respondent refused to give the charge of the vessel to the appellant, the vessel was still within the pilotage area or district of Newport, and therefore the Newport pilot was properly in charge as pilot. Sect. 29 of the Act of 1861 is important. This vessel was a vessel bound "from" Newport within the meaning of that section, and therefore the master could require—as he did—the assistance of a pilot licensed by the Newport Board, and, on being so required, the Newport pilot was bound to take upon himself the charge of the vessel, and to pilot the vessel for such distance within the pilotage district for which he might be licensed as the master of the vessel might require, and if the pilot refused to pilot the vessel to such distance, then he not only forfeited his right to any remuneration for his services, but he was also liable to be suspended or deprived of his licence. Therefore, in the first place, the provisions of sect. 9 of the Act of 1807 do not apply at all in this case by reason of the repealing provisions in sect. 4 of the Act of 1861, inasmuch as this vessel was a vessel bound from Newport; and in the next place, even if the pilotage was compulsory within the port of Bristol, it would not be so for that part of the port of Bristol which was overlapped by the pilotage area of Newport, and by sect. 29 the Newport pilot (the respondent) was entitled to pilot the ship to the furthest limit of the district for which he was licensed, and he was therefore entitled to remain in charge of the vessel, even after the vessel had entered the port of Bristol, so long as she was still within the Newport

pilotage district. The refusal by the respondent to give up the charge of the vessel to the appellant took place within the Newport pilotage district, although it may have been within the port of Bristol, and therefore no offence was committed. He referred to *The Charlton* (*ubi sup.*), *The Rutland* (76 L. T. Rep. 662; 8 Asp. Mar. Law Cas. 270; (1897) A. C. 333), and to the Act of 1891.

Clavell Salter in reply.—Taking these Bristol Acts together, they create the offence charged in this case, and that offence was committed unless the vessel was exempt under the Act of 1861. The effect of the Acts is that if a vessel is going into the port of Bristol and is in this area which is common to the port of Bristol and to the pilotage district of Newport, she is not exempt from compulsory pilotage because she happens to have been also at Newport.

Lord Alverstone, C.J.—This case presents to me very considerable difficulties, and, but for the assistance that I have received from the arguments, I think I should like to have taken time to go through the statutes referred to; but, after the best consideration I can give to the case, I think that this appeal must be allowed. The general purview of these statutes may, in my opinion, be stated with fair accuracy and conciseness without going through the whole of their enactments in detail. Originally, as appears from the history in the case of *The Charlton* (*ubi sup.*), and as I should gather from the statutes themselves, Bristol was, practically speaking, the only port of importance upon the Bristol Channel for this purpose, and according to the earlier statutes—and for this purpose I need only commence with the Bristol Wharfage Act of 1807—the authority for licensing pilots on the Bristol Channel was the Bristol Corporation. The respondent was summoned for an offence against the statute 47 Geo. 3, sess. 2, c. xxxiii. (the Bristol Wharfage Act 1807), in that he had continued to navigate this vessel within the port of Bristol when a Bristol pilot had offered his services. Therefore it seems to me that what we have really got to consider is the true state of the law at present as regards the area over which pilotage is compulsory in and out of Bristol, and as regards the vessels in respect of which pilotage is compulsory in and out of Bristol. I may say at once that we ought to deal with this case upon the theory that this vessel was bound "from" Newport. Upon the facts in this case it is not, in my opinion, open to the appellant to say that this vessel was not treated by the magistrates, who decided in favour of the respondent, as being bound from the port of Newport; but, on the other hand, it must be observed that it is admitted that the pilotage was compulsory within the port of Bristol. A paragraph of the case says this: "The steamship was not a coasting vessel or an Irish trader, and when within the port of Bristol was not exempt from compulsory pilotage." Therefore we must take it that the ship in respect of which this right to be navigated in the port of Bristol by a Newport pilot is claimed can only succeed if she is able to establish that, under the sections to which I am about to refer, pilotage was not compulsory within the port of Bristol in respect of that area which was common to the port of Bristol and to the ports or pilotage districts of Cardiff, of Newport, or of Gloucester. I was for a considerable time very much impressed with the argument of counsel for the respondent. It seemed to me that it was open to grave consideration, apart from the language of the sections to which I am about to refer, that the scheme of the Bristol Channel Pilotage Act 1861 was to create two or three other pilotage areas, the areas overlapping among themselves, as we are told that the pilotage areas of Newport and Cardiff do, and also overlapping that part of the Bristol Channel which is within the port of Bristol; and that it was intended to create certain authorities which should license pilots and should give to those pilots what I may call full rights within those geographical areas, even although the areas overlapped or were in certain parts in common. It seems to me that if we took that view, having regard to the fact that the pilotage was found to be compulsory in the Bristol district, we should be obliged to come to the conclusion that the Newport pilot would be a good compulsory pilot and would protect the ship, even although the Newport pilot was within the port of Bristol and had not, of course, *ex hypothesi* been licensed by the corporation of Bristol. That being so, we have to consider whether that is the effect of the Act of 1861. It may be said, no doubt, that the Act of 1861 does recite that the great extension of trade in the several ports of Cardiff, Newport, and Gloucester made it expedient "that a separate system of pilotage should be established in the Bristol Channel in connection with those respective ports, under the supervision of local boards for each of such ports," and that, therefore, there is no doubt that certain privileges and rights in connection with pilotage and pilots were intended to be created by the Act of 1861. Then comes the section—namely, sect. 4—to which so much argument has been addressed, and with which we have to deal in this case: "From and after" a certain date "so much of the ninth section of the said Act"—that is, the Act of 47 Geo. 3, the Act of 1807—"as relates to vessels navigating or passing up or down the Bristol Channel, bound to or from either of the said ports of Cardiff, Newport, or Gloucester, shall be and the same is hereby repealed." I was for some time impressed with the view that that did mean to exempt from the provisions of sect. 9 of the Bristol Wharfage Act of 1807 a vessel coming from Newport, Cardiff, or Gloucester, even though it went into Bristol, and that, at any rate within the area which was common to the two ports, or I should rather say to the port of Bristol and to the pilotage district of Newport—taking Newport in this case—created by sect. 8 of the Act of 1861, pilotage was no longer compulsory. It is to be observed that sect. 9 of the Act of 1807 says that "all vessels sailing, navigating, or passing up, down, or upon the Bristol Channel to the eastward of Lundy Island . . . shall be conducted, piloted, and navigated by pilots duly authorised and licensed by the mayor, aldermen, and burgesses of Bristol"; and the subsequent section (sect. 11) prevents unauthorised persons—that is to say, persons not sanctioned and authorised and licensed by the mayor, aldermen, and burgesses of Bristol—from navigating these ships. It is with some doubt that I have come to the conclusion that it was not intended

by the Legislature in sect. 4 of the Act of 1861 to include and deal with the case of vessels going into and out of the port of Bristol; that it was intended to deal with the case of vessels which were going to and from Cardiff, to and from Newport, and to and from Gloucester, by way of the Bristol Channel, and that the section did not purport to deal specifically with the case of vessels which were going into or out of Bristol at all. The concession was a very valuable one, as I pointed out in the course of the argument, because up to the passing of that Act in 1861, east of Lundy Island, all vessels, whether they went to Cardiff, Newport, or Gloucester, were bound to take Bristol pilots under the Bristol Wharfage Act of 1807. The subsequent sections of the Act of 1861 also, I confess, for a time impressed me in the respondent's favour. The power to license in sect. 23, the compulsion in sect. 29 which compels a pilot to take a vessel to the limit of the district for which he is licensed, and the power in sect. 26 to license the old existing port pilots of Cardiff, Newport, and Gloucester for the whole pilotage area of the new pilotage authority certainly do tend in favour of the view put forward on behalf of the respondent, that these persons were intended to have licences to navigate ships throughout their whole pilotage area. I cannot, however, help thinking that this is all subject to the general observation that the Legislature, in sect. 4 of the Act of 1861, were not thinking of or dealing with vessels that were going into or out of the port of Bristol at all. They were dealing with the case of the other ports there specified which were reached by the Bristol Channel; and therefore we must look at the other sections to see what are the provisions as to compulsory pilotage, and as to the persons who may be the compulsory pilots within the port of Bristol in the case of vessels going to and from the port of Bristol. In other words, to adopt the very comprehensive, accurate, and concise way in which counsel for the appellant put it in his reply, the effect of these statutes is not to exempt from compulsory pilotage vessels that are going into the port of Bristol, in this common area, simply because they happen to have been also at one of the ports which are mentioned in the Act of 1861. Therefore, though, as I have said, sect. 29 of the Act of 1861 and the other sections of that Act may afford arguments which have to be carefully considered, they are not, in my opinion, sufficient to support the argument of counsel for the respondent. I thought at first that possibly a distinction might be drawn between vessels bound from Cardiff, Newport, or Gloucester, and vessels bound to those ports. For this purpose, I doubt whether that distinction is sound. I think sect. 29 was passed for the purpose of compelling the Cardiff, Newport, or Gloucester pilot to take the vessel as far as his district would allow him, otherwise he was to forfeit certain rights which he enjoyed under the Act. I am supported in that view by the curious enactment in sect. 3 of the provisional order of the Act of 1891. I quite agree, and I think it is fairly put by both of the learned counsel, that the real enacting effect of this provisional order, which has the force of a statute, was only to alter the old geographical areas to which the Act of 1807 did apply, and it is quite possible, and I think it is true, that the new geographical area was subject to all the enactments both in the Act of 1807 and in the amending Act of 1861, and any other statute which has been mentioned. But I think that the language of sect. 3 does confirm the view that in dealing with the Act of 1807 and the other legislation with respect to the Act of 1807, particularly that in sect. 4 of the Act of 1861, they were not dealing with the case of vessels going into and out of the port of Bristol, because the provisional order does appear to recognise that vessels going to or from the port of Bristol shall be exempted from all obligations except when within the limits of that port. I therefore come to the conclusion, on a consideration of the statutes themselves, that this vessel was not an exempt ship; that she was bound, within the port of Bristol, going to Bristol, when she got within the area of the port of Bristol, to have a compulsory pilot, and that the man who was navigating her—namely, the respondent—who might well think that under sect. 29 of the Act of 1861 he had the right to take her, was not the compulsory pilot contemplated by the earlier Act.

Then it is said that the case of *The Charlton* (*ubi sup.*) is an authority in favour of this view. I do not think it is an authority at all. In my opinion the court were there dealing with a different case, and had not really before them the difficulties with which we have to deal in this case. I very much doubt whether the point which we have had to consider in this case was very carefully considered by the learned judges in that case. It is certain that they had not got all the statutes before them, and I doubt whether the point was carefully considered. But it is very obvious that in that case the only important question was, Was the duty of the compulsory pilot as such ended at the time of the collision, because, although he had been taken on board as a compulsory pilot, the vessel at the place where the collision occurred was outside the district for which the pilotage was compulsory, though still within the district for which the pilot was licensed? And unless the ship was an exempt ship outside Kingroad, or at any rate at the place where the collision occurred, no argument could have been raised. The case of *General Steam Navigation Company* v. *British Colonial Steam Navigation Company* (*ubi sup.*) was referred to, and it was dealt with in the judgments in the case of *The Charlton* (*ubi sup.*), and, to put the matter shortly, as it was put by Kay, L.J. in *The Charlton* case, the pilot in that case came on board as a compulsory pilot, and he continued to be in the position of, though in fact he was not, a compulsory pilot at the time when the collision happened. There are certain expressions in those judgments which do support the view that their Lordships thought in that case that pilotage within the area of the port of Bristol was still compulsory. To that extent opinions were expressed in favour of the view which I have adopted after hearing the arguments for the appellant. But I do not want to base my judgment simply upon the authority of that case, because I do not think it is an authority in that sense. I come to the conclusion that the legislation upon which counsel for the respondent based his argument is not sufficient to exempt the ship, and does not remove the obligation to have a compulsory pilot on board when the vessel, bound to the port of Bristol, gets within the limits of that port; and

in this case, inasmuch as the respondent, who was purporting to pilot the ship, was not licensed by the corporation of Bristol, but was only licensed to take vessels in and out of Newport, and, incidental thereto, to take them across this part of the area which was common to the various licensing districts when the vessel was leaving Newport, it does not enable the master to say that the statute was satisfied because he had got this pilot on board. I think, therefore, that the magistrates ought to have convicted in this case.

LAWRANCE, J.—I entirely agree, for the reasons given by my Lord.

KENNEDY, J.—I agree, and I only wish to add a very few words. One paragraph of this case states that this steamship, when within the port of Bristol, was not exempt from compulsory pilotage. If this is an area (the area ending with the point at Kingroad) within which she was not an exempt ship—in other words, within which she still had an obligation to take on board a compulsory pilot—then there was no power, as it seems to me, in the Newport pilotage authorities to create a compulsory pilotage for the Bristol port. The pilot who was on board was a pilot licensed by the Newport authorities; and, while under sect. 29 of the Act of 1861 he might be required to take an outward-bound vessel from Newport to the utmost limit within the Newport pilotage district that the master of the vessel wished, he could not thereby become a pilot who would be able to assert a right to be taken on board for the port of Bristol as a compulsory pilot. I am dealing with this case upon the basis of a statement in the case itself that this vessel was not an exempt ship from compulsory pilotage coming into Bristol, and, if that be so, then it seems to me, for the reasons which my Lord has given, that the Act of 1861 did not get rid of the obligation of compulsory pilotage, and that the post of a compulsory pilot could not be held by a pilot who had started as a Newport pilot and not as a pilot of the port of Bristol.

Appeal allowed. Case remitted to the justices with a direction to convict.

Solicitors for the appellant, *Whites* and *Co.*, for *James Inskip* and *Co.*, Bristol.

Solicitors for the respondent, *Herbert Smith*, *Goss*, *King*, and *Gregory*, for *Lyne* and *Co.*, Newport, Monmouth.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 14, 16, *and* 17, 1903.

(Before BARNES, J. and TRINITY MASTERS)

THE HAWTHORNBANK. (a)

Collision—Vessel "not under command"—Duty to keep course — Regulations for Preventing Collisions at Sea, art. 4 (*a*) (*c*) (*d*).

A vessel exhibiting two red lights under art. 4 (*a*) *of the Collision Regulations as a signal that she is "not under command" ought to keep her course when approaching another vessel so as to involve risk of collision.*

A collision occurred between the brigantine R. *and the barque* H. *The* R. *was at the time close-hauled on the starboard tack; the* H *was sailing free, but, having been recently in collision with a steamship, was exhibiting "not under command" lights. The helm of the* R. *was put up in order to pass ahead of the H., while the helm of the* H. *was ported.*

Held, that the H. *was to blame as she ought to have kept her course and let the* R. *get out of her way.*

ACTION for damage by collision brought by the owners of the brigantine *Ringleader* against the owners of the barque *Hawthornbank.*

The collision occurred about midnight on the 16th Oct. 1903, in the English Channel, some five miles S.W. of Dover.

The *Ringleader* was a brigantine of 162 tons register, and at the time was on a voyage from the Tyne to Folkestone with a cargo of coals, and manned by a crew of seven hands all told. She also had a pilot on board. The *Hawthornbank* was a steel barque of 1369 tons register, and was on a voyage from Antwerp to San Pedro, U.S.A., with a cargo of rails, and with a pilot on board, and manned by a crew of twenty-two hands all told.

The *Hawthornbank* had been in collision with the mail steamship *Orinoco*, and had received considerable damage. Her foretopmast and head-stays and sails and gear had been carried away, and her bows had been stove in. The services of a tug had been engaged, and she was at the time putting back to the Thames for repairs.

The weather was clear but overcast, the wind was a strong breeze from W.N.W., and the tide was running to the westward with the force of about a knot an hour.

The plaintiffs' case was that under these circumstances the *Ringleader* was sailing close-hauled on the starboard tack, heading about S.W. ½ W. magnetic, and making from two to three knots an hour with jib, foretopmast staysail, two topsails, two mainstay sails, and single-reefed mainsail, when a red light was seen nearly ahead, but on the starboard bow withal, and distant one or two miles. The *Ringleader* kept her course, and shortly afterwards another red light was seen a little broader on the starboard bow, and, after a further interval, a third red light appeared about a quarter of a mile off. Those in charge then came to the conclusion that the vessel approaching, which proved to be the *Hawthornbank*, was not under command, and the helm of the *Ringleader* was starboarded, as she was unable to port owing to the presence of a steamer showing her masthead and green lights on the starboard bow, and nearer to her than the vessel exhibiting the three red lights. The *Hawthornbank*, however, still keeping her port light open, continued to come on, as if under port helm, with considerable speed, and with her stem struck the *Ringleader* on the starboard side of the bowsprit, carrying it away and doing so much damage that she sank shortly afterwards, and her pilot was drowned.

The plaintiffs charged the defendants (*inter alia*) with proceeding at an improper rate of speed for a vessel carrying "not under command" lights, with failing to keep her course and speed, and with improperly porting. They also charged them with the breach of arts. 4 and 21 of the Regulations for Preventing Collisions at Sea.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

The defendants' case was that the tow-line of the tug that had been engaged to tow the *Hawthornbank* had slipped before it was hauled on board, and the tug was following and hauling in the tow-line, while the barque, under her lower main topsail, was moving through the water, making about three knots an hour, and heading about E.N.E. magnetic. The regulation side lights and a stern light and the red lights for a vessel not under command were being duly exhibited.

Under these circumstances the red light of the *Ringleader* was seen about two miles off, and bearing about three or four points on the port bow of the *Hawthornbank*. The *Ringleader* approached, with her red light open, on the port bow of the *Hawthornbank*, and, as she approached, the helm was ported a point and steadied. The *Ringleader*, however, shut in her red light and opened the green light, and appeared to be attempting to cross the bows of the *Hawthornbank*, and, coming on as if under a starboard helm, with her jibboom and stem struck the port bow of the *Hawthornbank*.

The defendants charged the plaintiffs (*inter alia*) with improperly starboarding and attempting to cross the bows of the *Hawthornbank*. They also charged them with breach of art. 29 of the regulations.

Arts. 4 and 21 of the Regulations for Preventing Collisions at Sea are as follows:

Art. 4. (*a*) A vessel which from any accident is not under command, shall carry at the same height as the white light mentioned in art. 2 (*a*), where they can best be seen, and if a steam vessel in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all round the horizon at a distance of at least two miles. . . (*c*) The vessels referred to in this article, when not making any way through the water, shall not carry the side lights, but when making way shall carry them. (*d*) The lights and shapes required to be shown by this article are to be taken by the vessels as signals that the vessel showing them is not under command, and cannot therefore get out of the way.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Aspinall, K.C. and *Nelson* for the plaintiffs.—The *Hawthornbank* was in fact under command, and was proceeding at a considerable speed. If she was in fact not under command under her lower main topsail only, she had brought herself to this condition by improperly reducing sail, and art. 4 (*a*) did not apply. The red lights were exhibited too late and not at a proper time. In any event the "not under command" lights are a signal to other vessels to get out of the way; and it is therefore the duty of a vessel in such circumstances to keep her course and speed. The *Hawthornbank* is to blame for porting her helm. There was a bad look-out on board the *Hawthornbank*, and the light of the *Ringleader* was not reported to the pilot.

Pickford, K.C. and *Adair Roche*, for the defendants, *contra*.—The *Hawthornbank* was justified in exhibiting "not under command" lights. See

The P. Caland, 68 L. T. Rep. 469; 7 Asp. Mar. Law Cas. 317; (1893) A. C. 207.

There was a bad look-out on board the *Ringleader*, and hence the collision. The steamer alleged to have hampered the movements of the *Ringleader* was the tug, which was much further astern, so that she was not really in the way.

Nelson in reply.

BARNES, J.—This is an action by the owners, master, and crew of the brigantine *Ringleader*, and the owners of her cargo, against the owners of the barque *Hawthornbank* in respect of a collision which occurred at about midnight on the 16th Oct. 1903, in the English Channel, off Dover. The result of it was that the *Ringleader* was so damaged that she sank shortly afterwards and was lost with the cargo and crew's effects, and the pilot which she had on board was unfortunately drowned. The case of the *Ringleader* is in substance that those in charge of her noticed the red light of the *Hawthornbank* nearly ahead, but slightly on the starboard bow, about a mile and a half off; that afterwards a second red light was seen about in the same position; and that afterwards a third red light was seen in the same position, or thereabouts; that when the third red light came into sight the vessels were about a third of a mile apart. The plaintiffs also say that they saw the lights of a steamer a little broader on the starboard bow than the lights of the *Hawthornbank*; and, according to the evidence of the master of the plaintiffs' vessel, the lights of that steamer seemed to him to be about the same distance off as those of the barque. On that point there was a conflict of evidence, because the defendants sought to make out that the lights of this steamer, which proved to be the tug of the *Hawthornbank*, were really a good deal further away from the brigantine than the plaintiffs' witnesses put them. However that may be, the case for the plaintiffs is that, when they got all those three red lights of the barque in sight, pretty close to, they came to the conclusion that she was a vessel not under command, and that they must act; and thereupon they acted by starboarding their helm, in the hope of getting across the barque's bows, being unable, according to the view of the master, who was the responsible man to act, to do anything else, because, if they had luffed by porting, they would have thrown themselves under the bows of the steamer, and, if they had kept on their way, they would have gone into the barque, and so he starboarded. The case of the *Hawthornbank*, shortly stated, is that she had, the day before, received damage by collision in the English Channel, and was putting back in distress with the object of making the Thames, and, no doubt, procuring the repairs rendered necessary by the first collision, which had, according to her master, damaged her stem, forcing it across to starboard, carried away all the headgear and foretopmast, stove in her bows, and done some other damage. The *Hawthornbank* had taken a pilot, had engaged a tug, and was endeavouring to make fast to that tug. There had been two attempts to get a tow line on board. The first attempt failed just as the line was about to be made fast, and the second attempt also failed, and the tug had again to occupy itself in hauling in the steel hawser. From that time up to the collision the *Hawthornbank*, which, when they first tried to take a tug, had broached to,

was proceeding with only the lower maintopsail set; that is to say, for about two hours before the collision she sailed under the lower maintopsail, and during those two hours the tug was getting in the tow rope after the first attempt, and was making the second attempt to get fast. There is no doubt that two red lights, in addition to the side lights, were put up, and the case for the *Hawthornbank* is that those two red lights were put up at about 10 p.m. in the mizzen rigging, on the starboard side, at a proper height, so as to show that the vessel was not under command. They then say that they saw the red light of the *Ringleader* something like two miles, or thereabouts, away, three or four points on the port bow. That is the pleaded case; but the master of the *Hawthornbank* said a mile or two miles off. It is then stated that the red light of the *Ringleader* kept open and gradually broadened on their port bow, and that, after they saw the light, when the *Ringleader* was a considerable distance off, they ported about a point, and then steadied, so as to give, according to the master of the defendants' ship, more room, and to enable the *Hawthornbank* to steer better. Then their case is that the *Ringleader* shut in her red light, when about four or five ships' lengths off, and about six points on the port bow, and showed her green light, as if attempting to cross the bows of the *Hawthornbank*, and shortly afterwards the collision happened. Now, those two cases present certain difficulties.

The first question is, what were the manœuvres of these two vessels, involving the further questions, at what time were the lights put up on the *Hawthornbank* — the plaintiffs contending that these extra red lights were only put up at the last moment before the collision, and the defendants contending that they were put up about two hours before—and what was the relative position of the two vessels to one another at the material time. I think that the weight of the evidence is in favour of the view, which I adopt, that the two extra red lights were put up somewhere about 10 p.m. I think it is probable that was so from the fact that that seems to have been about the time when the vessel was in difficulties with her tug; and they seem to have had those lights up from that time onwards to the collision. With regard to the manœuvres of the two ships, I accept the plaintiffs' view that the vessels were green to red—that is, that the *Ringleader* had the other vessel slightly on the starboard bow—whereas the defendants' case is that the two vessels were red to red; but I cannot see how the defendants' story can be correct on this point. In the first place, the courses on which the vessels were favours the view which the plaintiffs present. In the second place, if the vessels were red to red, as the defendants suggest, there could be no reason for the plaintiffs starboarding in the way it is said by the defendants they did; because, if they were red to red, the *Ringleader* had only to keep her course and avoid the two difficulties in her way—namely, the *Hawthornbank*, which they would pass easily, and the steamer, which would have to keep out of her way. Again, I cannot see how the collision—which undoubtedly took place between, in the first instance, the starboard side of the *Ringleader's* bowsprit and afterwards her bows, and the port bow, near the stem, of the *Hawthornbank*—could have occurred on the story told by the defendants; because, if it were correct to say that the plaintiffs' vessel got six points on the port bow of the defendants' vessel and then starboarded, and the ships were proceeding at the same speed as they had been going, I do not see how it is possible to bring about a collision with the bows of the *Hawthornbank*, and at an angle leading aft. I therefore accept the view of the position of the ships and the general outline of the story of the navigation told by the plaintiffs. There are still left some questions of difficulty. The first relates to the charge against the plaintiffs that their helm was improperly starboarded. That involves, I think, bad look-out, because it is said that, if these two extra red lights were up, those in charge of the *Ringleader* ought to have seen them; but I think a good look-out was being kept on the *Ringleader*. I think the men were doing their duty and looking out as well as they could. They saw the first red light—that is, the side light—of the *Hawthornbank* at a considerable distance, although they did not see the other two lights at the same time. They first saw one and then they saw another, and I think it is quite possible that the lights may have had some obscuration from the masts or rigging of the *Hawthornbank*, because they were hung three or four feet to starboard of the mizzen mast. It is obvious that anybody on the port bow, fine on the bow, might have something between them and those lights, especially if the vessel were not keeping quite steady on her E.N.E. course. The exact obscuration would depend upon how the vessel was moving. Then again, the lights were globular, which would not necessarily come into view so readily or so brightly as the side light which was first seen. I am satisfied that those on board the *Ringleader* saw the two extra side lights as soon as they reasonably could be expected to do so. The question whether those in charge of the *Ringleader* were wrong in starboarding depends very much on the opinion of the nautical assessors who are assisting me. If the plaintiffs are right in saying that the steamer which they saw appeared to be about the same distance off as the ship, there certainly was a position of very considerable difficulty, because there was the *Hawthornbank* intimating by her signals that she was out of command, a little ahead of the *Ringleader*, and the steamer on the starboard bow. The master of the *Ringleader* did not know that it was a tug at the time. It might be any steamer coming up. It might be a large steamer, and, if he luffed, it would throw him right under the bows of that steamer. To get rid of that difficulty the defendants try to make out that the tug was farther away. My view is that the master of the *Ringleader* was justified, from what he saw, in thinking that the steamer was pretty close to him, in the same way as the barque was, when he made out that the barque was not under command. It must not be forgotten that the tug's side lights may have been showing more brilliantly than those of the barque, and therefore may have produced the appearance of being closer. I am not prepared to accept the defendants' view of this case, that the tug was so far astern as they make out. Some time had elapsed since the last attempt to get the tow rope fast, and I see no reason why the tug would not make up to the barque again as fast as she could. That being my

view, I have consulted the Elder Brethren, and they agree that the plaintiff's vessel cannot reasonably be expected to have done differently—in other words, there was no negligence or breach of any rule on her part in starboarding in the circumstances. The reasons appear to be these: As her master says, it would have been risky to have gone about and ported under the steamer's bows; it would have been a very serious danger if the steamer had been close up; he could not keep straight on with safety, because the vessels were approaching, and so he starboarded and tried to get across the bows of the barque. The only point that can be made against him for doing that is that he said something to the effect that sub-sect. (c) of art. 4 (1) was not properly in his mind; but I think that, when his evidence is fairly considered, what he meant to convey was very much what he said in his evidence in chief—namely, that he had made up his mind that the vessel showing the three red lights was a disabled vessel, scarcely having any way through the water, and if he had thought that she was going at any great speed he would not have starboarded. That seems to me very much a nautical question, and the Elder Brethren take the view that the plaintiffs' master could not reasonably have done in the circumstances other than what he did do. I think, therefore, he cannot be considered to blame.

Now, the other side of the case is also a matter of considerable difficulty. The broad points taken by counsel for the defendants are that the barque was not under command, that she had her proper lights showing in the circumstances, and that she did nothing wrong. Was the barque under command? Or was she not? She was proceeding in the damaged condition which I have already described, with only the lower maintopsail set, for something about two hours before the collision, and she was put into that position with the object of getting her tug and getting safely into the Downs. The question is, Was she at this time under command, or not under command from any accident? There is no doubt that her condition was due to the previous collision, which was an accident, and I have asked the Elder Brethren—it is a matter purely for them—whether she was under command or not. Their view is that the defendants' ship was, in the circumstances, not under command, having regard to all the conditions of the traffic and the action which she might be called upon to take—to act promptly and properly for other vessels. I understand by that, that although it would be possible for a vessel going, as she was, to alter her course slowly, or to take action in some way for the purpose of altering her course for a vessel which she might meet, and so get out of the way, she had not only one vessel to consider when she put up these lights. She had to consider the traffic in the Channel, and all the vessels out of the way of which she might have to keep. I may add these observations. Either she would pay off very slowly indeed, or she might, if she tried to come up, come up very quickly, and then she would not be in a position, certainly not in the latter case, to act for other vessels. That is the answer to the first broad point in connection with the defendants' case. Then another point was made—namely, that she was proceeding negligently, having regard to the circumstances of the case, in reducing herself only to this sail that she had set at the time. I have asked the Elder Brethren a further question about this, and they advise me that the circumstances were not such as to justify the court in holding that she was proceeding in an improper manner. There is positive evidence from the defendants' master, and from the surveyor, to the effect that she could not set her headsails, and it must not be forgotten that what she was doing was being done with the object of proceeding to the Thames, and she was, it seems to me, acting reasonably in endeavouring to take a tug to proceed to the Downs. A further point was taken—namely, that if the defendant vessel says, in effect, "Here I am in a crippled condition, and not under command," and exhibits "not under command" signals, she should act accordingly, and leave other vessels to get out of the way; but the evidence is that she, some time before this collision actually happened, ported her helm. I have already said that I do not accept the view that they ported because of a position of lights such as they contend for, but they ported their helm to a green light. The Elder Brethren take the view, and I agree, that that was a material cause in bringing about this collision. The helm was ported, the vessel paid off, and I think, but for that having taken place, there was a great probability that the plaintiffs' ship would have got across the bows of the barque. My view, therefore, is that, having signalled that she was not under command, and that the other vessel must act for her, she ought not to have acted in the way she did, but should have kept her course and let the brigantine get out of the way. She did not do so, and the result is that the *Hawthornbank* must be held alone to blame. There is one other matter. As I have already said, the story told by those on the *Hawthornbank*, that they ported to a red light in order to give more room and to steer better, I do not accept as regards the light that was seen. I think the vessels were green to red. I think, therefore, that the look-out was defective on board the *Hawthornbank*, and that the pilot was not properly informed that there was a green light in sight, which light really must have been visible at the time the helm was ported. It seems to me that, if that is so, the *Hawthornbank* must be held alone to blame, and her owners liable, because the look-out was defective — perhaps because they were looking after the tug and not paying sufficient attention to the navigation ahead. That disposes of the question of compulsory pilotage.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Thomas Cooper* and *Co.*

Friday, Nov. 20, 1903.

(Before BARNES J. and TRINITY MASTERS.)

THE GERMANIA. (a).

Salvage—Stranding of salved vessel—Value for purposes of award.

A steam trawler towed a disabled steamship into Aberdeen Bay, and signals were made for a pilot and a tug. A tug came up in response and offered to pilot and tow the vessel into harbour,

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

but the offer was refused by her master, and the tug sent back for a pilot. In the meanwhile the hawser parted, and the vessel drifted ashore. Her value at the time the services of the tug were offered was 8500l. The costs of refloating were 1150l., and of the repairs in consequence of the stranding 5600l. In an action for salvage by the owners, master, and crew of the trawler:

Held, on the facts, that they were entitled to a salvage award of 750l., and that, for the purposes of determining the award, the value of the salved property was to be taken at 8500l.

Held, further, that the steamship ought to have taken the services of the tug when offered.

ACTION for salvage.

The plaintiffs were the White Star Fishing Company Limited, the owners of the trawler *Waago*, and her master and crew. The defendants were the owners of the German steamship *Germania*.

The *Waago* was a steam trawler of 155 tons gross register, fitted with engines of 350 horse-power effective, and was at the time on a voyage from the Faroe fishing grounds to Grimsby with fish, and manned by a crew of ten hands all told.

The *Germania* was a steamship of 2607 tons gross register, and was bound for Kratzwick to Newcastle-on-Tyne in water ballast.

About 7.30 a.m. on the 3rd Dec. 1902, the *Waago* was about thirty miles E.S.E. of Girdlestone Light, in Aberdeen Bay, when the *Germania* was seen flying signals of distress. On coming up to her it was found that she had broken her tail-end shaft and lost her propeller the day before, and was drifting to the N.N.W. with two anchors down. The master of the *Germania* hailed the *Waago*, and it was agreed that she should render assistance. After three attempts, during one of which the hawser parted and the *Germania* collided with the quarter of the *Waago*, a connection was made, and towing commenced about noon for Aberdeen. About 5 p.m. Aberdeen Bay was reached, and the *Waago* held the *Germania* head to wind while flares were exhibited for a tug and a pilot. A tug came alongside, and, after signalling the *Germania*, told the master of the *Waago* that there was too much sea for a pilot boat to cross the bar. The tug offered to take the *Germania* into the harbour, but her services were refused. The tug then left to fetch a pilot. Between 8 and 9 p.m. the master of the *Germania* hailed the *Waago* to slack away the warp, and the *Waago* accordingly dropped astern to do so, but as she did this the *Germania* drifted to leeward, and, on the *Waago* being again hailed to go ahead, the hawser parted. The *Germania* then dropped anchor, and steps were taken to make the *Waago* fast again, but before this could be done the *Germania* drifted ashore. She was eventually floated off at a cost of 1150l., and the subsequent repairs due to the stranding cost 5600l.

The value of the *Waago* was 5000l., and of her cargo 254l. after allowance had been made for deterioration of the fish owing to the delay caused in rendering the services. The value of the *Germania* at the time the services were rendered was 8500l.

It was contended by the defendants that no salvage was due to the plaintiffs, as the *Waago* had not completed the services she had agreed to render. They also contended that, if any salvage was due, the cost of floating her off and the repairs due to the stranding ought to be deducted from her value.

Aspinall, K.C. and *Batten* for the plaintiffs.—The services were completed when the *Germania* was brought into Aberdeen Bay when the tug offered to take her in. The master of the *Germania* neglected to avail himself of the services of the tug. It was an error on the part of the master to order the *Waago* to be slacked away, and in consequence of his mistake the hawser parted and the *Germania's* anchor dragged, and she drifted ashore. It is submitted that the value of the vessel before she stranded—viz., 8500l.—must be taken as her value for the purposes of the award.

Laing, K.C. and *Stubbs*, for the defendants, *contra*.—The plaintiffs are not entitled to any salvage award. The *Waago* ought to have towed the *Germania* into Aberdeen Harbour, and it was owing to unskilful towing that the hawser parted and the *Germania* drifted ashore. Assuming, however, that the plaintiffs are entitled to some award, it is submitted that the value on which the award is based must be what she was actually worth to her owners—namely, 1750l.

Batten in reply.—The services of the *Waago* came to an end when signals were made by the master of the *Germania* for a pilot and a tug. The intention of the master was to employ others to take him into harbour, and, as far as the *Waago* was concerned, her services were then completed.

BARNES, J.—The question is whether any salvage is to be given in this case, and, if so, upon what basis. The plaintiffs contend that they ought to be treated as having brought into safety, at the time they finished their services, property to the value of 8500l.; whereas the defendants contend that there was no salvage at all, and that, in any event, the value of the *Germania* can only be taken at 1750l., as 6750l. has to be deducted, made up of 5600l., the cost of repairs, and 1150l., the cost of the salvage operations to get her off. The *Germania* had met with bad weather, in which she had broken her tail-end shaft and lost her propeller. When she was found by the *Waago* she had two anchors down, but they did not prevent her drifting generally in a north-westerly direction. The *Waago* was asked to assist her, but there was some confusion as to the exact words used by the English master of the *Waago* and the German master of the *Germania* in connection with the arrangement made for the towage. It has, however, been practically agreed by counsel that the matter, so far as salvage is concerned, must be treated as an open arrangement—to render salvage services with the object of getting her into a place of safety—and on that basis I propose to treat the case. The *Waago* was made fast to the *Germania* about midday on the 3rd Dec., and started to tow her. It took her a long time—I think some four hours—to make fast, and afterwards the vessel was towed in the direction of Aberdeen. They appear to have reached Aberdeen Bay at about 5 p.m., or a little later, in the afternoon; and, so far, matters went fairly well. It had been bad weather, with a strong wind and sea from the

S.E., and I think—and the Elder Brethren agree—that if the vessel had not had assistance from towing she would have been in danger of going on the coast further to the northward than she did. When the vessels came near to Aberdeen, according to the master of the plaintiffs' vessel, a white flare was burnt for a tug and a pilot, and I think it is fairly obvious that the master of the trawler is right in saying that he would not like to have taken such a large vessel as the *Germania* by himself into Aberdeen, but that he could take her where she would be in a position to get tugs, and I think his statement is correct that signals were made for tugs. In response a tug came out and came alongside the *Germania*, and a conversation ensued between the two masters. The master of the tug said that he told the master of the *Germania* that he could not have a pilot, because it was too rough for a pilot to come out; but he himself had a licence for Aberdeen for the tug and could take the *Germania* safely in, and get a pilot afterwards; that he could go ahead, and the trawler, if wanted, might make fast astern, and the remuneration could be settled ashore. Then there was a discussion, according to his evidence, as to the price; but the master of the *Germania* said he would not give more than 10*l*. There the negotiations, such as they were, broke off, without anything further being done. There is one point which it is material to mention here. The master of the tug said that it was not safe for the trawler alone to take the *Germania* in, and that he told the master of the *Germania* he must dismiss the trawler from ahead, but she could work astern. Now, the master of the *Germania* says that when he had this conversation he understood the master of the tug to say, "Clear out the trawler altogether; I will bring you into a safe place"; and that he himself said to the master of the tug, "You had better let one of your men go on board the trawler, and you can go astern, inside." Then he went on to say that the tug went to the trawler, but came back and "asked if I would pay him if he brought out a pilot. I said he had better bring two, and that I would pay him 6*l*. to 7*l*. He asked 200*l*. for going astern, and I offered him 10*l*., and he laughed at that and went to the trawler." It seems to me that there may have been some confusion between what these men understood each other to say; but one thing I do not think is established by the defendants, and that is that any stipulation was made by the tug that the trawler should be absolutely dismissed. The general inference I draw is that there was bargaining going on, and that the defendants' master had the offer of a tug; but that he seems to have thought that if he could obtain a pilot he could get in with the trawler, and probably would have to pay but a very little more for a tug astern. My view is that the trawler's master was right in saying that he would not like to take the big ship in alone, but would bring her to a place where she could get a tug, and that those in charge of the ship should have recognised that position and never have allowed the tug to go. The master of the *Germania* should have taken that tug, and then this disaster would not have happened. However, the two vessels remained out in this weather, and the hawser near the steamer began to chafe. Those on the steamer started to get it in, but could not, because it was weighted between the two vessels by a chain cable. The master of the trawler seems to have thought, from their calling constantly to him to go astern, that he must take the weight off somehow, and that there might be some risk in doing it, but that he must, as they were drifting nearer the shore, get a taut hawser between them. I have consulted the Elder Brethren about this, and they do not see that there is any ground for suggesting that the master of the trawler was doing anything wrong in the circumstances at all. Their view is that it was not his fault that the hawser parted and that this misfortune happened. I think the evidence of the master of the trawler must be accepted, and that he tried to make fast again and could not. Unfortunately the steamer's anchor did not hold, and she went ashore. What is the general result? It seems to me that the plaintiff trawler had done what she could to bring the defendants' vessel into a place of safety, and that if the tug had been taken there would have been no difficulty. I regard it as a case in which there ought to be a salvage award made on the basis of the plaintiffs' vessel having assisted the *Germania* from where she was taken in tow to a place in Aberdeen Bay, close to Aberdeen. Looked at from that point of view, it is a case of towage, though for a very short time, of a very valuable character, because it was from a position where the vessel, if unassisted, would have been in danger of going ashore at a spot more northerly than Aberdeen, to a place where she could get a tug. I have considered the case very carefully, with the assistance of the Elder Brethren, and I am of opinion that the plaintiffs are entitled, on a value of 8500*l*., to an award of 750*l*.

Solicitors for the plaintiffs, *Deacon, Gibson, Medcalf*, and *Marriott*, for *Grange* and *Wintringham*, Great Grimsby.

Solicitors for the defendants, *Stokes* and *Stokes*.

Jan. 27, 28, *and* 29, 1904.

(Before BARNES, J. and TRINITY MASTERS.)

THE PEARLMOOR. (*a*)

Damage to cargo—Bill of lading—Exceptions—Marginal clause.

The plaintiffs were indorsees of bills of lading under which a cargo of maize, barley, linseed, oats, and wheat was shipped on the defendants' steamship. By the bills of lading it was provided in clause 2 *that "the . . . owners . . . shall not be responsible for loss, damage, or injury arising from sweating . . . or consequences arising therefrom . . . or heat"; and in clause* 3 *that "the . . . owners . . . shall not be responsible for any loss or injury to the said goods occurring from any of the causes above mentioned, or from any loss or injury arising from the perils of the seas . . . whether any of the perils, causes, or things above mentioned . . . be occasioned by any act or omission, negligence, default . . . of stevedores . . . or other persons in the service of the shipowners . . ." On the margin of the bills of lading under which the maize was shipped was stamped: "In no*

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

case is the steamship to be held liable for heating or any other damage occurring to the within mentioned goods." Part of the maize became heated on the voyage, and the other cargo was damaged through improper stowage.

In an action by the plaintiffs to recover damages:

Held, that the second set of words "above mentioned" did not refer to the matters in clause 2, and that the word "heat" referred to heat arising from some extraneous cause.

Held, further, that if the owners desired to relieve themselves from liability for the negligence of their own servants there should have been express words to that effect, and that the clause in the margin did not apply in the case of negligence.

Price *v.* Union Lighterage Company (89 *L. T. Rep.* 731; 9 *Asp. Mar. Law Cas.* 398; (1904) 1 *K. B.* 412) *followed.*

ACTION for damage to cargo by indorsees of bills of lading.

The plaintiffs were Robert Procter, Sons, and Co. Limited, and the defendants the owners of the steamship *Pearlmoor.*

The cargo consisted of maize, barley, linseed, oats, and wheat shipped on board the defendants' steamship *Pearlmoor*, at Buenos Ayres, in May and June 1902. The maize and barley and linseed were all shipped in bags, the oats partly in bags and partly in bulk, and the wheat was all in bulk.

On arrival of the vessel at Hull it was found that some of the wheat had been damaged by coal dust, some of the oats were mixed with the barley, and some of the linseed was mixed with the wheat, and it was also found that the bulk of the maize was in a heated condition, partly owing, it was contended by the plaintiffs, to its having been in contact with the sides of the ship.

The plaintiffs alleged that the damage was due to insufficient dunnage, to the bags having been cut by the stevedores so as to give more room for stowage, through the bulkhead between the bunkers and one of the holds not being proof against coal dust, through insufficient ventilation, and generally owing to bad stowage. They also alleged that the vessel was unseaworthy, but this point was not proceeded with.

The plaintiffs claimed 551*l.* 14*s.* for the damage to the maize, and 21*l.* 0*s.* 4*d.* for the damage to the remainder of the cargo—571*l.* 0*s.* 4*d.* in all.

The defendants denied that the cargo was badly stowed, or that their vessel was unseaworthy, and alleged that the damage to the maize was due to inherent vice. They also alleged that, if the damage was caused by improper stowage, that was due to the negligence of the stevedores, and such negligence was covered by the exceptions in the bills of lading.

The material clauses in the bills of lading were as follows:

1. The Act of God, the King's enemies, &c.

2. That the master, owners, or agents of the vessel or its connections shall not be responsible for loss, damage, or injury arising from sweating . . . bursting of packages, or consequences arising therefrom . . . decay, hook marks, or injury from hooks . . . explosion, heat, fire at sea or on shore, at any time or in any place.

3. That the master, owners, or agents of the vessel or its connections shall not be responsible for any loss or injury to the said goods occurring from any of the causes above mentioned, or for any loss or injury arising from the perils or accidents of the seas . . . whether any of the perils, causes, or things above-mentioned, or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowners . . .

On the margin of the bills of lading under which the maize was shipped there was in addition stamped the following clause:

In no case is the steamship to be held liable for heating, or any other damage accruing to the within-mentioned goods, nor for insufficient strength of bagging.

The defendants in the further alternative, while denying liability, paid into court the sum of 30*l.*

Evidence was called by the plaintiffs and defendants in support of their respective cases, and

BARNES, J. in dealing with the facts of the case said:—It is necessary in this case to dispose first of the questions of fact, because there is a question of the construction of the bills of lading under which these goods are carried to be disposed of afterwards. The plaintiffs appear to be the consignees under certain bills of lading—a copy of one of which has been put in—for some maize, barley, linseed, oats, and wheat shipped on the *Pearlmoor* at Buenos Ayres, for Hull, in May 1902. It is said that the grain arrived at Hull damaged to a certain extent. The question of importance in the case is in connection with the maize, because the claim made relating to the maize amounts to 551*l.* 14*s.*, whereas the other matters are quite trifling. The plaintiffs' contention with regard to the maize may be put in this form: That for some reason or other a large number of the bags were cut in order to stow more cargo into the hold; that the crevices were filled up with loose maize; and that the loose maize got into the spaces at the ends of the cargo, against the fore and after bulkheads, and also into the wings of the ship; and that, in that condition of things, the ventilation was not such as it should have been in the course of the voyage, and the damage was thus occasioned. With regard to the voyage, there seems to have been some bad weather, when the ventilators were closed, but the captain says he had often had such bad weather before, and that there was nothing out of the usual in the weather that was experienced. He had previously said that very bad weather was experienced on the 7th June and for several days afterwards, and the ventilators had to be closed for two or three days sometimes. There was undoubtedly closing of the ventilators for a certain time. The next matter is that the shipment was made under bills of lading which described the cargo as in good order and condition; but that does not mean anything more than that there was nothing specially noticeable about it which would require to be marked on the mate's receipts. [His Lordship then dealt with the evidence as to the number of bags that were cut.] The conclusion to which I have come upon the whole is that while no doubt there is always a certain quantity of loose grain, there was in this case an unusual quantity; and I think that must have been due to the cutting of the bags at shipment, for some reason or other—it does not matter what. It seems to me there was an undue

proportion of loose grain, for the reasons I have given, and that that grain was in the places where the ventilation should be—namely, in the wings and the ends where the bulkheads should be separated from the cargo, and that there was therefore less free ventilation than there should have been. Now, I think it is not made out that the whole of this damage by heating is due to the cause which I have been considering, but I think some of it was. I think the ship's ventilation became defective to a certain extent owing to this excessive quantity of loose grain which was about for the reasons I have given; and I have asked the Elder Brethren what is their view. They think that as there was more loose grain than usual it might aggravate the heating. That is, I believe, all one can say about this case. I do not attribute the whole of this heating to this cause. The probability is that a portion of this heating was due to the state of the cargo itself, and to its being confined in the hold of the ship. It appears to me that the proper and only conclusion I can come to is to put down half of this heating to that cause. If the damage by heating amounts to 400*l*., I think 200*l*. of that is due to this choking up of the ventilation.

The next matter to discuss is what has been called the iron damage. It does not seem to me to be quite the right term. It means the damage to the bags which have been against the ironwork of the ship, and, in consequence of the accumulation of water, have been thereby damaged. The bags were described as being so wet that they burst when moved, and the grain poured out and was damaged. Now, the quantity that is said to have met with damage in this respect is 920 bags, in all, equivalent to 344 quarters, and it is said that the damage amounted to 81*l*. Was that due to bad stowage, or was it not? I understand the contention of the defendants was that it was due to the working of the ship in bad weather if any bags got out of place—that everything was right at the start, and that any cargo which got against the side of the ship got there in the course of the voyage. Here again there is a question of fact to decide. The broad contention of the plaintiffs is that some of the cargo battens were not in their places when the ship arrived, so that some of the cargo got against the sides and frames and stringers. On the other hand, the case for the defendants is that the battens were all in their places when the ship started. I think myself that the evidence for the plaintiffs is better than that for the defendants on this point. My opinion is that the places where this grain had got against the ironwork of the ship were not adequately protected, in the way they should have been, when the ship started. I accept, broadly speaking, the view presented on this part of the case by the plaintiffs, and I find that the damage was due to improper stowage. So that matter will depend, as also the point I have already decided, upon what effect is to be given to the bills of lading. With regard to the other small items, wheat and coal dust got mixed, and it seems to me that could not have happened without there being some defect in the bulkhead. So also with regard to the mixing of wheat and linseed. It was a temporary bulkhead, and seems to have been in such a condition that the grain got through the interstices. Lastly, there was an item for the mixing of barley and oats in No. 5 hold. I cannot see how that happened unless the sail cloths were not properly fixed. Those are my findings on this matter, and the next question is what is the law.

Pickford, K.C. and *Bateson* for the plaintiffs.—Negligence is at the root of all the damage, and the exceptions in the second and third clauses, even if they cover this damage, are of no avail. As Walton, J. says, in *Price* v. *Union Lighterage Company* (88 L. T. Rep. 428, at p. 430; 9 Asp. Mar. Law Cas. 398, at p. 400; (1903) 1 K. B. 750, at p. 754): "If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words." With regard to the marginal clause the words "in no case" do not explicitly cover negligence. In *Taubman* v. *Pacific Steam Navigation Company* (26 L. T. Rep. 704; 1 Asp. Mar. Law Cas. 336) there was a provision that the shipowner would not be answerable for loss of luggage "under any circumstances whatever." That, however, was a special contract between a shipowner and a passenger by sea, not part of a bill of lading contract. The case was commented on by the Court of Appeal in *Price* v. *Union Lighterage Company* (89 L. T. Rep. 731; (1904) 1 K. B. 412). It is submitted the second group of words "causes above mentioned" in clause 3 only refer to the first group in the same section. They cannot be said to refer to the exceptions in clause 2. This is clear because the defendants have put in the words "whether occasioned by negligence" in the one class of perils, and left it out in the other. The damage to the maize was caused by heating, which was caused by fermentation. It is not therefore within clause 2 as "sweating" or as "heat"; for the words before and after the word "heat" show that heat means outside action.

Laing, K.C. and *Adair Roche*, for the defendants, *contra*.—The damage by heating is within clause 2, and comes under the heading of "sweating." Heating causes moisture, and the result of such moisture is what is termed "sweating." It also comes within the marginal clause. This is a rubber stamp clause specially used in the case of maize cargoes, and the words "any other damage" are expressly intended to cover any damage like the present. If there had only been room the marginal clause would have been stamped at the end of clause 3, and it must be read as if it were there. The words "In no case is the steamship to be held liable for heating," &c., by themselves cover negligence. See

Ashenden v. *London, Brighton, and South Coast Railway*, 42 L. T. Rep. 586; 5 Ex. Div. 190.
Mitchell v. *Lancashire and Yorkshire Railway*, 33 L. T. Rep. 161; L. Rep. 10 Q. B. 256.

The perils mentioned in clause 2 cover negligence, for the second group of words, "causes above mentioned," in clause 3 refer to clause 2.

Pickford, K.C. in reply.

BARNES, J.—Having disposed of the questions of fact, I now have to apply the law. That brings me to consider the terms of these somewhat extraordinary bills of lading. They are all in the same form, but the marginal clauses are stamped only on the bills of lading relating to the maize. They contain very long clauses of

exceptions, and if it had not been for the courtesy of counsel in providing me with a type-written copy I do not know how I should have been able to get on without the assistance of a magnifying glass to read these exceptions, which are contained in several paragraphs of very small print. I cannot understand why at the present day shipowners do not take the opposite course to that which these bills of lading take —of excepting a mass of detailed perils, causes, and things—and state what they are willing to be responsible for. However, the exceptions seem to grow and grow, based upon the old form of bill of lading. The first point that is taken is a general point, and that is that what I may term the negligence clause—the third clause of exceptions — does not apply to those exceptions which have been relied upon by the defendants. The third clause begins thus: "That the master, owners, or agents of the vessel or its connections shall not be responsible for any loss or injury to the said goods, occurring from any of the causes above mentioned." I suppose "the causes above mentioned" must there mean the causes referred to in the first and second paragraphs of the exceptions and stipulations, because those are the only causes that so far have been above-mentioned. But then there comes a long string of words, which commences thus: "or for any loss or injury arising from the perils or accidents of the seas," &c. This ends with the words "whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowners, whether on board the said ship or any other ship belonging to or chartered by them, or otherwise howsoever, for whose acts they would otherwise be liable." Now, it is quite clear that the words "above mentioned," which I have just read, cannot have precisely the same meaning as the words "above mentioned" at the beginning of paragraph 3; because the first part only refers to the first and second sets of exceptions, and if it only refers to the first and second sets of exceptions, to use the words "above mentioned" where they occur again in precisely the same way would then only refer to the first and second sets of exceptions. No one has contended that it means that. The contention for the plaintiffs is that where you find the words "above mentioned" a second time they refer to what is just above—namely, in the third paragraph, beginning with the words "or for any loss or injury arising from the perils." The contention for the defendants is that they must include those perils, causes, or things, and also the causes or things mentioned in Nos. 1 and 2. I have considered this matter with as much care as I can, and the view that I take is that when the words "above mentioned" are used a second time, having regard to their collocation, they only refer to the specific causes and things which are set out in paragraph 3. It is extremely doubtful whether one is really right or wrong about that particular view, but that is a construction which I hold, and it seems to me that that is the proper one to adopt.

If that is right it makes an end of this case; but, assuming that is not the view to take, I have still to consider the effect of the words in paragraph 2, on which the defendants rely. What are those words? He relies first on the word "heat." I think that the contention of the plaintiffs is correct, that that word, having regard to its collocation, which is between the words "explosion" and "fire at sea or on shore" does not refer to the heating of the cargo from its own spontaneous combustion or generation of heat, through the action of moisture coming against it, or its own moisture causing it to develop heat, but that the word "heat" refers to some extraneous source, such as heat coming from the engine-room. So much for that point. The next word relied upon was the word "decay." The argument upon that was very faintly pressed, and I do not think myself that any of the loss with which I have had to concern myself in dealing with the facts can be attributed to the ordinary meaning which is attached to the word "decay." Then comes the word "sweating"—"loss, damage, or injury arising from sweating." Now, in this case I have already found that the damage was due to the causes which I specified in my judgment upon the facts, and it seems to me that those causes do not include the idea of sweating. I think the correct view of that word is that expressed by Mr. Pickford—viz., of moisture dropping on to the bags from condensation, which arises if there is moisture which evaporates and then condenses in the hold. The damage, in my opinion, was not caused by that class of injury. There is the further point taken on the marginal clause, which is as follows: "In no case is the steamship to be held liable for heating or any other damage accruing to the within mentioned goods nor for insufficient strength of bagging." Now, there are several cases referred to in connection with this point. the last of which is *Price* v. *Union Lighterage Company* (*ubi sup*). I only propose to refer to one paragraph in the judgment there, which summarises what I wish to say upon this matter. That is as follows: Walton, J. in the course of his judgment, said: "I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as insurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words." There are general words in this case, not expressly referring to negligence, and, it seems to me, they do not include negligence on the part of the shipowner or those for whom he is responsible. But, of course, in this case the view which I take about that clause is fortified by the fact that this marginal clause only occurs in a bill of lading which does deal with negligence in certain specific cases; and negligence being thus dealt with in certain specific cases leads more than ever to the conclusion that —general words being used somewhere else—if in such a marginal clause as this the negligence of the shipowner or his servants is to be excluded, the language should expressly refer to that exclusion. There is a further point to be dealt with—that what has been discussed in the course of

this case and called the iron damage is, as the defendants contended, sweating damage. If the first point that I dealt with, as to the construction of the words in clause 3 so far as they affect clause 2, is right, then any difficulty as to the construction of the word "sweating" is got rid of. But even if the view I take is not correct, it appears to me, having regard to the facts, that it is not shown by the defendants that the damage I have dealt with is, strictly speaking, damage done by sweating. There are only some other small matters to refer to—namely, the damage to the wheat and linseed and the barley and oats by mixing. It was not contended that those small items could be really brought within any of the terms of the exceptions in the bill of lading, and therefore the defence as to them fails. The result, in my opinion, is that the 30*l.* which has been paid into court in this case is not sufficient to satisfy the plaintiffs' claim, assuming, of course, that the damage which I have found, but which will have to be definitely ascertained by the registrar and merchants, exceeds that amount, which it almost certainly must do. My judgment must be for the plaintiffs, for an amount to be ascertained by the registrar and merchants in accordance with my judgment.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the defendants, *Botterell* and *Roche*.

July 13, 1903, *and Feb.* 16, 1904.

(Before BUCKNILL, J.)

THE MINNETONKA. (*a*)

Collision—Both to blame—Damages—Payment by cargo owners to shipowners—Right of cargo owner to recover money so paid from wrongdoing vessel—Registrar and merchants.

A collision occurred between the steamships U. *and* M., *for which both vessels were found to blame. The* U. *had on board at the time a cargo of coals shipped by and the property of the Admiralty, and, in order to avoid expense of storage and reshipment, an agreement was come to by which the owners of the* U. *waived their right to carry the cargo to its destination, the coals were discharged and sold, and the Admiralty agreed to pay the owners* 1000*l.* *The owners of the* U. *recovered against the owners of the* M. *a moiety of their claim for repairs and detention. A claim was made by the Admiralty, as owners of the cargo on board the* U., *against the owners of the* M. *for their proportion of the sum agreed to be paid to the owners of the* U.

Held, affirming the report of the registrar, that they were not entitled to recover, as such a payment could not be said to be the natural result of the collision, and that, if the owners of the M. *were liable, the sum recovered would be payable to the owners of the* U., *who had already been paid a moiety of all the losses they had incurred by reason of the collision.*

MOTION in objection to the report of the assistant registrar.

A collision occurred on the 9th June 1902, in the English Channel, between the steamships *Uskmoor* and *Minnetonka*. The *Uskmoor* at the time was on a voyage from the Tyne to the Cape with a cargo of coals shipped by and the property of the Admiralty. After the collision the *Uskmoor* put into the Thames for repairs, and after some correspondence as to the coals, which is sufficiently dealt with by the learned judge in his judgment, the following letter was written on behalf of the Director of Navy Contracts to the managing owner of the *Uskmoor*:

Admiralty, S.W., 18th June 1902.—Gentlemen,—With reference to your letter of the 13th June, I have to acquaint you that, to minimise loss in the interests of all concerned, the Admiralty is prepared to agree to the following arrangement, to which it is understood that you and the underwriters have given your concurrence—viz.: The voyage to be terminated and the coal sold. The owners to be paid the sum of 1000*l.*, to be apportioned as a substituted expense, in lieu of those which would otherwise have been incurred, on the basis shown by the following approximate figures:

		General Average		Cargo.	Freight.
£664 10 0	.....	Hire of barges	£166 2 6	£332 5 0	£166 2 6
106 17 6	.....	Shifting, &c.	53 8 9	—	53 8 9
424 10 10	.....	Reshipping	—	—	424 10 10
£1195 18 4	.....		£219 11 3	£332 5 0	£644 2 1
£996 15 0	.....	Apportioned in substitution for the above	£182 19 11	£276 18 4	£536 16 9

For 1000*l.* the figures will, of course, be slightly different. The *Uskmoor* to load another cargo on completion of repairs, on same conditions as charter of the 15th May, and at rate of freight current at date of signing the new charter, provided the owners give proper notice to Messrs. Mathwin and Sons, of Newcastle, of the date when steamer will be ready to load after repair. I shall be glad to have your confirmation of this arrangement by return of post, and to have a letter from you agreeing on these conditions to allow the cargo to be handed over to whomsoever it is sold to. The name of the buyers for insertion in such letter will be communicated to you as soon as sale is definitely arranged.—I am, Gentlemen, your obedient servant, PERCY MINTER, for Director of Navy Contracts.—Messrs. W. Runciman and Co.

This was agreed to by the owners of the *Uskmoor*, and the cargo was duly discharged and sold.

An action was brought by the owners of the *Minnetonka* against the owners of the *Uskmoor* and heard before the President (Sir F. H. Jeune) and Trinity Masters, and both vessels were found to blame for the collision. The case will be found reported in 87 L. T. Rep. 55; 9 Asp. Mar. Law Cas. 316; (1902) P. 250.

An action was then brought by the Admiralty, as owners of cargo on board the *Uskmoor*, against the owners of the *Minnetonka*, but was settled upon the terms of both vessels being to blame. At the reference before the assistant registrar and merchants to assess the damages, the Admiralty claimed (*inter alia*) the above-

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

mentioned 1000*l.* The assistant registrar found that there was nothing due from the defendants except a sum of 5*l.* 5*s.* in respect of surveys.

The assistant registrar in his report dealt with the claim as follows:

The first item of the claim is for the difference between the cost of the coal and the price realised. It was contended by the defendants that nothing was due from them, on the ground that the cargo owners had not acted with reasonable diligence in not accepting a better price than that ultimately obtained. We are of opinion that the defendants' contention is right, and that this head of the cargo owners' claim must be disallowed. A sum for the cost of surveys is, however, payable to them—namely, 5*l.* 5*s.*—of which a moiety is recoverable against the defendants. The second head of the claim was for 1000*l.* agreed to be paid by the Admiralty to the shipowners for abandoning the voyage. It is not clear from the evidence that the whole of this sum was to be paid. In our view of the case, however, this doubt is not material, for we are of opinion that under all the circumstances the reasonable and business-like course for all parties was for the cargo to be sold in the Thames, and the payment of any sum to the shipowners by the cargo owners was not a consequence of the collision for which the wrongdoers are liable. The shipowners have recovered from the wrongdoers the cost of repairs and damages for the detention of their ship, and at the end of the period of detention they were in a position to, and did, take up a fresh charter. The duty of the shipowner being to carry the cargo to its destination, it was to his advantage to make an arrangement with the cargo owners whereby he would be free from this duty, and be able to take a new cargo when the repairs were finished. Any payment therefore made by the cargo owners to the shipowners is not a natural and reasonable result of the collision, and therefore is not recoverable against the wrongdoer.—(Signed) E. S. ROSCOE, Assistant Registrar.—12th June 1903.

The Admiralty appealed.

Bucknill, J. referred the case back to the assistant registrar for further information as to whether or not the amount claimed by the Admiralty had or had not been paid to the owners of the *Uskmoor* in their action against the *Minnetonka.*

The following is the material part of the further report of the assistant registrar:

By the report dated the 12th June 1903, I found that the cargo owners could not recover this sum from the owners of the *Minnetonka*, and the cargo owners appealed against the report. The hearing of the appeal on the 13th July was adjourned by Bucknill J. in order that I might report whether any part of the sum of 276*l.* 16*s.* 4*d.*, a moiety of which is now claimed by the cargo owners, had been allowed to the owners of the *Uskmoor* by the report on the claim against the *Minnetonka* dated the 22nd Dec. 1902. The claim in respect of this sum of 276*l.* is based on several letters which were put in at the previous reference; the particulars of the claim are set out in the letter of the Director of Navy Contracts dated the 18th June. It is to be noted that in the letters of the 13th and 17th June the proposed payment is spoken of as being in respect of freight, a word which would be proper, since, if the ship was repairable, her owners were entitled to carry on the cargo and earn this freight, and in the letter of the 20th June it is stated that the sum payable by the cargo owners would follow the completion of "the general average adjustment." The claim is, however, now put forward as being in respect of the hire of barges for the purpose of warehousing the cargo, and expenses which would have been incurred had the voyage not been abandoned, but which was not in fact incurred and were therefore saved. I have to report that, as in the reference on the claim by the *Uskmoor* only the actual expenses incurred for discharging the cargo and for the hire of barges were allowed (item No. 7), no part of the present claim has been dealt with in the ship's reference. In the ship's reference, however, all sums in respect of loss of freight, and for expenses at the port of loading, were allowed to the shipowners (see item No. 35). At the further hearing further arguments were addressed to us by counsel for the claimants and the defendants, and I was asked to make several findings on points submitted to us. The points submitted by counsel for the cargo owners and our findings thereon are as follows: (1) That the voyage was not commercially at an end; we find that the voyage was not commercially at an end. (2) That on the 18th June repairs were expected to take six weeks; we find that the repairs were expected to take six weeks. (3) That 1000*l.* was agreed to be paid on terms contained in letters of the 18th June, explained by those of the 19th and 20th; we find that 1000*l.* was agreed to be paid on the terms contained in these letters. (4) That the Admiralty has been called on to pay their share. There is no direct evidence as to this, but the solicitor for the owners of the *Uskmoor*, who was present at the further reference, stated that the cargo owners would be called on to pay the sum claimed. (5) That the agreement was beneficial to all concerned, and a reasonable and proper one to reduce loss which would have been occasioned had the parties insisted on their strict rights to have voyage concluded. I find, as stated in the previous report, that it was reasonable and for the benefit of all concerned that the voyage should be abandoned, so that expenses in the Thames might be lessened, and that there should be no risk of the deterioration of the cargo. I further find the agreement by the Admiralty to pay 1000*l.*, or a part thereof, was not a reasonable agreement, because the object of the abandonment of the voyage was to save further expenses, and it was unreasonable for the cargo owners to pay any sum to the shipowners, since it was the duty of the shipowners to take all measures necessary to enable them to carry the cargo to its destination (see Carver on Carriage by Sea, 3rd edit., sect. 302); and, as the voyage was not commercially at an end, the cargo owners could have insisted on their cargo being carried to its destination without any payment to the shipowners except that of the agreed freight. I further find that the agreement, so far as it related to the payment of 1000*l.*, or any part thereof, was one arising out of the relation between ship and cargo, and that the collision was not the cause of it, and that the sum claimed is inadmissible as a head of damage in an action against the wrongdoing ship: (*The Marpessa*, 66 L. T. Rep. 356; 7 Asp. Mar. Law Cas. 155; (1891) P. 403). (6) That none of the items shown in the previous reference were allowed in respect of the expenses included in the 276*l.* The finding on this head has already been stated. The points submitted by counsel for the defendants were: (1) That by the arrangement made in June 1902 on the basis of a reshipment of cargo, which was alleged to be necessary and reasonable, the owners of the *Uskmoor* recovered from the owners of the *Minnetonka* a complete indemnity for all damages actually incurred arising out of the collision. I find that this was so. (2) That that indemnity, being obtained on the basis of voyage being abandoned, included all loss of expenses and all loss of profits from the date of eleven days before collision when the *Uskmoor* commenced her voyage by bunkering in the Tyne. That under these circumstances the owners of the *Uskmoor* could not claim from the owners of the *Minnetonka* any further sum in respect of the abandonment of the voyage, and that therefore the Admiralty cannot claim any such sum. I find the facts stated in the affirmative. I also find that the owners of the *Uskmoor* have obtained damages on the basis of the voyage being

abandoned, and that the owners of the *Uskmoor*, if they recover the sum claimed in this reference by the cargo owners from them, should deduct this amount from the sum awarded to them in this claim against the *Minnetonka*: (see *The Marpessa*, *ubi sup.*). I was further asked to vary the previous order as to costs, but, having regard to my finding, I cannot vary the order as to the costs of the previous reference. The costs of this further reference I leave to be dealt with by the court.—(Signed) E. S. ROSCOE, Assistant Registrar.—20th Nov. 1903.

Acland, K.C. for the plaintiffs.—The agreement was to pay a sum of money which should be a substituted expense, and as such ship, cargo, and freight would have to contribute if it was a case of general average. The proportion of the £1000 or substituted expense which the cargo would have to bear is 277*l.* 16*s.* 4*d.*, and the Admiralty is entitled to recover that sum from the wrongdoer. The assistant registrar has found that the parties did the right thing under the circumstances, and that the course taken of discharging and selling the cargo was a reasonable and businesslike one:

The Marpessa (*ubi sup*);
Carver on Carriage by Sea, 3rd edit., sect 302;
Notara v. *Henderson*, 26 L. T. Rep. 442; 1 Asp. Mar. Law Cas. 278; L. Rep. 7 Q. B. 225.

The agreement was made to minimise the loss. The expenses of warehousing cargo would not have been general average losses at all, as they would have been incurred after the ship had arrived in a place of safety. It may be that the owners of the *Uskmoor* recovered more than they ought to have done from the owners of the *Minnetonka*, but that is no answer to our claim.

Aspinall, K.C. (*Pritchard* with him), for the defendants, *contra*.—In *The Marpessa* (*ubi sup.*) the question was whether the owners of the ship could recover money actually paid, and the President (Sir F. H. Jeune) found that the alleged loss had not legally been caused by the collision. In the present case there is the same class of claim, but the alleged losses are only hypothetical expenses. The claim has first of all been made on the ground that it is in the nature of loss of freight, then of general average, and now it is called a substituted expense. It is really some sort of suggested liability which arises out of an arrangement between the parties by which they may have saved themselves from some hypothetical expense.

Acland, K.C. in reply.

BUCKNILL, J.—This is an application by way of appeal from the report of the registrar, on the ground that that report cannot be supported in law. The matter has been before the court on two occasions. On the last occasion the court referred the matter back to the registrar to find whether any part of the amount claimed by the Admiralty—namely, 277*l.* 16*s.* 4*d.*—had in fact been allowed to the *Uskmoor*, in the reference between the owners of the *Uskmoor* and the owners of the *Minnetonka*, for the damage sustained by the *Uskmoor* in consequence of a collision between those two ships, for which they were found both to blame. The registrar has found that this amount had not been dealt with in that reference. The *Uskmoor* was on a voyage from the Tyne to South Africa, laden with a cargo of coal, the property of the Admiralty. During the voyage she came into collision with the *Minnetonka*, in consequence of which the *Uskmoor* herself was damaged, and also, to a certain extent, the cargo on board. The *Uskmoor* was then taken to the river Thames to be repaired, and it was ascertained that the repairs would take, it was estimated, about six to eight weeks, and the Admiralty and the owners of the *Uskmoor* very properly tried to see what could be done in the circumstances for the benefit of each other. On the 12th June the Admiralty wrote to the owners of the *Uskmoor* asking them what arrangements they had made with regard to the storage of the cargo on shore or in lighters during the repairs to the ship. The letter ended with this paragraph: "Until the receipt of the surveyor's (Mr. Lewis') report it will not be possible to form a definite opinion as to the best course to pursue, but I should be glad to have your views as soon as possible as to the advisability of selling the coal and considering the voyage terminated, so as to avoid the expense of storage and re-shipping." The expense of re-shipping would not fall entirely upon the cargo owners, but the expense of storage, subject to general average, would fall upon the cargo owners. That letter was answered by the owners of the *Uskmoor* on the 13th June, when they said the repairs would take about eight weeks, and it was impossible for them to advise the Admiralty as to the termination of the voyage, but that if the Admiralty wished to do so they would do so for the consideration of 7*s.* 6*d.* per ton "as full freight." Then on the 17th June Mr. Lewis wrote to the Admiralty, amongst other things, this: "Messrs. Runciman will now accept 1000*l.* in respect of the freight, which is a trifle more than Messrs. Hopkins, Son, and Cookes had advised you. They had written their letter to you before they could make sure whether it was 996*l.* or 1000*l.* All that is wanted from you now is a letter to Messrs. Runciman stating that you offer them 1000*l.* in respect of the freight and stating that you will give them another cargo to replace the present one at the 16*s.* rate or more if the freights should rise in the meantime, of course they giving you proper and sufficient notice when the vessel is expected to be ready, and Messrs. Runciman to have the option of refusing the offer." On the same day Messrs. Hopkins, Son, and Cookes wrote to Mr. Lowrey, the secretary of the Salvage Association, and they put the case in this way: "We beg to inform you that we have carefully considered the facts and circumstances of this case, and assuming the voyage is terminated in London and the shipowners are paid 4*s.* 6*d.* per ton, equal 996*l.* 15*s.*, this amount will be apportioned as per annexed sheet as a substituted expense in lieu of hire of barges: Six weeks 664*l.* 10*s.*, shifting ditto 106*l.* 17*s.* 6d, re-shipping cargo 424*l.* 10*s.* 10*d*, total 1195*l.* 18*s.* 4*d.*; and in addition to the above expenses which will be saved, the expected deterioration by breakage of coal, estimated by Mr. Lewis at about 10 per cent. at least on Cape Town values, and 2 per cent. for loss of weight, is avoided. It will, of course, be necessary to obtain the agreement of all interests to this arrangement." Then Mr. Lowrey wrote on the 18th June to Messrs. Hopkins, Son, and Cookes: "The ship underwriters have approved our suggestion that the coals should be sold in London and that the loss of freight should be treated as a substituted expense." The keynote of this case is that the loss of freight should be treated as a substituted expense. Then comes the letter of the 18th June,

setting out the figures of general average and freight, and there is the final letter from the Admiralty on the 20th June to Messrs. Runciman: "Your expression 'to pay the shipowners the sum of 1000*l.*' is understood as meaning that the sum of 1000*l.* will be apportioned on the basis stated in my letter of the 18th June, and a claim made by the owners upon the Admiralty for the portion thereof falling upon the cargo when the general average adjustment is completed." When this case first went before the registrar and merchants it was put in this way: That the shipowners and the Admiralty had agreed that the sum of 1000*l.* was to be paid for freight. To-day the claim is not for freight at all. It is not put as having anything to do with freight. That part of the case has been put on one side. It is put in this way: That the Admiralty have entered into an obligation, binding upon them, to pay to the owners of the ship 276*l.* odd, and that there was a good consideration for that binding contract between them for the abandonment of the voyage. When one comes to test the claim, to see what it really means, it comes to this, that if the voyage had not been abandoned and if the cargo had remained in barges, and if the Admiralty had become responsible to pay, as they would have become, for the hire of the barges, the amount would certainly have exceeded 276*l.* It may be that this is a sum of money which, in the circumstances of this case, the shipowners could recover from the Admiralty—I do not say it would be so or would not be so—but it does not follow that, because the Admiralty would be liable to the shipowners, therefore the Admiralty can put that liability over on to the backs of the owners of the *Minnetonka*, the wrongdoing ship. The only way in which the Admiralty can recover against the owners of the *Minnetonka* here is by showing a certain loss, or a sum of money lost; that is, a certain loss in consequence of a reasonable arrangement by the person having a claim minimising the claim which he has against the wrongdoer. But it must be a loss and a liability arising directly in consequence of the wrongdoing act of the *Minnetonka*. If it is not, then it is not recoverable. Is that the case here? I think not. The real facts as I find them to be and as I understand them to be, and as to them there is really no contradiction, are these: The voyage was abandoned. As between the shipowners, the *Uskmoor*, the cargo owners, and the Admiralty, a sum of money greater than 276*l.* was agreed to be paid. It is now said that that sum of money is a sum of money for which the Admiralty would have been liable in an event which has not in fact occurred, and that is a sum which directly represents a loss by the Admiralty occasioned by the wrongdoing of the *Minnetonka*. I think all these suggestions are not according to the real facts—that what really has happened is this, that the parties have put their heads together and come to some hypothetical figure not based upon fact, and not representing a direct loss or damage suffered by the Admiralty in consequence of the collision; and that therefore the Admiralty cannot make good this claim as against the owners of the *Minnetonka*. But there is something else which, though not absolutely conclusive, is very important to be considered, and that is that this 276*l.*, if the Admiralty could make the owners of the *Minnetonka* pay it, would be payable to the *Uskmoor*, and the owners of the *Uskmoor* have already been paid all the loss they have sustained in consequence of the collision; and although it is possible to conceive a case where the owners of a ship may make a profit by the wrongdoing of the other party, in this case I think the owners of the *Uskmoor* would not be entitled to make such a profit, although, of course, the Admiralty could not make that answer if they had undertaken, for good consideration, to pay a sum of money to the *Uskmoor*. In conclusion, it seems to me that this case fails, because it has not been made out in law or in fact to be a loss sustained by the Admiralty directly in consequence of the wrongdoing act of the *Minnetonka*. Therefore my judgment must be against the appellants, and I confirm the report No. 1 of the registrar, and also report No. 2, with the result that those who have succeeded must have the costs of this appeal, and also of the second reference.

Solicitors for the plaintiffs, *Freshfields*.

Solicitors for the defendants, *Pritchard* and *Sons*.

Feb. 23, 24, *and* 25, 1904.

(Before BARNES, J. *and* TRINITY MASTERS.)

THE HARE. (*a*)

Collision—Manchester Ship Canal—Fog—Application of Sea Rules—Duty to stop and reverse on hearing whistle of approaching vessel—Regulations for Preventing Collisions at Sea, arts. 16 *and* 30—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 418 (1).

Semble, *the Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal. Even assuming that they do apply, a vessel coming down the canal in a fog is not necessarily to blame under art.* 16 *of the regulations if she does not stop her engines on hearing the whistle of an approaching vessel forward of her beam; for the approaching vessel must be in the canal, and it may be assumed that she is being navigated on her right side, and her position is therefore, under the circumstances, sufficiently ascertained.*

ACTION for damage by collision.

The plaintiffs were the owners of the steamship *South Coast*, and the defendants the owners of the steamship *Hare*.

The collision occurred about 1.28 p.m. on the 6th Dec. 1903 in the Manchester Ship Canal near the Weaver Sluices. The weather was foggy, and there was no wind, the tide was slack, and both vessels were sounding their whistles.

The *South Coast* was a steamship of 421 tons gross register, and at the time was proceeding down the canal on a voyage from Manchester to Plymouth with a general cargo on board and manned by a crew of twelve hands all told.

The *Hare* was a steamship of 804 tons gross register, and at the time was proceeding up the canal on a voyage from Dublin to Manchester with a general cargo and passengers, and manned by a crew of twenty-four hands all told.

The facts of the case will be found sufficiently set out in the judgment.

The case is reported on the question of the

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law

application of the Regulations for Preventing Collisions at Sea to waters such as the Manchester Ship Canal, and on the application of art. 16 of of the regulations to such waters.

By the Regulations for Preventing Collisions at Sea it is provided:

These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels.

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed having careful regard to the existing circumstances and conditions. A steamvessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters.

By sect. 418 (1) of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Her Majesty may on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulations for the preventing of collisions at sea, and may thereby regulate the lights to be carried and exhibited, the fog signals to be carried and used, and the steering and sailing rules to be observed by ships, and those regulations (in this Act referred to as the collision regulations) shall have effect as if enacted in this Act.

At the trial of the action the master of the plaintiffs' vessel admitted that he had heard the whistle of the *Hare* before she came into view, but did not stop his engines.

It was contended by the defendants that on this account the plaintiffs' vessel must be found to blame as art. 16 of the Collision Regulations had not been complied with.

Aspinall, K.C. and *Noad* for the plaintiffs.—The Sea Rules do not apply to waters such as the Manchester Ship Canal. Sect. 418 (1) of the Merchant Shipping Act 1894 applies only to collisions at sea. There is no by-law for the Manchester Ship Canal which requires a vessel to stop on hearing the whistle of another vessel forward of the beam. The canal by-laws are a complete code dealing with the duties of ships under all circumstances, and it is submitted that any such regulation was expressly omitted. *The Carlotta* (80 L. T. Rep. 664; 8 Asp. Mar. Law Cas. 544; (1899) P. 228) is in favour of this view. It is true that art. 30 provides that nothing in the Sea Rules shall interfere with the operation of a special rule duly made by a local authority. Assuming, however, that the Sea Rules applied, art. 16 has no application to the present case and the circumstances were special, and it would not have been a safe thing for the *South Coast* to have stopped. It is necessary that a vessel should keep her heading in the narrow waters of a canal, and there is no danger in her so doing, as a vessel must be coming in a fixed direction. It is not like the open sea, where one vessel may be crossing the course of the other. But, even assuming the rule does apply, in this case the position of the *Hare* had been duly ascertained.

Laing, K.C. and *Bateson*, for the defendants, *contra*.—The Sea Rules apply to the high seas and "all waters connected therewith navigable by sea-going vessels." If there is no local rule which ought reasonably and properly to prevent the application of the Sea Rules then the Sea Rules apply. For instance, in the case of a vessel in dock, she would be bound to carry the regulation lights when under way. The Manchester Ship Canal is a water connected with the high seas within the meaning of art. 30 of the regulations. The fact of a gate being shut at times during certain states of the tide does not prevent its being so, and it is submitted that although the Canal is shut off from the sea it is connected with it none the less. In this particular case the gate of the locks was open, so that in fact the canal at the time was actually connected with the high seas. In *The Carlotta* (*ubi sup.*) there was no rule as to navigation in question. There is as much a duty to stop in a canal on hearing a whistle forward of the beam as elsewhere. It is the duty of a vessel to stop and ascertain the true bearing of an approaching vessel in every case:

The Bernard Hall, 86 L. T. Rep. 658; 9 Asp. Mar. Law Cas. 300

The Koning Willem I., 88 L. T. Rep. 807 9 Asp. Mar. Law Cas. 425; (1903) P. 114.

The by-laws for the Manchester Ship Canal, even if they did provide for a case such as the present, could not be enforced as they had not received the consent of the Board of Trade as required by sect. 198 of the Manchester Ship Canal Act 1885. They have not been "duly made" within the meaning of art. 30 of the regulations.

Aspinall, K.C. in reply.

BARNES, J.—This is a case of a collision which took place between the steamships *South Coast* and *Hare*, a little before two o'clock in the afternoon of the 6th Dec. in last year, in the Manchester Ship Canal, near the Weaver Sluices. The weather at the time was foggy, and the tide had nearly ceased to operate at all—it was slack—there being such tide, I mean, as seems to be allowed to run in during the time that the lock gates are open at Eastham. The *South Coast* is a screw steamer of 421 tons gross register, and was proceeding down the Ship Canal on a voyage from Manchester to Plymouth with general cargo. The *Hare* is a screw steamer of 804 tons gross register, and was proceeding up the Ship Canal, on a voyage from Dublin to Manchester with general cargo and passengers. These vessels were sounding their whistles for fog, and they met in collision at the place I have mentioned, the collision taking place practically stem on, the stem of the *Hare* striking the starboard bow of the *South Coast* about two feet from the stem. The question is which of these vessels was to blame for this collision. I do not intend to go through the cases presented on each side, as there is a certain looseness in the evidence and certain inconsistencies have been pointed out in the preliminary act and pleadings of the plaintiffs and their evidence, and certain criticisms have been made on the defendants' evidence. The result, however, is that one of the broad points to determine in the case is whether the collision happened, to use an ordinary expression, in the water of the plaintiffs or in the water of the defendants, each side maintaining that it took place on their own side of the canal, and, therefore, that the other ship was in the wrong. Other points in the case are as to the navigation of

these vessels with regard to stopping, helm action, and speed. With the assistance of the Elder Brethren I have come to a conclusion of fact in this case which enables me to decide it, but there are some points which have been disclosed in the course of the arguments that involve matters of some little difficulty; and if I felt it necessary to decide the case only upon some of these more difficult matters I should have thought it desirable, probably, to express what I have to say after more consideration. But the points that have been pressed, and which involve certain difficulties, are not, to my mind, essential features of the case, and I can without, I hope, tying my hand too tightly by the expression of any views about these more difficult matters, come to a conclusion about this case. Dealing first with one of the points presented on the part of the defendants against the plaintiffs, it is this: it is said that the plaintiffs' vessel did not stop her engines on hearing the whistle of the defendants' ship. The plaintiffs' master said: "I heard a whistle once before she came up before I saw her." Upon his evidence it would seem that he only stopped his engines when he saw what he described as a loom, and then thought it was a ship. The point made by the defendants is that the plaintiffs' vessel must be to blame because her engines were not stopped on hearing the whistle of the defendants' ship, before even she was seen. It is said that that makes the plaintiffs' vessel responsible because of art. 16 of the Sea Regulations. The answer made to that point is that that regulation does not apply, and that none of the Sea Regulations do apply to the Manchester Ship Canal. I am not at all satisfied that it is necessary for me to express a positive opinion about that point, but my present impression is that the Sea Regulations do not apply to the Manchester Ship Canal. These regulations are made in pursuance of sect. 418 of the Merchant Shipping Act, under which Her Majesty—that Act was passed in the reign of the late Queen, namely in 1894—may on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulations for the prevention of collisions at sea. Now, the plaintiffs say that the regulations only apply for the purpose of preventing collisions at sea, and that this was not a collision which took place at sea. The defendants, however, say that it did take place at sea within the meaning of the section, and that the words "at sea" have been interpreted by those who drew the regulations as including something which included the present case, because the preliminary is as follows: "These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels." I do not myself read that preliminary article as intended to extend the word "sea" beyond its proper meaning. The preliminary rule says "high seas and in all waters connected therewith," and my view has already been expressed in the case of *The Carlotta* (*ubi sup.*). Of course, if the sea rules do not apply, there is an end of that point, and my view is that they do not apply to the Ship Canal. I cannot myself conceive how they could strictly be said to apply to a piece of navigable channel artificially constructed, terminating at Eastham in locks which only at times admit the sea, and which has locks at different places all the way up, from place to place, and where it is necessary to do what the pilot of the *Rondane* said. He said they were in every lock together down to Latchford. I should have thought it was tolerably clear that the upper part cannot be said to be connected with the sea, at any rate, and I do not see very well how the term could be applied to the lower part, even if it is, for a portion of the time, allowed to have an inflow of sea water, when the gates are open. Certainly it would be, I think, extremely inconvenient if the Sea Regulations were so held to apply. It would have this very curious result, that vessels navigating in the canal near a part of the sea, to which they cannot get, and vessels navigating in the sea, might be hearing whistles forward of their beam, and for which they would have to act, though by no possibility could they get at each other.

But Mr. Aspinall took a further point—namely, that even if the sea rules apply, then there is art. 30 of the regulations, which provides "that nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters." He said there is a scheme in this case of rules made by the local authority which regulates the navigation of the Manchester Ship Canal, and he referred me to the published regulations of the Manchester Ship Canal—to arts. 6, 7, 15, and 16, and to the schedule of signals which are contained in those regulations. Then he said that those rules, or some of them, show what vessels have to do when they are meeting each other, and what they have to do to avoid danger of collision. But there seems some difficulty in treating those regulations as really made within the meaning of art. 30—as really duly made by the local authority—because Mr. Laing pointed out that under sect. 198 of the Manchester Ship Canal Act 1885 the only power to make by-laws or regulations applicable to such a matter as I am considering is power to make regulations "for regulating the conduct of the owners, masters, and crews of vessels propelled by steam with respect to the rate of speed at which they may proceed within the canal, docks, or works, or any part or parts thereof, respectively, and for requiring such vessels to stop or slow their engines at such times and places as the company may require, and to keep the advertised times of sailing, and for regulating the taking on board, landing, or putting out of passengers"—which does not in terms cover all the matters that have to be considered with regard to signals, lights, and so forth on board ships; and, further, that in the latter part of the section there is a provision that such "by-laws, except so far as they relate solely to the company or their officers or servants, shall be subject to the provisions with respect to by-laws of the Harbour, Docks, and Piers Clauses Act 1847, except sect. 85 of that Act, but no such by-laws shall have any force or effect unless and until the same be confirmed by the Board of Trade." Sect. 85 of the Act of 1847, which is there referred to, provides that no by-laws shall come into operation until allowed in the manner prescribed and approved by one of the judges. Now, for one of the judges is substituted the Board of Trade,

but I understand that the particular regulations which have been relied upon by Mr. Aspinall have not been confirmed by the Board of Trade. That is the statement made to me, as far as I understand it. So that the point which Mr. Aspinall took would not seem to be satisfactorily established. But the result of that would be that although the regulations may not, perhaps, be strictly termed enforceable, as being duly made, as I understand it, at present, yet still they show what the practice of navigation is; and so far as the actual seamanship and navigation of those two vessels is concerned both parties have argued the case before me as if it was their own duty to keep to their own side and to act with reasonable caution and stop and reverse and pass port side to port side. There is one other point I might mention, which seems to me important. That is, that even if art. 16 applies, yet the rule applies only where the position of the vessel which makes the fog signal is not ascertained, and I think in this case that even if that rule is treated as applicable, the position in the particular circumstances of the case was such that when the whistle of the other vessel was heard that vessel was in a position which was ascertained. It is perfectly obvious that she must be in the canal—they need not trouble themselves about vessels in the river—and therefore her ordinary position in the canal must be ascertained if both vessels keep to their right side. Her distance, too, must be reasonably ascertained because the *Rondane* was proceeding ahead of the plaintiffs' vessel and between her and the *Hare*. So both I and the Elder Brethren think that if art. 16 applies the circumstances were such that it was reasonable to say that the position of the *Hare* was sufficiently ascertained to comply with the rule. I also think it is worth while pointing out that the rules must be worked with a certain amount of reason. Mr. Aspinall relied upon the second part of art. 16, "so far as the circumstances of the case admit." It would be very awkward if every time a whistle was heard and there were a number of vessels going down and others were coming up, meeting each other, it was obligatory upon any vessel in a lock to stop. It would seriously hamper vessels astern; and although there is a rule in the schedule of signals providing a special signal to be made if a vessel is obliged to stop when another vessel is following her, the effect of stopping for every whistle heard would be to stop all the traffic, and there would be, it seems to me, a general standstill, which is not desirable. For these reasons, which, as I have said, I give without any lengthy consideration, I am of opinion that the plaintiffs' vessel cannot be held to blame simply because she did not stop her engines upon hearing the whistle of the *Hare*. [His Lordship then dealt with the facts, and found the *Hare* alone to blame for the collision.]

Solicitors for the plaintiffs, *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the defendants, *Batesons* and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, March 4, 1904.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

BOARD OF TRADE *v.* SAILING SHIP GLENPARK LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Seamen—"Distressed seaman"—Provisions for relief—Evidence of distress—Receipt of wages by seaman—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 190, 191, 193 — *Merchant Shipping* (*Mercantile Marine Fund*) *Act* 1898 (61 & 62 *Vict. c.* 44), *s.* 4.

The question whether a seaman who has been shipwrecked abroad is a "distressed seaman" within the meaning of sects. 190, 191, *and* 193 *of the Merchant Shipping Act* 1894 *is a question of fact.*

A "distressed seaman" does not of necessity cease to be a "distressed seaman" on his being paid the wages due to him, when such wages are enough to pay the expenses of his maintenance abroad and passage home.

Decision of Bigham, J. (88 *L. T. Rep.* 693; 9 Asp. Mar. Law Cas. 413; (1903) 2 *K. B.* 324) *affirmed.*

Quære, *whether the "sufficient evidence" of expenses incurred for his benefit which is provided for by sect.* 193, *sub-sect.* 3, *means "conclusive evidence."*

APPEAL by the defendant company from the judgment of Bigham, J. at the trial of the action without a jury.

The action was brought by the Board of Trade against the owners of the sailing ship *Glenpark* to recover the sum of 99*l.* 18*s.* 11*d.*, being the balance of moneys paid by the plaintiffs in respect of the maintenance and relief of certain seamen alleged to have been "distressed seamen" within the meaning of the Merchant Shipping Act 1894.

In May 1900 the *Glenpark* left Barry (Cardiff) on a voyage to Cape Town and (or) any ports or places within the limits of 75 degrees north and 60 degrees south latitude, the maximum time to be three years' trading in any rotation and to end in the United Kingdom or Continent of Europe between the Elbe and Brest inclusive at master's option.

On the 29th Jan. 1901 the *Glenpark*, in the course of her voyage, left Port Germein, in South Australia, on a voyage to Algoa Bay, her crew consisting of twenty-six hands all told—namely, master, two mates, cook, steward, carpenter, sailmaker, boatswain, five apprentices (one of whom acted as third mate), twelve A.B.s, and one ordinary seaman.

On the 1st Feb. 1901 the *Glenpark* struck on a sunken rock near Wedge Island, in Spencer Gulf, South Australia, and became a total wreck. The crew lost the whole of their effects except the clothes they were wearing, but were saved and taken in the ship's boats to Port Victoria, in South Australia, arriving there on the 2nd Feb. 1901. The log and the agreement with the crew were lost with the vessel.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

Between the 2nd and the 4th Feb. 1901 the crew were subsisted at Port Victoria by the Governor of South Australia on behalf of the Crown, acting by the Marine Board of South Australia, at a cost (excluding that incurred in respect of the master) of 13*l.* 1*s.*

On the 4th Feb. 1901 the crew were provided with passages from Port Victoria to Port Adelaide by the same authority at a cost (excluding that incurred in respect of the master) of 20*l.* 16*s.* The crew on their arrival on the 4th Feb. at Port Adelaide were (except the master) subsisted there by the same authority at a cost of 26*l.* 5*s.*, and were also provided by the same authority with necessary clothing.

On the 6th Feb. 1901 the representatives of the owners of the *Glenpark* at Port Adelaide, in the presence of the superintendent of the Mercantile Marine Board of South Australia, paid each member of the crew the balance of wages due to him under the agreement with the crew up to the time the vessel was lost.

The majority of the crew obtained employment at Port Adelaide, but eight members thereof failed to obtain any employment and were provided with passages to the United Kingdom by the same authority at a cost of 63*l.* 2*s.* 6*d.*

The total expenses incurred on behalf of the crew (excluding the master) by the said authority amounted to the sum of 236*l.* 5*s.* 1*d.*

The Board of Trade, on behalf of the Crown, paid the sum of 236*l.* 5*s.* 1*d.* to the said authority as money due to them in respect of expenses incurred on account of distressed seamen within the meaning of sect. 193 of the Merchant Shipping Act 1894, and the Board of Trade contended that they were entitled on behalf of the Crown to recover the whole of that sum from the defendants under the same section.

The defendants paid to the plaintiffs, and the plaintiffs accepted, both without prejudice, various sums amounting in all to 136*l.* 6*s.* 2*d.* in respect of the expenses of members of the crew, fourteen in number, and with regard to the expenses of these members the defendants admitted liability; and no question of further payment in reference to such members now arose. As regards these fourteen members of the crew, the wages so paid to them were in every case less than the amount expended on their behalf as hereinbefore mentioned. The sum of 136*l.* 6*s.* 2*d.* was in fact greater by 1*l.* 5*s.* 6*d.* than the amount of the said expenses, but the difference was, for the purposes of this case, treated as immaterial. The balance of the total sum of 236*l.* 5*s.* 1*d.*—viz., 99*l.* 18*s.* 11*d.*—had never been paid to the plaintiffs by the defendants in whole or in part, and the plaintiffs now claimed that balance from the defendants in the present action. That balance represented the amount of expenses incurred on behalf of the eleven remaining members of the crew other than the fourteen members above-mentioned, the wages paid to whom were in every case greater than the expenses so incurred.

At the trial of the action Bigham, J. held that the eleven seamen in question were "distressed seamen" within sect. 193 of the Merchant Shipping Act 1894 notwithstanding the fact that the wages paid to them were in excess of the expenses of their maintenance abroad and passage home. The learned judge also held that under sect. 193, sub-sect. 3, the production of the account of expenses there mentioned and proof of payment were conclusive evidence of the right of the Board of Trade to recover such expenses.

The learned judge therefore gave judgment for the plaintiffs.

The case is reported 88 L. T. Rep. 693; 9 Asp. Mar. Law Cas. 413; (1903) 2 K. B. 324.

The defendants appealed.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) contains the following provisions under the heading, "Distressed Seamen":

Sect. 190. The Board of Trade may make regulations with respect to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad, and may by those regulations (in this Act referred to as the distressed seamen regulations) make such conditions as they think fit with regard to that relief, maintenance, and sending home, and a seaman shall not have any right to be relieved, maintained, or sent home except in the cases and to the extent and on the conditions provided by those regulations.

Sect. 191 (1). The following authorities, that is to say, governors of British possessions, . . . may, in accordance with and in the conditions prescribed by the distressed seamen regulations provide for the maintenance, until a passage home can be procured, of the following seamen and apprentices (who are in this Act included in the term distressed seamen) namely, (*a*) seamen and apprentices to the sea service, whether subjects of Her Majesty or not, who by reason of having been discharged or left behind abroad or shipwrecked from any British ship, or any of Her Majesty's ships, are in distress in any place abroad; . . . (4) The authority shall be paid in respect of the expenses of the maintenance and conveyance of distressed seamen such sums as the Board of Trade may allow, and those sums shall, on the production of the bills of disbursements, with the proper vouchers, be paid as hereinafter provided.

Sect. 193, sub-sect. 1, as amended by sect. 4 of the Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 & 62 Vict. c. 44) provides that when expenses on account of a distressed seaman for maintenance, necessary clothing, and conveyance home are incurred by or on behalf of the Crown, these expenses shall be a charge upon the ship, whether British or foreign, to which such distressed seaman or apprentice belonged, and shall be a debt to the Crown from the master of the ship or from the owner of the ship for the time being.

Sub-sect. 2 provides:

The debt, in addition to any fines which may have been incurred, may be recovered by the Board of Trade on behalf of the Crown either by ordinary process of law, or in the court and manner in which wages may be recovered by seamen.

Sub-sect. 3 provides:

In any proceeding for such recovery, the production of the account (if any) of the expenses furnished in accordance with this Act, or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade, shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown.

Danckwerts, K.C. and *Maurice Hill* for the defendants.—To justify the payment of money for the relief of a distressed seaman under this Act, it is not enough to show that the seaman was "discharged or left behind abroad or shipwrecked," it must also be shown that he was

"in distress." "Distressed" means "in want"—*i.e.*, in want of something necessary which he is unable to procure for himself, as was Æneas after his shipwreck: "Ipse ignotus egens Libyæ deserta peragro": (Æn. I. 384). In the case of these eleven seamen they received wages which in each case were largely in excess of the expenditure which was actually necessary for their maintenance. With reference to sect. 193, sub-sect. 3, "sufficient evidence" does not there mean "conclusive evidence":

Barraclough v. *Greenough*, 8 B. & S. 623; L Rep. 2 Q B. 612.

"Sufficient" means *primâ facie* sufficient:

R. v. *Fordham*, L. Rep. 8 Q. B. 501.

An enactment altering the law as to evidence, and creating statutory evidence whereby the rights of parties may be defeated, must be construed strictly:

Northard v. *Pepper*, 10 L. T. Rep. 782; 2 Mar. Law Cas. O. S. 52; 17 C. B. N. S. 39, at p. 50.

The *Attorney-General* (Sir R. B. Finlay, K.C.) (the *Solicitor-General* (Sir E. Carson, K.C.) and *Henry Sutton* with him) for the Board of Trade.—There was some evidence before Bigham, J. that these seamen were in distress, and no evidence was offered in opposition. It would be monstrous to say that a seaman abroad is not in distress merely because his wages are enough to pay for a passage home, and to land him penniless in England. He may have a wife and family dependent on his earnings. [He was stopped.]

Maurice Hill replied.

COLLINS, M.R.—This is an appeal from a decision of Bigham, J., and the principal point raised is a very short one. The question is whether, under the particular circumstances of this case, certain persons were "distressed seamen" within the meaning of sect. 191 of the Merchant Shipping Act 1894. Now the question arises in this way: These sailors were shipwrecked near Australia, and they succeeded in getting in the first instance to Port Victoria, from which place they found their way ultimately to Adelaide. In the wreck they lost all their kit, in fact everything except the clothes in which they stood, but when they got to Adelaide the wages due to them up to that date were paid them by the agents of the shipowners. Now, it is not disputed that up to the time that the wages were paid at Adelaide these men were "distressed seamen," but it is contended by the shipowners that from and after the time that the wages were paid these men ceased to be "distressed seamen," and were therefore not within the provisions of the Merchant Shipping Act 1894, which entitle the British representative at the place where a "distressed seaman" may be to furnish him with the means for maintenance and to supply him with a passage home. Now the words under which the question arises are in sect. 191. [His Lordship read it.] It is said that these shipwrecked seamen do not come within the class of seamen there referred to because, having received their wages, they were not "in distress." It seems to me that the question whether they were, or were not, "in distress," notwithstanding the fact that they had received their wages, is a question of fact. It seems to me to be perfectly possible that a seaman who has lost everything except what he stands up in, and who has upon his shoulders the burden of a family, may very well be "in distress," although he has just been paid his wages. Wages paid to him in a foreign country afford him no provision for getting home again except at his own cost, and leave him, as I have said, with the burden of his family at home. On my reading of the section the fact that a man is shipwrecked is not conclusive evidence of his being "in distress." As was pointed out by my brother Romer in the course of the argument, a shipwrecked person may be a millionaire with plenty of money actually in his pocket so that he stands in no need of assistance from a banker or anyone else. You could not say that such a person was a "distressed seaman," and entitled under the Act to be maintained and provided with a passage home. Therefore the question whether a seaman who has been shipwrecked is "in distress" seems to me to be one of fact. That being so, what is the evidence in the present case? The evidence is that which I have stated, and then by sect. 193, sub-sect. 3, the production of the account of the expenses furnished in accordance with the Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade is "sufficient evidence" that the expenses were incurred or repaid under the Act by or on behalf of the Crown.

Bigham, J. seemed to think that "sufficient evidence" was equivalent to "conclusive evidence." Without giving any opinion on that point, it seems to me that the evidence is certainly sufficient, if it is not contradicted. In the present case I think that there was plenty of evidence—in the absence of anything more to the contrary than the fact that wages of a certain amount were paid—upon which the learned judge at the trial was justified in coming to the conclusion that these men were "distressed seamen" within the meaning of the Merchant Shipping Act 1894. In fact, on the evidence that was before him, I should have arrived at the same conclusion myself. Therefore on the facts of the case it seems to me that there is no ground for interfering with the decision of Bigham, J. On the question whether the words "sufficient evidence" in sect. 193, sub-sect. 3, mean "conclusive evidence" it is unnecessary that I should give any decision, and I therefore desire to reserve my opinion.

ROMER, L.J.—I am of the same opinion. Whether a shipwrecked sailor is or is not at a particular port a "distressed seaman" is a question of fact. He is not of necessity a "distressed seaman" because he has been shipwrecked. For example, as was pointed out by my Lord, a man who had been shipwrecked could not fairly be called a "distressed seaman" if he arrived with 500*l.* in his pocket at a place like Port Adelaide where every necessity can be obtained. On the other hand, I certainly am not prepared to hold that a shipwrecked sailor who has lost everything, coming to a place like Port Adelaide, ceases to be a "distressed seaman" because he is paid his wages, even if those wages turn out to have been sufficient to pay for the expenses of his maintenance there, and his shipment back to England. I do not think that a man could be said to be of necessity a distressed seaman because he may

have been paid his expenses to England, landing him there without a penny or without enough to enable him to keep himself at all, even for the shortest possible time on his arriving in England, especially bearing in mind, as has been pointed out, that he may have a family in England dependent on him. It is a question of fact. Now, in the present case we have what the statute calls "sufficient evidence" that these seamen were "distressed seamen" at the time in question. Against that sufficient evidence there is no contrary sufficient evidence to be placed. That being so, I come to the conclusion, on the question of fact, that these seamen were "distressed seamen." Like the Master of the Rolls, I express no opinion, because it is unnecessary that I should do so, upon the point whether "sufficient evidence" in sect. 193, sub-sect. 3, means "conclusive evidence."

MATHEW, L.J.—I am of the same opinion. It was not disputed that if the wages paid to the seaman were less than the amount necessary to bring him back to England he would be a "distressed seaman." He would certainly be so, if he were in that position. If that be so, it seems to me that it is a question of fact to be determined by the court how far wages paid to a man under those circumstances were available for the purpose of bringing him home. As I pointed out, it makes a serious alteration in the terms of the contract between the shipowner and the seaman. Now, what is the evidence here? We have before us the account upon which the authorities in Australia acted, and that account, it is said, is evidence that they must have been satisfied as regards each of these men that they continued to be "distressed seamen." If the case were that a seaman, shipwrecked abroad, must arrive destitute in this country if his wages were to be chargeable with the expense of bringing him home, I should approve of the judgment of the official who said that a seaman does not cease to be a "distressed seaman" by reason of the fact that if his wages were paid at once he would be able to discharge his present obligations. As to the meaning of the expression "sufficient evidence" in sect. 193, sub-sect. 3, it is unnecessary to express any opinion whether or not the words mean "conclusive evidence," because there was undoubtedly, in the present case, evidence before the court upon which the court was entitled to act, as it remained unanswered on the part of the shipowners. For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiffs, *Solicitor to the Board of Trade.*

Solicitors for the defendants, *Rowcliffes, Rawle,* and *Co.*, for *Hill, Dickinson,* and *Co.*, Liverpool.

Wednesday, March 23, 1904.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

Re AN ARBITRATION BETWEEN C. TRAAE, FOR THE OWNERS OF THE STEAMSHIP RIKARD NORDRAAK, AND LENNARD AND SONS LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Hire — Suspension of hire — Detention by ice "caused by breakdown of steamer"—Vessel detained owing to repairs made necessary by stranding.

By a charter-party it was provided by one clause that, in the event of loss of time from damage preventing the working of the vessel, the payment of hire should cease until she should again be in an efficient state to resume her service, and by another clause that "detention by ice should be for account of charterers unless caused by breakdown of steamer."

During the voyage the vessel stranded; the necessary repairs were effected and she resumed her voyage; owing, however, to the delay thus caused she was unable to proceed to the destined port before it was closed by ice, and she was consequently detained at an intermediate port.

Held (affirming the judgment of Ridley, J.), that there was a detention by ice "caused by breakdown of steamer," and that payment of hire ceased during that detention.

APPEAL of C. Traae from the judgment of Ridley, J. upon a special case stated by arbitrators.

The arbitrators appointed under a submission contained in a charter-party, dated the 1st Oct. 1902, stated a special case for the opinion of the court which, so far as is material, was as follows:

By the charter-party, dated the 1st Oct. 1902, it was agreed between C. Traae, for the owners of the steamship *Rikard Nordraak*, hereinafter called "the owners," and J. M. Lennard and Sons Limited, hereinafter called "the charterers," that the owners should let and the charterers should hire the steamship for the term of about two calendar months from the day on which she was placed with a clear hold at the disposal of the charterers at Cardiff, Barry, Penarth, Newport, Swansea, or Port Talbot, as therein mentioned, to be employed on a voyage to Spain and Portugal, thence to the Baltic, and back to United Kingdom or the Continent, as charterers or their agents should direct, upon the following (among other) conditions:

Clause 1. That the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for and during the service.

Clause 3. That the charterers should pay for the use and hire of the vessel at the rate of 370*l.* per calendar month, commencing on and from the day of her delivery to charterers as aforesaid, and at and after the same rate for any part of a month used to complete a voyage, hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) in the same good order and condition as when accepted (fair wear and tear only excepted) at a port in United Kingdom or on the Continent between Bordeaux and Hamburg.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

Clause 14. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire should cease until she should be again in an efficient state to resume her service; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time should be at the charterers' risk and expense.

Clause 16. The act of God, perils of sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner.

Clause 26. Detention by ice to be for account of charterers unless caused by breakdown of steamer.

The steamship was duly placed at the disposal of the charterers under the charter-party, and proceeded under the charter-party to Pomaron, in Spain, where she loaded a cargo under the charter-party, for which bills of lading were signed for delivery of the said cargo at St. Petersburg.

The steamship sailed from Pomaron for St. Petersburg on the 19th Oct. 1902.

On the 28th Oct. 1902, while in the course of the voyage to St. Petersburg, the steamship grounded at or near Fairmunde, in the Baltic, and thereby received such damage as to render her unfit to continue the said voyage without repair. The captain accordingly put back to Copenhagen for repairs, where the vessel arrived on or about the 1st Nov. 1902, and the necessary repairs were completed on the 1st Dec. 1902. The cargo, or part of it, had been discharged for the purpose of the repairs. It was reloaded after the repairs were completed, and the vessel sailed from Copenhagen on the 1st Jan. 1903, and arrived at Revel, at the entrance of the Gulf of Finland, on the 6th Jan. She put into and stayed at Revel because she was unable to proceed further towards St. Petersburg by reason of ice. She is still at Revel, not frozen in, but awaiting the breaking up of the ice at St Petersburg and the approaches thereto.

In these circumstances a dispute arose between the owners and the charterers under the charter-party as to the period for which, according to the true construction of the charter-party, the payment of hire should cease in consequence of the damage received by the steamship by grounding as aforesaid, and whether hire is payable by the charterers under the charter-party during the period of the detention of the ship at Revel.

The arbitrators found and awarded that no hire was payable by the charterers to the owners under the charter-party for the period from the 28th Oct. 1902 until the 20th Dec. 1902 inclusive, but that hire was payable by the charterers to the owners in respect of the period from the 20th Dec. 1902 until the 6th Jan. 1903 inclusive.

They found as a fact that the port of St. Petersburg became closed by ice on the 26th Nov. 1902, and not before, and that by reason of the ice it was practically impossible for the steamship, after completion of her repairs as aforesaid, to get nearer to St. Petersburg than the port of Revel, where she now lies. They further found as a fact that, if the steamship had not grounded on the 28th Oct. 1902 and received damage as aforesaid, she could easily have reached St. Petersburg and have discharged her cargo and have got away from that port before the 26th Nov., and before the port of St. Petersburg was closed by ice.

In these circumstances it was contended before the arbitrators on behalf of the charterers that the detention of the ship at Revel was a detention by ice caused by breakdown of steamer, and that, according to the true construction of the charter-party, the hire ceased during the period of such detention. On the other hand, it was contended on behalf of the owners that the detention at Revel was not a detention by ice at all, or that in any case it was not a detention by ice caused by breakdown of the steamer, and that therefore the hire continued to run during the period of such detention.

If and so far as it was a question of fact, the arbitrators awarded and determined that the detention of the steamship at Revel was a detention caused by breakdown, and, subject to the opinion of the court on the question hereinafter submitted, they awarded and determined that the hire ceased under the charter-party during the period of such detention.

The question for the opinion of the court was:

Whether upon the facts stated and upon the true construction of the charter-party hire was and would be payable by the charterers to the owners under the charter during the detention of the ship at Revel awaiting the opening of the port of St. Petersburg.

If the court should answer this question in the negative, then the award as above stated was to stand.

If the court should answer the question in the affirmative, then the award as above stated was to be set aside, and in that case the arbitrators awarded and directed that the hire continued to run at the rate stipulated by the charter-party, notwithstanding the detention of the steamer at Revel.

The special case was argued before Ridley, J., and the learned judge held that the decision of the arbitrators was right, and gave judgment in favour of the charterers.

The shipowners appealed.

Sims Williams for the appellants.—The decision of the learned judge, holding that the award of the arbitrators must be upheld, was wrong. Under this charter-party the liability to pay hire would not cease in any case except upon the happening of one of the events specified in clause 14. The detention of the vessel at Revel was not caused by any one of those events. The vessel, as soon as she was repaired, was again in an efficient state, and the liability to pay hire would again arise. It had been decided that hire did not cease to be payable because, owing to accident, the vessel was delayed for repairs:

Havelock v. *Geddes*, 10 East, 555;
Inman Steamship Company v. *Bischoff*, 47 L. T. Rep. 581; 5 Asp. Mar. Law Cas. 6; 7 App. Cas. 670.

In consequence of those decisions this clause was inserted in charter-parties. In *Hogarth* v.

Miller Brother and Co. (64 L. T. Rep. 205; 7 Asp. Mar. Law Cas. 1; (1891) A. C. 48) this clause came up for consideration, and it was held that there was a suspension of hire only during the time that the vessel was actually inefficient for service. Even if this detention can be said to have been caused by the stranding of the vessel, "stranding" is one of the excepted perils specified in clause 16. Clause 26 does not provide that the payment of hire shall cease if there is a detention by ice caused by breakdown of steamer. It is an entirely separate and distinct clause, and a provision for the cesser of hire ought not to be read into it. If the charterers have any remedy under clause 26, it is a remedy in damages only. This detention by ice was not "caused by breakdown of steamer." The vessel after she was repaired was not broken down at all, and was able to proceed on the voyage. She was not detained by ice, for she was not frozen in at all. At Revel her cargo could have been discharged and forwarded by land to St. Petersburg.

Scrutton, K.C. and *H. W. Loehnis*, for the respondents, were not called upon to argue.

COLLINS, M.R.—I think that this appeal must fail. It seems to me that clause 26 of the charter-party means what it plainly says: "Detention by ice to be for account of charterers unless caused by breakdown of steamer." The steamer was broken down, and by reason of that breakdown she was so long delayed that she was unable to proceed on the voyage as far as St. Petersburg by reason of that port being blocked by ice. Therefore there was a "detention by ice," which was not to be "for account of charterers," but was to be for account of the shipowners. Therefore the payment of hire was suspended during that detention. This appeal fails, and must be dismissed.

ROMER, L.J.—I am of the same opinion.

MATHEW, L.J.—I agree. *Appeal dismissed.*

Solicitors for the appellants, *Botterell and Roche.*

Solicitors for the respondents, *Downing, Bolam, and Co.*

Tuesday, March 22, 1904.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

PRINCE OF WALES DRY DOCK COMPANY (SWANSEA) LIMITED *v.* FOWNES FORGE AND ENGINEERING COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Damages, measure of—Sale of goods—Disclaimer of responsibility for bad workmanship—Costs of action by sub-vendee against purchaser reasonably defended.

The plaintiffs having undertaken the repairs of a steamship for the owners, employed the defendants, an engineering company, to construct a new crank shaft. The defendants agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them.

In an action by the plaintiffs against the shipowners to recover the price of the shaft which had been supplied by the defendants, the shipowners counter-claimed for damages for breach of contract in consequence of the shaft having broken down on a voyage.

The plaintiffs, after communicating with the defendants, who thereupon repudiated all responsibility, defended the counter-claim.

The shipowners succeeded on their counter-claim, the shaft being found to have been of faulty workmanship.

In an action by the plaintiffs to recover from the defendants the costs of the shipowners' counter-claim, as damages resulting from the defendants' breach of contract:

Held, that the terms on which the defendants had supplied the shaft did not relieve them from paying these costs; and that the plaintiffs were entitled to recover the costs of the counter-claim except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft.

APPEAL by the plaintiffs from the judgment of Kennedy, J. at the trial of the action without a jury.

The action was brought to recover from the defendants the costs which had been incurred by the plaintiffs in defending a claim made against them by the owners of the steamship *Alcester.*

In Jan. 1902 the steamship *Alcester*, being out of repair and needing a new crank shaft, was intrusted by the owners to the present plaintiffs, the Prince of Wales Dry Dock Company (Swansea) Limited, to have the necessary work carried out.

The plaintiffs, not being manufacturers of crank shafts, ordered one of the defendant company.

The defendant company agreed to supply a double throw ordinary built crank shaft for the steamship *Alcester* for the sum of 150*l.*, and their letter which constituted their acceptance of the plaintiffs' order contained in a postscript the following clause:

NOTE.—We do everything in our power to insure good material and workmanship, together with quick dispatch, but disclaim all responsibility for failure of either, beyond the replacement of faulty work as supplied by us (if practically possible to do so).

The defendants then manufactured and supplied the plaintiffs with a crank shaft, and the plaintiffs put it into the ship.

The *Alcester*, on the completion of the repairs, started on a voyage, but, in consequence of the breaking of the crank shaft, had to put into Naples for temporary repairs, and on her return to England she had to be fitted with a new crank shaft.

The owners of the ship refused to pay the plaintiffs for the crank shaft which had broken down.

The plaintiffs thereupon brought an action for the price of the shaft.

The shipowners delivered a counter-claim alleging a breach of the plaintiffs' contract in supplying a faulty shaft, the amount of damages claimed being based not only on the value of the crank shaft, but also on the detention of the ship consequential on the failure of the crank shaft.

Upon the counter-claim being delivered, the plaintiffs at once communicated with the present

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

defendants for their opinion as to the course which should be taken.

The defendants gave the plaintiffs the most complete assurance that there was nothing faulty in the material or workmanship of the shaft, and suggested that the reason of its breaking down was the bad design, for which they were not responsible.

Under these circumstances the plaintiffs defended the counter-claim raised by the shipowners.

At the trial of that action the judge found that there was no fault in the design, and that the cause of the breakdown of the shaft was faulty material and workmanship, and he gave judgment in favour of the shipowners for 356*l.* damages and costs.

Thereupon the plaintiffs commenced the present action to recover from the defendants the costs of the counter-claim on which the shipowners had obtained judgment.

At the trial of this action without a jury, Kennedy, J. gave judgment for the defendants.

The plaintiffs appealed.

Bailhache for the plaintiffs.—The costs of the counter-claim made by the shipowners which the plaintiffs have incurred are damages which might reasonably be supposed to have been in the contemplation of the present plaintiffs and defendants, at the time of the contract between them, as the probable result of a breach of the contract; and *primâ facie* the plaintiffs are entitled, therefore, to succeed in this action:

Hammond v. *Bussey*, 20 Q. B. Div. 79.

The postscript to the defendants' letter accepting the plaintiffs' offer does not relieve the defendants from that common law liability to pay the damages now claimed. The effect of the postscript is merely to relieve the defendants, if they should supply a new crank shaft, from the natural and direct damages arising from a breach of contract to supply a good shaft. He referred to

Agius v. *Great Western Colliery Company*, 80 L. T. Rep. 140; (1899) 1 Q. B. 413.

J. A. Hamilton, K.C. (*Lewis Noad* with him) for the defendants.—The defendants did not request the plaintiffs to defend the counter-claim. They repudiated all liability. They are protected by the postscript, which relieves them from the liability to pay these costs as being damages arising from their breach of contract to supply a properly made crank shaft. The object of the clause in the portscript is to relieve them from all damages in respect of a breach of the contract beyond the liability to replace faulty material or workmanship.

COLLINS, M.R.—This is an appeal from a decision of Kennedy, J., and it certainly raises a point of some nicety. It is perfectly clear law, since the decision of *Hammond* v. *Bussey* (*ubi sup.*) in this court, that, unless there is some special bargain between the plaintiffs and the defendants, the plaintiffs are entitled to recover these costs from the defendants, and the only point in this case is whether the terms of the contract between the plaintiffs and the defendants were such as to exclude the liability of the defendants to pay the costs in question. That depends upon the terms of the postscript to the defendants' letter, by which they said that they did everything in their power to insure good material and workmanship, but disclaimed all responsibility for failure of either beyond the replacement of faulty work if practically possible to do so. Now, it seems to me that that clause is not introduced with any reference or relation whatsoever, either express or implied, to costs under any possible circumstances. What the clause is addressed to is the substitution for the general liability to pay general damages consequential upon the breakdown of the machinery, of an obligation to replace the shaft, but that obligation is just as much a binding obligation as was the obligation upon them, in the first instance, to furnish a good shaft. That obligation is certainly undertaken by them in their letter, but it is qualified by the postcript, with the result that an immunity is secured for them from what are called general damages—*i.e.*, loss of time and so on—incidental to and following upon the delivery of a bad shaft. They have secured that immunity and have taken upon themselves the responsibility of replacing faulty or defective work by the substitution of another shaft. But when that liability has been substituted for the other, the clause has accomplished its purpose. It was essential to the determination of the question whether or not that liability existed that it should be ascertained whether the shaft supplied was defective in material or workmanship. That point has been ascertained in the action brought by the shipowners, at the expense of the plaintiffs in the present action, and, according to the law as laid down in *Hammond* v. *Bussey* (*ubi sup.*), they are clearly entitled to be reimbursed by the defendants, unless the defendants have contracted themselves out of that liability. In my judgment the defendants have not limited their liability in that way, and they stand unprotected from their common law liability. It is clear to me that the rule laid down in *Hammond* v. *Bussey* (*ubi sup.*) must be read, as is repeatedly stated in the judgment, with reference to the facts of that case. The court in that case held that the liability of the defendant to pay the plaintiff's costs was not a liability which attached under the first part of the rule in *Hadley* v. *Baxendale* (9 Ex. 341), which refers to damages arising naturally from the breach of contract. The court held that the liability came under the second branch of the rule, that the damages were such as might reasonably be supposed to have been in the contemplation of the parties, when they made the contract, as the probable result of a breach of it. That, I think, justifies me in saying that this clause does not *primâ facie*, and cannot be taken *primâ facie* to, relieve the defendants from an obligation to pay these costs, which do not flow directly from the original breach of contract, but arise necessarily from the conduct of the parties after the breach. The conduct of the defendants after their breach of contract was such as to make it most reasonable on the part of the plaintiffs to defend the claim made against them by the shipowners. It would even have been unreasonable for them not to do so. They trusted to the assurances given them by the defendants that the shaft had been properly constructed, and, having therefore defended the claim and thereby incurred costs, it seems to me that the liability which they then incurred is altogether outside the conditions of the clause on

which the defendants rely. I think that on the true construction of the contract the parties stand with their common law rights, upon the point now in dispute, quite unimpaired. On these grounds, though I recognise the difficulty of the case, I feel bound to differ from the conclusion arrived at by Kennedy, J., and in my judgment the appeal ought to be allowed.

ROMER, L.J.—This case depends upon the construction of a postscript to a letter written by the defendants, and the postscript is so loosely framed that I am not surprised that it has given rise to a difference of judicial opinion. It has puzzled me a good deal, and I cannot say that my doubts are wholly removed, but, on the whole, I have come to the conclusion that the appeal ought to succeed. The meaning that I attach to the postscript in question is this: The defendants contracted that, in case of the failure of the shaft that they sold, by reason of faulty material or workmanship, they were to be liable at any rate to the extent of replacing the faulty work, but were not to be liable further by way of contract; that is to say, they were not to be liable for further loss beyond the cost of replacing the shaft for the faulty work. But then what flows from the fact of there being a contract of this limited kind? Suppose that the shipowners had brought an action against the present plaintiffs in respect of the failure of the shaft, but limiting their claim to damages to the value of a new shaft; and suppose that the plaintiffs informed the present defendants that the action had been brought against them, and then, upon the assurance of the defendants that there was nothing faulty in the workmanship of the shaft, had defended the action in the interests both of themselves and of the defendants. Then at the trial of that action it is found that the workmanship is faulty, and accordingly a new shaft has to be delivered. In such a case I should say that, within the meaning of the decision in *Hammond* v. *Bussey* (*ubi sup.*), the costs of the defence could be said to be damages which might reasonably be supposed to have been in the contemplation of the parties at the time when they made the limited contract that I have indicated, and for that reason I think that the costs in such a case as that could be recovered by the plaintiffs from the defendants. Now, apply that to the present case. Here was an action against the plaintiffs on the ground of faulty workmanship, and the relief included a claim for damages for the price of a new shaft; in other words, for delivery of a new shaft as part of the damages resulting to the ultimate purchasers of the shaft because of its faulty construction. It is true that the action also contained a claim for further damages, but, when the defence had to be put in, the then defendants (the present plaintiffs) had to consider that, as to a great part of the action, it obviously concerned the present defendants on what I have called their limited contract, and they accordingly consulted with the defendants. The defendants then claimed the protection of this clause, and said that the shaft was not faulty in material or workmanship. Thereupon the present plaintiffs defended the action brought against them, and under the circumstances I think that their defence was reasonable and proper so far as concerns their costs in defending that part of the action in which a claim was made for a new shaft. Those costs were reasonably incurred, and the plaintiffs are entitled to say, as against the present defendants, that these costs must be taken to have been in the contemplation of the parties as damages reasonably likely to flow from a breach by the defendants of their limited contract. Then the question arises, How are those costs to be ascertained? It appears to me that the right order to make is that the plaintiffs are entitled to the costs of the action except so far as those costs were increased by any issue other than the issue I have mentioned.

MATHEW, L.J. concurred.

J. A. Hamilton, K.C.—Will your Lordships make an order that the costs should be divided in the proportion which the plaintiffs' interests bear to the defendants' interests? The shipowners recovered 356*l.* from the present plaintiffs, and the present defendants are interested in that sum, as your Lordships hold, to the extent of only 150*l.*

COLLINS, M.R.—We think that the order suggested by my brother Romer is the right one, and the plaintiffs will have the costs of the shipowners' counter-claim, except so far as they were enhanced by other issues, if any.

Appeal allowed.

Solicitors for the plaintiffs, *Williamson, Hill,* and *Co.*

Solicitors for the defendants, *Farrar, Porter,* and *Co.*, for *G. F. Hill* and *Son*, Cardiff.

Tuesday, March 22, 1904.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

SEARLE *v.* LUND. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Liberty to over-carry goods if discharge cannot be effected without undue detention—Discharge prevented by delay at previous port—Delay caused by negligence of shipowner's agent — Remoteness of damage — Liability of shipowner.

A bill of lading contained the following clause: "If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns."

The ship was delayed at a port of call in the course of her voyage by the negligence of the shipowner's agents, with the result that, on her arrival at the port where the goods were to be discharged, the master found that the discharge could not be effected without undue detention, and he therefore over-carried the goods to London.

In an action by the consignee to recover damages for the over-carriage of the goods:

Held, affirming the decision of Kennedy, J. (88 *L. T. Rep.* 863; 9 *Asp. Mar. Law Cas.* 419), *that the damage was not so remote from the negligence of the shipowner's agents as to disentitle the consignee from succeeding in the action.*

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

APPEAL by the defendant from the judgment of Kennedy, J. at the trial of the action without a jury.

The action was brought against the owner of the steamship *Yarrawonga* to recover damages for the breach of a contract contained in a bill of lading.

The *Yarrawonga* was one of a line of steamers, known as the Blue Anchor Line, regularly running between Australian ports, of which Melbourne was one, and London, and calling on the way at Durban and Cape Town.

In Sept. 1901 the plaintiff shipped on the *Yarrawonga* at Melbourne forty-five cases of merchandise and 1750 bales of fodder, to be delivered at Cape Town.

The bills of lading contained an option for the consignees to require delivery at Durban, and also contained the following clause:

> If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns.

On the 25th Oct. the *Yarrawonga* arrived at Durban.

On the assumption that she would leave Durban and arrive at Cape Town in due course four days later, the plaintiff secured a berth for her at Cape Town for the day when she ought to arrive there.

The ship was, however, delayed at Durban.

This delay was caused to some extent by bad weather, and by a strike of the labourers there, but chiefly by a blunder on the part of the defendant's agents, who directed the plaintiff's cargo to be discharged. The mistake was discovered and the cargo was reshipped on the *Yarrawonga*.

In consequence of this delay the ship arrived at Cape Town several days later than had been expected, and on her arrival there the berth that had been secured for her was occupied by another vessel.

The South African war was at that time being carried on, and the harbour at Cape Town was consequently in a very congested condition.

The master was honestly and reasonably of opinion that the cargo could not be discharged there without undue detention of the ship, and he decided to carry it on to London.

This he did, and the cargo had then to be brought back to Cape Town at considerable expense.

At the trial of the action before Kennedy, J. without a jury, the learned judge said it was the fact that there would have been no need for undue detention at Cape Town but for what happened at Durban, and that, but for the want of reasonable care on the part of the defendant's agents there, the vessel might have been discharged without undue delay at Cape Town. He held that the damage suffered by the plaintiff by the over-carriage of the cargo to London was not too remote from the negligence of the defendant's agents at Durban, and that the plaintiff was entitled to recover in the action.

The case is reported 88 L. T. Rep. 863; 9 Asp. Mar. Law Cas. 419.

The defendant appealed.

J. A. Hamilton, K.C. and *Loehnis* for the defendant.

Scrutton, K.C. and *Leck* for the plaintiff.

COLLINS, M.R.—This is an appeal from a decision of Kennedy, J., who gave judgment in favour of the plaintiff in an action against a shipowner to recover damages for negligently over-carrying the plaintiff's cargo. The cargo in question was shipped on the defendant's steamship, which performed round voyages between Australia and London, calling at Durban and Cape Town on the way. It appears from the evidence that these voyages are accomplished with great regularity, and the times of the ship's arrival at the various ports can be calculated with considerable nicety. The cargo in question was shipped in Australia for delivery at Cape Town, with an option for the consignees to require delivery at Durban. The vessel arrived at Durban on the 25th Oct., which was the exact day that she was expected there. The plaintiff did not exercise his option to require delivery there, but, by a blunder on the part of someone for whom the defendant is responsible, the cargo was discharged at Durban. The mistake was then discovered, and the cargo was reshipped. Now, on the 25th Oct., when the vessel arrived at Durban, the plaintiff made arrangements on the footing of the vessel's departure for Cape Town on the following Tuesday, and he secured a berth at Cape Town for the following Saturday where his cargo might be discharged. At Durban the ship met with some difficulties both from the weather and from labour disputes, but Kennedy, J. at the trial, after making allowance for the delay thus caused, came to the conclusion that, if the ship had not been delayed also by the blunder which resulted in the cargo in question being discharged and then reshipped, the vessel might have left Durban on the Tuesday, and have arrived at Cape Town in time to make use of the berth which the plaintiff had secured. The learned judge found that this blunder in fact caused a delay of two or three days. There were other things which caused delay, but, if it had not been for the delay caused by this blunder, the vessel would have arrived at Cape Town in time to get the benefit of the berth that had been secured. That is the finding of the learned judge, and there was ample material before him upon which he might fairly come to that conclusion. When the vessel arrived at Cape Town the berth that had been secured was no longer available. The bills of lading contained a clause providing that if in the opinion of the master discharge could not be effected without undue detention, the steamer was to have liberty to over-carry the cargo to London at merchant's risk and deliver them to the consignees or their assigns. The master, in the exercise of what was found by Kennedy, J. to be a sound judgment, was of opinion that, having regard to the congestion of shipping in the harbour at Cape Town, the discharge of the cargo could not be effected without undue detention, and he decided to carry the cargo on to London. The cargo was accordingly carried to London, and then had to be brought back to Cape Town, and these proceedings very naturally involved the plaintiff in considerable expense. The action is brought to recover the damages caused by the over-carriage of the goods. The question is whether the chain of casuality between the negligence at Durban in discharging the plaintiff's cargo, which caused the vessel two or three days' delay, and

the late arrival at Cape Town which resulted in the loss of the berth and the carrying on of the cargo to London has been sufficiently established. In my opinion it has, and none the less because the master in the exercise of his discretion elected to make use of the option of carrying the cargo on to London. There was no negligence or improper conduct on his part. I think that the damage all resulted from the negligence which occurred at Durban, and which caused the vessel to lose the berth that had been secured at Cape Town. The consequence is one that might reasonably be anticipated and regarded as following naturally on the act of negligence. That seems to me to be the legal and practical view of the matter. The ship made the voyages so regularly that the day of her arrival at Cape Town could be calculated with considerable exactness, and a berth was secured for her there in view of the voyage there from Durban being completed in the usual time. The vessel did not arrive at Cape Town as soon as she ought to have done in consequence of the blunder at Durban, and this blunder was made by someone for whom the defendant is responsible. The defendant now says that the damage is too remote, but from the correspondence it appears that he himself took the view which was afterwards taken by Kennedy, J. I think that the decision of Kennedy, J. was right, and that the appeal must be dismissed.

ROMER, L.J.—The circumstances of this case are somewhat complex, but I am not prepared to differ from Kennedy, J., who has held that the non-discharge of the plaintiff's goods at Cape Town was caused by the negligence of the defendant's agents at Durban. The damage of the plaintiff is not too remote. He is entitled to succeed in this action, and the appeal must fail.

MATHEW, L.J. concurred. *Appeal dismissed.*

Solicitors: for the plaintiff, *Mellor, Smith,* and *May*; for the defendant, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 10, 11, 14, *and* 21, 1904.

(Before BIGHAM, J.)

GRANGE AND CO. *v.* TAYLOR. (*a*)

Bill of lading—Construction—Bulk cargo—Undivided portions of bulk—"Each bill of lading to bear its proportion of damage"—Error in apportioning—Short delivery.

Bills of lading for undivided portions of a bulk cargo of grain contained the following clause and note in margin: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any:"

"Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any."

By an error in apportioning damaged grain one consignee received a full consignment of sound grain. One of the other consignees, refusing to accept more than his proportionate share of damaged grain, received a consignment which was 108 *quarters short.*

Held, in an action for short delivery, that the error was caused by the consignees' agents, and that the clause in the bills of lading cast no duty on the shipowner to apportion the good and unsound grain.

CLAIM against shipowner for short delivery of a quantity of maize shipped under bills of lading on board the *Palestrina* and discharged at the Victoria Docks, and for breach of contract contained in the bills of lading and for conversion of the plaintiffs' goods.

The cargo of maize was in bulk, and bills of lading were given in respect of undivided portions.

The plaintiffs were indorsees of two of the bills of lading.

The bills of lading contained the following clause and impressed note in the margin:

If the parcel herein signed for constitutes part of larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any. Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any.

By an error in apportioning, one consignee received a complete consignment of sound grain and the plaintiffs, refusing to accept more than their proportion of damaged grain, brought an action for short delivery.

The facts sufficiently appear in the following considered judgment.

Hamilton, K.C. and *Leck* for the plaintiffs; *Carver,* K.C. and *Adair Roche* for the defendants.

The following cases and Act were cited:

Porteous v. *Watney*, 39 L. T. Rep. 195; 4 Asp. Mar. Law Cas. 34; 3 Q. B. Div. 534, at p. 542, per Brett, L.J.;
Petrocochino v. *Bott*, 30 L. T. Rep. 840; 2 Asp. Mar. Law Cas. 310; L. Rep. 9 C. P. 355;
Spicer v. *Martin*, 60 L. T. Rep. 546; 14 App. Cas. 12;
Nottingham Patent Brick and Tile Company v. *Butler*, 15 Q. B. Div. 261, at p. 268, per Willes, J.;
Collins v. *Castle*, 57 L. T. Rep. 764; 36 Ch. Div. 243;
The London and St. Catherine Dock Act 1864 (27 & 28 Vict. c. 178), s. 120.

Cur. adv. vult.

BIGHAM, J.—This is an action by indorsees of bills of lading against shipowner to recover damages for short delivery of a quantity (108 quarters) of maize. The defence is that the maize was delivered to the dock company, and that they were the agents of the plaintiffs to receive it. The defendants' ship, the *Palestrina*, took on board a large quantity of maize in bulk at Odessa to be carried to London. The shipper asked for and obtained from the defendants several bills of lading, each being for an undivided portion of the bulk. This was done to facilitate the sale of the maize. The bills of lading contained the following clause: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and (or) sweepings, if any";

(a) Reported by W. TREVOR TURTON, Esq., Barrister-at-Law.

and in the margin there was an impressed note: "Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." Two of these bills of lading came into the hands of the plaintiffs, who were buyers of the portion of the bulk thereby represented. The bills of lading for the remainder reached the hands of other buyers, among whom was a Mr. Paul. The vessel arrived in London and went to the I jetty of the Victoria Dock, when she began her discharge by means of an elevator which stands on that jetty. The maize was gathered under the open hatchways and then lifted in the elevator over the ship's side and shot into the barges of the bills of lading holders. Mr. Paul came first in time, and therefore first in turn, and received his full bill of lading quantity. Before the discharge to him was completed, but when it was too late to stop it, part of the remaining bulk was found to be heated. This heated grain was put on the quay, and was there apportioned among the different bill of lading holders, 108 quarters being the quantity which ought to have been taken by Mr. Paul as the quantity applicable to his bill of lading. He had, however, already received and taken away his full quantity in sound maize. The result was that at the end of the discharge the plaintiffs found that unless they took the 108 quarters they would be short by that quantity of their share of the bulk. They refused to take the 108 quarters, alleging that if they did so they would be saddled with more than their proper proportion of heated grain, and they then brought this action.

The question is whether the shipowners are liable. The answer depends on the nature of the obligations of the shipowner under the bill of lading contract and on the usage or practice ordinarily followed in the discharge of those obligations. The bill of lading, of course, obliges the shipowner to deliver goods corresponding with the description in the document, and it also obliges him to deliver such goods to the proper person to receive them. But the plaintiffs contend that, having regard to the words, "each bill of lading to bear its own proportion of damage," the obligation is not discharged by a mere delivery of the bill of lading quantity, but delivery must in such case be made up by the shipowner of the proper proportions of sound and damaged. It is said that the bill of lading is a contract between the holder and the shipowner and between no other persons, and that, as between those two parties, the words relied upon can have no other meaning than that contended for. I am of opinion that the words put no such burden on the shipowner. It would be very unreasonable if they did. The delivery is made to the barges of the receivers turn and turn about. At first nothing but sound grain may come out of the ship, and it will be impossible to say whether there will be any damaged grain or, if any, how much. Again, the character of the damage may vary very much; some part may be badly damaged and the other part only slightly. How is the shipowner to foresee this, and how, where, and when is he to sort the grain? Skilled men are required for such work; the crew cannot do it. Is the shipowner to find and employ such men? Then, where is the sorting to be done? It cannot be done in the ship. Is the shipowner to hire quay space for the work? And when is it to be done? Until the last parcel of the bulk is out the sorting is impossible. Must the shipowner hold back all delivery until that point in the discharge is reached? I agree with Mr. Hamilton that the mere difficulty or even impossibility of discharging a duty affords no excuse for a breach if in fact the duty has been undertaken; but when I am asked to say that the shipowner has undertaken the difficult duty here contended for I expect to find plain and unambiguous words imposing it. I do not find such words in this case. If the shipowner had given but one bill of lading for the whole parcel his duty would have been completely discharged by delivering the grain with the damaged and sound mixed just as it came to hand out of the ship. Was it intended that his compliance with shipper's request to give several bills of lading should throw upon him the burden of sorting the bulk and dividing the damaged grain in the manner suggested? I cannot think so. Then why are the words introduced, and what is their effect? This bill of lading is headed, "Chamber of Shipping, Black Sea—Berth Contract Bill of Lading, 1902"; and in the top left corner are the words, "As agreed with the London Corn Trade Association and the Chamber of Shipping, 12 March 1902." Thus the bill of lading appears to be in a form adopted by the members of the Corn Association in this country and shipowners who send their ships to the Black Sea. It is in common use in connection with a very large trade, and is doubtless well known to all people in that trade. Now the shipment of grain in bags and the stowing of it in the ship's hold in separate parcels are expensive operations which add to the cost of the grain when it arrives in this country without enhancing its value. It is therefore apparently often shipped in bulk, and bills of lading are given for undivided portions of the bulk. This is a great convenience to the merchant, for it enables him to sell the grain in small parcels. The form has been drawn with special reference to this practice, and the clause relied upon has been inserted in consequence of it. Then if the shipment is made under this practice (it is not necessarily so made) the impressed note is put in the margin of each bill of lading to draw attention to the fact: "Part of parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." The London Corn Trade Association's form of sale contract, which was given in evidence before me, contains a corresponding provision: "Should any of the within-mentioned quantity form part of a larger quantity . . . in bulk, no separation . . . shall be deemed to be necessary. All damages and sweepings . . . shall be shared by the various parcels *pro rata*," showing that when the grain comes to be sold the sales are made on the footing on which the bills of lading are drawn. When the bill of lading is read by the light of these facts the meaning and object of the clause in question becomes quite plain. It is put there for the purpose of regulating the rights of the holders of the different bills of lading *inter se*, and is not intended to increase the shipowner's duty at all. But the plaintiffs insist that the contract in the bill of lading does not and is never intended to do more than express the agreement between the shipper and the shipowner; in other words, that it cannot regulate

the rights of cargo-owners *inter se*; and they refer to *Porteous* v. *Watney* (*ubi sup.*) in support of this contention. No doubt the primary object of a bill of lading is to evidence the terms on which the shipper and shipowner have agreed for the carriage and delivery of goods, and Brett, L.J. at p. 542 of 3 Q. B. Div., is reported as saying: "The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence." These words must, however, be read with reference to the form of the bill of lading in that case. That form contained no reference whatever to the holders of other bills of lading. The action was by shipowner against bill of lading holder for demurrage. The bill of lading contained the words "on paying freight for the said goods and all other conditions as per charter-party." This charter-party gave a lien on all cargo for demurrage at the port of discharge. The defendant had always been ready and willing to take his goods, but the holders of bills of lading for other cargo lying on top had made default in taking their cargo away so that the defendant's goods could not be discharged. It was held that by the terms of his bill of lading contract the defendant had rendered himself liable for payment of the demurrage, and that he could not escape by saying that the delay was due to the negligence of holders of other bills of lading. Indeed, so much did Brett, L.J. consider the different bills of lading holders strangers to each other that he held that if the man in actual default had paid the shipowner, the defendant could not have relied on the payment by way of defence, an opinion which involved the rather startling conclusion that if there had been goods below belonging to a score of different bills of lading holders, the full amount of the demurrage would have been recoverable from each of them. The Lord Justice at p. 543 uses these words: "I think that if the consignee of a portion of the cargo had a bill of lading in the same words, and had been called upon to pay and had paid the whole demurrage to the shipowner, the holder of another bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship." But the authority is in truth of no application to the present case. The bill of lading before me appears on its face to be one of a group. The makers and takers of it know it to be one of a group. The same thing is no doubt true in the case of the bills of lading for the remainder of the bulk. The shipowner, not for his own benefit, but merely for the benefit of the various receivers, subscribes to the stipulation as to the division of damaged grain. All the receivers buy their bills of lading with notice, and, in my opinion, become bound towards each other by what the shipowner has done for them. Even if it should be true that the intention has not been legally effected, and that the bills of lading holders are not bound *inter se*, that affords no reason for saying that the words used in the attempt to accomplish the intention should be twisted to a purpose for which they were never used—namely, to impose a heavy obligation on the shipowner.

The view which I take of the meaning of the bill of lading contract is borne out by the practice followed in the discharge of grain cargoes at Victoria Docks and at the jetty in question. The practice is for the servants of the dock company to bring the cargo in the ship's hold under the open hatchways; for this service the shipowner pays the dock company 4*d.* a ton. The grain is then lifted by means of an elevator out of the hold and shot from the elevators into the barges of the consignees; for this service the consignees pay the dock company 1*s.* 9*d.* per ton. If any of the grain is found to be heated it is discharged on the quay and there sorted by the dock company's servants, the cost being covered by the dock company's charge against the consignees. In this way the dock company act as the agents of the ship to discharge the cargo and as the agents of the consignees to receive it; and the evidence, though in parts conflicting, satisfies me that as a matter of fact the receipt of the grain into the elevator is the receipt by the dock company, as agent for the consignee or bill of lading holder. If this be so, the shipowner has in this case not only discharged the bill of lading quantity, but the plaintiffs have also received it, with the result that the claim for short delivery fails. It was, however, contended on the plaintiffs' behalf that, whatever the general practice might be, the grain in this particular instance was not in fact received by them until it was placed in their barges or trucks. It appeared that upon this jetty there were two elevators belonging to different owners. The elevator which was used on this occasion belongs to a firm of Thompson and Co., who use it for the discharge of their own vessels. But sometimes no vessel of their own happens to be alongside, and the elevator is idle. On such occasions Thompson and Co. solicit other shipowners to send their ships to the wharf, so that they may be discharged by their elevator, and they have an arrangement with the dock company by which in such circumstances they do all the work above described for the dock company for an inclusive charge of 1*s.* 11*d.* a ton. Thus the dock company get the work for which they charge 2*s.* 1*d.* (1*s.* 9*d.* and 4*d.*) done for 1*s.* 11*d.* This course was followed in the present case. Thompson and Co. were anxious to secure a discharge and delivery by their elevator because, I suppose, they could do the work for less than 1*s.* 11*d.* per ton, and so make a profit, and, as they feared that the job might fall into the hands of the owner of the rival elevator, they went to the defendants and induced the defendants to send the ship to the part of the jetty where their elevator stands. It was said by the plaintiffs that the defendants, by allowing the vessel to go under Thompson's elevator in these circumstances, made Thompson and Co. their agents, and that all the work,

whether done on the ship or in the elevator or on the quay, was therefore done by the defendants. I do not, however, take this view of the matter. Neither the plaintiffs nor the defendants had anything to do with the arrangement between the dock company and Thompson, and when the time for paying for the work arrived, debit notes were sent in by the dock company to the ship and cargo-owners for the 4*d.* and 1*s.* 9*d.*, just as though no such arrangement existed. I wish to add that the practice at these docks appears to have been substantially the same for the last thirty years, although, no doubt, elevators have only recently come into use. Dealing with the question in 1874, Brett, J., after stating the practice in relation to the delivery of bales of hides, says: "I am of opinion that the moment the shipowner has cleared the goods from the deck he ceases to be responsible in any way for them; and that, whatever remedy the plaintiffs may have against the dock company or anyone else, they cannot under the circumstances charge the shipowner with the loss of the bale": (see *Petrocochino* v. *Bott*, L. Rep. 9 C. P., at p. 361). It is perhaps necessary to mention one other matter. It appeared that when Thompson's men in working out the ship came across the heated grain, they notified the circumstance to the dock clerks, and after the apportionment the clerks, in the ordinary course of their duty, entered the 108 quarters in the dock books as belonging to Mr. Paul. The plaintiffs suggested that, even if there was no short delivery, this was a conversion. To this there are two answers. The first is that there was no conversion; the book entry interfered in no way with the plaintiffs' rights—the plaintiffs might have taken away the 108 quarters at any moment, and no one would have objected. The second answer is that, even if there was a conversion, it was not by the defendants; they, as I have already said, had finished with the goods when they delivered the grain into the elevator. The fact is that the plaintiffs did not want the 108 quarters. They preferred their action for short delivery. If they had taken the 108 quarters, as they might have done at any moment if they had wished, they would have been left with an action for breach of the duty to properly sort and apportion—an action which, if brought against the present defendants, would have failed, as this action fails, on the ground that the defendants had entered into no contract to do the work of sorting and apportioning. There must be judgment for the defendants with costs, and for the defendants on the counterclaim for freight.

Solicitors for plaintiffs, *Lowless* and *Co.*
Solicitors for defendants, *Botterell* and *Roche*.

Friday, March 4, 1904.

(Before Lord ALVERSTONE, C.J., KENNEDY and CHANNELL, JJ.)

TOUGH (app.) *v.* HOPKINS (resp.). (*a*)

Metropolis — Smoke from tug — Nuisance — "Chimney" — Prohibition order — Specifying works—Public Health (London) Act 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 5 (4) (5), 23 24.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The funnel of a tug plying to and fro in the river Thames, within the jurisdiction of the port sanitary authority of London, is a "chimney" within sect. 24 (*b*) *of the Public Health (London) Act* 1891.

If a court of summary jurisdiction makes a prohibition order under sect. 5 *of the Public Health (London) Act* 1891, *such order need not specify the works to be done by the person against whom the order is made if in the opinion of the court no works could be done to prevent a recurrence of the nuisance.*

CASE stated on an information preferred by the respondent against the appellant under sect. 24 of the Public Health (London) Act 1891 for that on the 24th Aug. 1903, on the Thames and within the port of London, upon a certain vessel—to wit, the steamship *Richmond*—the following nuisance existed — namely, a chimney (not being the chimney of a private dwelling-house) sending forth smoke in such quantity as to be a nuisance —and that the appellant, being the owner of such vessel, had made default in complying with a notice served under such section.

Upon the hearing of the information the following facts were proved or admitted by the appellant:

He was then the owner of a steam-tug known as the *Richmond*.

On the 25th April 1903 a notice was served upon him at the instance of the port sanitary authority of London, a copy whereof is set out below.

On the 24th Aug. 1903 the steam-tug was towing six barges, and was proceeding from below the Custom House to Southwark Bridge and beyond, within the jurisdiction of the port sanitary authority, and while the tug was proceeding between the Custom House and Southwark Bridge there was being sent forth from the funnel thereof dense black smoke for the space of about five minutes in such quantity as to be a nuisance.

The steam-tug was then being navigated by a master, engineer, and crew employed by the appellant, who was not on board, and who had no personal knowledge of such emission of black smoke.

The steam-tug did not stop or lie up at any point of the voyage of the 24th Aug., but was then proceeding to Kingston-on-Thames, where she was in the habit of lying every night. The steam-tug was employed throughout the day in plying for hire as a tug between Woolwich and Kingston-on-Thames.

The engines and boilers on board the steam-tug were of modern construction and of the best known type of marine engines and boilers, and were constructed as to consume as far as possible all the smoke caused therein, having regard to the funnel being a short one, and adapted for passing under bridges at high-water level by hinging backwards nearly to deck level.

The appellant had given strict instructions to his servants to prevent, as far as possible, the production of black smoke on the steam-tug, and good Welsh steam coal procured by the appellant was burnt on board, and the furnaces of the tug had been freshly stoked with such coal at about opposite the Custom House on the 24th Aug., and from three to four minutes was not

an unreasonable time to allow the fresh fuel to cease emitting black smoke on such a vessel.

The emission of smoke from the funnel of the tug could have been prevented by the fire being kept bright by frequent and careful stoking or by the use of steam coal.

Upon the above facts it was contended by the appellant: (1) that sect. 24 of the Public Health (London) Act 1891 was inapplicable to a steam-tug such as the *Richmond* while plying to and fro on the river Thames as described above; (2) that the *Richmond* on the 24th Aug. was not a vessel lying within the district of the port sanitary authority within the meaning of art. 3 of an order of the Local Government Board, dated the 25th March 1892, and made under sect. 112 of the Public Health (London) Act 1891; (3) that if by reason of such order of the Local Government Board the sect. 24 of the Public Health (London) Act 1891 was applicable to a vessel used as the steam-tug was being used on the 24th Aug. 1903, then the proceedings under such section should have been taken against the master of the vessel and not against the appellant; (4) that proceedings in respect of smoke from vessels plying on the river Thames could only be taken under the provisions of sect. 23 of the Public Health (London) Act 1891.

On behalf of the respondent it was contended: (1) that the funnel of the steam-tug was a "chimney" within the meaning of that expression in sect. 24 (*b*) of the Public Health (London) Act 1891; (2) that the alleged nuisance arose owing to the appellant not having used anthracite coal in the furnaces of the tug and from the coal that was used having been carelessly and improperly stoked; (3) that the appellant was liable for the acts of his servants and was a person by whose act, default, or sufference the nuisance arose; (4) that the magistrate had a discretion as to whether or not he specified on the prohibition order any works to be done by the appellant to prevent the recurrence of the nuisance, and that it was for him to determine whether or not it was desirable to do so.

The magistrate's attention was called to the case of *Weeks* v. *King* (15 Cox C. C. 733; 49 J. P. 704).

The magistrate found as a fact that the funnel of the steam-tug was a chimney within the meaning of sect. 24 of the statute and that black smoke had been sent forth from it in such quantities as to be a nuisance at the place and time and on the day mentioned in the information. He also found as a fact that no works that could be ordered would cure the alleged nuisance, but that it was a question of stoking with proper fuel, and that if a bright fire were kept up by frequent and careful stoking the nuisance could be prevented. He was of opinion that the information had been properly laid under sect. 24 (*b*) of the Public Health (London) Act 1891 and that the appellant was a person by whose act, default, or sufferance the nuisance arose, and he overruled the contentions of the appellant and convicted him of the nuisance alleged in the information and made an order upon him prohibiting the recurrence of the nuisance.

The appellant, after the magistrate had convicted him as above-mentioned, required him on making the prohibition order against him under sect. 5, sub-sects. 4 and 5, of the Public Health (London) Act 1891, to specify therein the works to be executed by him for the purpose of preventing the recurrence of the nuisance, but the magistrate refused to specify any works in the order, because it was not, in his opinion, desirable to do so, because there was no question of works here involved, but only a question of careful and skilful stoking with proper fuel.

The notice referred to above was as follows:

Take notice that under the provisions of the Public Health (London) Act 1891 the port sanitary authority of the port of London, being satisfied of the existence of a nuisance on the above-mentioned vessel, arising from a chimney—to wit, the funnel of the boiler furnace on the said vessel (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance—do hereby require you, within forty-eight hours from the service of this notice, to abate the same, and to execute such works and do such things as may be necessary for that purpose, and to do what is necessary for preventing the recurrence of the said nuisance. If you make default in complying with the requisitions of this notice within the time above specified a summons will be issued requiring your attendance before a petty sessional court to answer a complaint which will be made for the purpose of enforcing the abatement of the said nuisance or prohibiting the recurrence thereof, or both, and for recovering the costs and penalties that may be incurred thereby.—Dated 25th April 1903.—JAMES BELL, Town Clerk.

By sect. 5 of the Public Health (London) Act 1891 (54 & 55 Vict. c. 76):

(1) If either—(*a*) the person on whom a notice to abate a nuisance has been served as aforesaid makes default in complying with any of the requisitions thereof within the time specified, or (*b*) the nuisance, although abated since the service of the notice is, in the opinion of the sanitary authority, likely to recur on the same premises, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such person a summary order (in this Act referred to as a nuisance order). (2) A nuisance order may be an abatement order, a prohibition order, or a closing order, or a combination of such orders. (3) An abatement order may require a person to comply with all or any of the requisitions of the notice or otherwise to abate the nuisance within a time specified in the order. (4) A prohibition order may prohibit the recurrence of a nuisance. (5) An abatement order or prohibition order shall, if the person on whom the order is made so requires, or the court considers it desirable, specify the works to be executed by such person for the purpose of abating or preventing the recurrence of the nuisance.

And by sect. 23:

(3) Every steam engine and furnace used in the working of any steam vessel on the river Thames either above London Bridge or plying to and fro between London Bridge and any place on the river Thames westward of the Nore light, shall be constructed so as to consume or burn the smoke arising from such engine and furnace; and if any such steam engine or furnace is not so constructed, or being so constructed is wilfully or negligently used so that the smoke arising therefrom is not effectually consumed or burnt, the owner or master of such vessel shall be liable to a fine not exceeding 5*l*., and on a second conviction to a fine of 10*l*., and on every subsequent conviction to a fine of double the amount of the fine imposed on the last preceding conviction.

And by sect. 24:

(*a*) Any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the

combustible used therein and which is used for working engines by steam, or in any mill, factory, dye-house, brewery, bake-house, or gaswork, or in any manufacturing or trade process whatsoever; and (*b*) any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance shall be nuisances liable to be dealt with summarily under this Act, and the provisions of the Act relating to those nuisances shall apply accordingly: Provided that the court hearing a complaint against a person in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace shall hold that no nuisance is created and dismiss the complaint, if satisfied that such fireplace or furnace is constructed in such manner as to consume, as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof.

J. A. Hamilton, K.C. and *Bigham* for the apellant.—Sect. 24 does not refer to the funnel of a steamboat on the Thames but merely applies to a chimney in the ordinary sense of the word. A case like the present comes under sect. 23 (3). Further, the order made did not specify the works to be done in order to prevent a recurrence of the nuisance which it should have under sect. 5 of the Public Health (London) Act 1891. The mere fact that the powers and duties under sect. 24 of the Act of 1891 are assigned to the port sanitary authority cannot make that section applicable to the funnel of a steam vessel on the Thames.

Danckwerts, K.C. and *R. Cunningham Glen* for the respondent.—The order assigning to the port sanitary authority the powers of an ordinary sanitary authority under the Act of 1891 provides that any vessel lying within the port sanitary authority shall be liable to their jurisdiction as if it were a house. Sect. 24 deals with a nuisance arising from smoke and sect. 23 deals with the construction of the furnace. They therefore deal with different matters, and sect. 24 applies to a nuisance arising from the smoke of a vessel. With regard to the order made in this case, if no actual works are necessary they need not be specified.

Lord ALVERSTONE, C.J.—Notwithstanding the very ingenious argument of Mr. Hamilton and the observations which Mr. Bigham has made, I think that this decision was right. I quite agree with them that the order of the Local Government Board of the 25th March 1892 has not increased the responsibility of persons who own tugs in respect of nuisances from tugs or ships. It merely provided that the port sanitary authority was to take such proceedings as could be taken under the Act in respect of "ships, vessels, boats, waters, or persons within their jurisdiction," and it includes sect. 24 of the Public Health (London) Act 1891. Whatever the opinion of the draftsman may have been, the mere inclusion in that order would not increase the responsibility if we were of opinion that sect. 24 could not apply to the chimney or funnel of a steam-tug plying on the Thames. The point has admitted of argument, and I think there is some ground for thinking at the first blush that the reading of sect. 24 would indicate that it was intended to apply to chimneys on land in the ordinary sense of the word, but when we look at the object of the legislation, and certain expressions in sect. 24 itself, I think any such construction would be too narrow. It is, as far as this part of the section is concerned, essentially what may be called a black smoke section—that is to say, it is a section which provides that "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. Sect. 23, the previous section, has undoubtedly dealt specifically with the steam engines and furnaces used in the working of steam vessels which were being worked in the district where this vessel was being worked. It provides that they "shall be constructed so as to consume or burn the smoke arising from such engine and furnace; and if such steam engine or furnace is not so constructed, or being so constructed is wilfully or negligently used so that the smoke arising therefrom is not effectually consumed or burnt, the owner or master of such vessel shall be liable to a fine not exceeding 5*l*., and on a second conviction to a fine of 10*l*.," and then it goes on: "Provided that in this section the words 'consume or burn the smoke' shall not be held in all cases to mean 'consume or burn all the smoke,' and the court hearing an information against a person may remit the fine if of opinion that such person has so constructed his furnace as to consume or burn as far as possible all the smoke arising from such furnace, and has carefully attended to the same, and consumed or burned as far as possible the smoke arising from such furnace." Those words show that there are special provisions with regard to the construction of furnaces and engines upon the steamers and the negligent use of them, but it is to be observed, and I think the argument of Mr. Glen is of importance, that there is a corresponding provision with regard to furnaces upon land, because sub-sect. 1 of sect. 23 also provides that the furnaces employed in the working of engines by steam and a number of other furnaces, all of which must be on land, "shall be constructed so as to consume or burn the smoke arising from such furnace," and there is a corresponding sub-section with regard to their negligent user. Therefore we have with regard to both furnaces on land and furnaces on ships the sort of provision which goes a certain distance for the proper construction of the engines and furnaces and for the non-negligent user. Then we come to sect. 24, which is unquestionably a nuisance section. I think it is not without importance that it immediately follows sect. 23, and is under the same heading. "Smoke consumption." If the words to which I am about to refer can be fairly applied to a chimney on board a steamship, there is no reason why this should not apply. The first provision of sect. 24 says: "Any fireplace or furnace which does not so far as practicable consume the smoke" shall be a nuisance liable to be dealt with summarily. Then comes the important clause: "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. I think that, quite apart from negligence, is meant to deal with the case, which has not been covered by the previous section, of a chimney other than that of a dwelling-house sending forth black smoke. We have had our

attention directed to the other legislation of a similar character with regard to railway engines and with regard to traction engines, and there does not appear to be any black smoke nuisance section in any of them. Therefore one would rather assume that this legislation is something which may be said to be additional protection, unless the words "any chimney (not being the chimney of a private dwelling-house)" are sufficient to show that a steamship would not be included. I think both the purview of this section and the object of the legislation would point to black smoke being emitted within the port from the chimney or funnel of a steamer as constituting an offence. It is quite obvious there may be cases in which the black smoke would come from a chimney which would not ordinarily be called a funnel. I do not think any argument can be based upon the fact that the word "chimney" is used because the word "funnel" is a technical and almost secondary meaning for that kind of chimney. I cannot see any reason why emission of black smoke from steamers constantly plying on the Thames should not be as much prevented as the emitting of black smoke from chimneys on land. I therefore come to the conclusion that sect. 23 does not contain, as Mr. Bigham pressed us that it did, the whole code with regard to nuisances coming from steamships or smoke coming from steamboats. The language of sect. 24 is not enough to enable us to hold that it does not include the chimney of a steamship. Therefore I think this conviction was right. Upon the second point which Mr. Hamilton mentioned, I ought perhaps just to say we held the other day in *Central London Railway Company* v. *Hammersmith Borough Council* (90 L. T. 537), and I think we were right in saying so, that the order was not bad, because it did not specify works to be done, though the defendant asked for the specification of them if there were no works that could be done. I do not think that objection prevails. I think, therefore, that this appeal should be dismissed.

KENNEDY, J.—I am of the same opinion. To my mind the only point which certainly is not wholly free from difficulty is the question as to whether sect. 24 (*b*), "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance," includes the funnel of a tug-boat or steamer. Usually, no doubt, "chimney" is a phrase applicable to that through which smoke passes from a fire of some sort in a building. It is not the term which is technically the proper term to describe those passages or flues, or whatever you like to call them, on a steamboat, which convey the smoke from the furnace of the steamer to the upper air, but I see nothing to prevent "chimney" being used in what one may call its natural sense—namely, that of a passage by which smoke from a fire is carried away upwards. Otherwise you would have no "black smoke section," as my Lord has described it shortly, with regard to the description of thing which may send out smoke in quite as great quantities with quite as great mischief if it is enough to create a nuisance, as what may be more usually described by the word "chimney"—namely, the smoke passage from the roof of a building." There is no definite clause relating to the word "chimney" in this Act, as far as I know, and certainly one would expect it to have been referred to if there was one after the care that Mr. Hamilton and Mr. Bigham have shown in arguing this case. We have not heard that chimney is anywhere defined, and if it is not defined it seems to me naturally enough intended to cover here that which it may cover in a popular though not in a technical sense. I need not add anything on the other point to that which my Lord has said.

CHANNELL, J.—I agree. I think "chimney" in this section is used simply as the thing from which smoke does issue into the open air. It might quite well be found that the cases of funnels of steam vessels or of funnels of locomotive engines or other movable smoke-producing apparatus might be so dealt with elsewhere in the Act as to lead one to come to the conclusion that they were not intended to be included in these general words in sect. 24 (*b*), but in fact the operation of sect. 24 is only to apply the particular summary procedure in reference to certain cases of smoke nuisances, cases coming under (*a*) and coming under (*b*). The other sections deal with the construction and user of apparatus producing smoke, and do not deal, as sect. 24 does, with the consequences or results of it, which in certain cases may be dealt with under the summary procedure in reference to nuisances. The result seems to me to be that sect. 24 and sect. 23 are dealing not with different subject-matters but with different consequences of the subject-matter, and there is no reason, therefore, because steam vessels are specially dealt with under sect. 23 to say they cannot come under sect. 24. I see no reason for cutting down what seems to me the primary meaning of the word "chimney" in sect. 24. *Appeal dismissed.*

Solicitors: *J. A. Roberts; The City Solicitor.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, Feb. 3, 1904.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE ARNE. (*a*)

Bill of lading—Discharge of cargo—Goods to be taken "as fast as steamer can deliver"—Deficiency of railway waggons—Option of shipowner to discharge in other ways not exercised.

Goods were shipped under a bill of lading which provided: "The goods to be taken from the ship by the consignees (at their expense) immediately after arrival, and as fast as steamer can deliver or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods." On arrival of the vessel the consignees neither took delivery nor did the master exercise his option of landing or lightering the goods.

In an action by the charterers against the consignees for damages for detention of the vessel:

Held, that the plaintiffs were not deprived of their remedy because the master had not exercised his option as to landing or lightering the goods, and were entitled to recover.

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Held, further, that the plaintiffs having made out a primâ facie *case of delay in taking delivery by the defendants, the onus was upon the defendants to show that the delay arose from no default on their part, and was due to the want of appliances in the port, and that they had failed to do so.*

APPEAL by the plaintiffs from a judgment of the judge of the Swansea County Court in favour of the defendants.

The plaintiffs were Gebruder van Uden, of Rotterdam, the time charterers, and J. Roebe, the master of the steamship *Arne*, and claimed 51*l.* 5*s.* damages for detention of the steamship.

The defendants were W. Gilbertson and Co. Limited, the indorsees of bills of lading and consignees of the cargo.

The cargo was shipped in two parcels. The first parcel consisted of about 1078 tons of pig iron and 28 tons of old rails, and the second of about 910 tons of pig iron. It was shipped on board the *Arne* at Antwerp for Swansea by the same shipper in each case.

By the bills of lading, which were dated the 6th April and the 28th April 1903 respectively, it was stipulated:

The goods to be taken from the ship by the consignees (at their expense) immediately after arrival and as fast as steamer can deliver, or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods. All goods consigned to "order" will be delivered upon the quay, or into lighters, or warehoused at the option of the agents of the steamer, such delivery to be for account and risk of owners of the goods.

The discharge took place out of the ship direct into railway trucks.

According to the admission of facts the respondents commenced to take delivery of the first consignment of cargo at 9 a.m. on Tuesday the 14th April, but did not complete taking delivery until 12 30 p.m. on Saturday, the 18th April, making altogether 99½ hours. The respondents commenced taking delivery of the second consignment of cargo at 7.45 a.m. on Monday, the 4th May, and completed taking delivery at 10 p.m. on Thursday, the 7th May, making 86½ hours in all.

The appellants contended that a reasonable time for taking delivery of the first consignment of cargo expired at noon on Thursday, the 16th April, and of the second consignment at noon on Wednesday, the 6th May. The appellants claimed two days at 15*l.* per day making 30*l.* as damages for the first voyage, and one day ten hours for the second voyage, making 21*l.* 5*s.*—51*l.* 5*s.* in all. On the hearing of the appeal these damages were reduced to 41*l.*

The appellants alleged that their vessel was capable of delivering about 500 tons a day, and that the cause of the delay was that the defendants failed to see that a sufficient number of railway waggons were provided.

The respondents alleged that a reasonable amount to discharge per day based on averages in the case of previous steamers would be from 250 to 300 tons.

The learned County Court judge gave judgment for the defendants. His judgment was as follows:

I consider that the defendants are entitled to judgment on the construction of the clause in the bill of lading.

The plaintiffs appealed.

Meager for the appellants.—It is submitted the respondents did not take delivery within a reasonable time. The clause enabling the shipowners to land the goods is discretionary; it does not bind them to do so. It is inserted for their own protection, and their omission to do so is no answer to a claim for detention. As Lindley, L.J. put it in *Hick* v. *Rodocanachi* (65 L. T. Rep. at p. 303; 7 Asp. Mar. Law Cas. at p. 100; (1891) 2 Q. B. at p. 632): "These clauses are obviously inserted in the interest and for the benefit of the shipowner, and they give him an additional remedy for the recovery of what is due to him, and not a remedy in substitution for any which he would have apart from these clauses. The master is under no obligation to land the goods and assert his lien instead of allowing the consignee to land them, and leaving him to be sued for the payments he ought to make. The master is empowered to do this, but he is under no obligation to exercise the power. He is the person to decide whether he will exercise it or not." The ship could have delivered 500 tons of cargo a day, and the consignees ought to have provided sufficient trucks. He also referred to the case of

Modesto Pineiro and Co. v. *Dupré*, 86 L. T. Rep. 560; 9 Asp. Mar. Law Cas. 297.

Balloch, for the respondents, *contra*.—If there was no unreasonable delay the shipowner has no cause of complaint, and if he had one he could by exercising the power given him by the bill of lading compel the consignees to take delivery as there provided. The ordinary course of delivery is into railway trucks, and the evidence goes to show that under this method only 200 to 300 tons of cargo could be received per day. The supply of trucks is dependant on the railway company, over whom the respondents have no efficient control. The words "as fast as steamer can deliver" only mean as fast as the facilities of the port where delivery is taken will allow of:

Wyllie v. *Harrison*, 13 Sess. Ca. (4th), 92.

In that case the vessel had been chartered to carry iron ore "to Glasgow General Terminus or Queen's Dock, in charterer's option," and then "deliver as customary." It was also provided by the charter-party, "cargo to be discharged as fast as steamer can deliver after being berthed." At the general terminus the customary mode of discharge was into trucks, and the only trucks permitted were those of the Caledonian and North British Railway Companies. The Court of Session held the charterers were not responsible for the delay caused by want of trucks. As the Lord Justice-Clerk (Lord Moncreiff) said: "The place of delivery may be a port which is subject to regulations which are not within the powers of the charterer, and which must be complied with before delivery can be given at all. Where these regulations, which are incorporated into the charter-party, provide that goods shall not be laid down on the quay, but put into trucks, I think the whole obligation of delivery is subject to the possible contingency of trucks being available." This decision was approved by the Court of Appeal in *Good* v. *Isaacs* (67 L. T. Rep. 450; 7 Asp. Mar. Law Cas. 212; (1892) 2 Q. B. 555). There a vessel with a cargo of fruit went into a

fruit berth, but the cranes which had to be used for the discharge were under the control of Government officials, who refused to allow them to be used at once. It was held that the charterers were not liable for the delay. See also

Hulthen v. *Stewart*, 88 L. T. Rep. 702; 9 Asp. Mar. Law Cas. 403; (1903) A. C. 389.

In *The Jaederen* (68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351) the vessel was "to be discharged as fast as she can deliver." The custom of the port was then imported into the contract, and the defendants succeeded because the plaintiffs failed to make out any breach of the contract to discharge as fast as the ship could deliver. In *Lyle Shipping Company* v. *Cardiff Corporation* (83 L. T. Rep. 329; 9 Asp. Mar. Law Cas. 128; (1902) 2 Q. B. 638) it was held that as the charterers had done their best to obtain sufficient waggons for the railway company they were not liable. Smith, L.J. expressed the opinion (83 L. T. Rep., at p. 333; 9 Asp. Mar. Law Cas., at p. 133; (1900) 2 Q. B., at p. 643) that it did not matter whether the words "as customary" were in the contract or not, "for if not they would be implied." He also referred to

Postlethwaite v. *Freeland*, 42 L. T. Rep. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599; Carver on Carriage by Sea, 3rd edit., sect. 619 (*a*).

Meager in reply. — It is a question of fact whether delivery was taken within a reasonable time or not under the circumstances:

Metcalfe v. *Thompson*, 18 Times L. Rep. 706.

The PRESIDENT.—I thought at first that we had not the materials before us for deciding the whole of the case; but, on considering the matter carefully, it seems to me that we are in a position to deal with it as it stands. I have no doubt that the learned judge's decision was based on the view that on the true construction of the bill of lading the shipowners had their remedy, and their sole remedy, in the power to land the goods on the quay or in lighters if they were not taken away by the consignees. In addition to the words "I consider that the defendants are entitled to judgment on the construction of the clause in the bill of lading," the learned judge says that counsel for the plaintiffs contends that that condition was optional, showing that what he based his decision on was, not that there was no right of action in the case, but that the sole remedy for a breach of the condition as to taking delivery was in the terms provided by the bill of lading. I am unable to agree with the learned judge that that view is correct. It seems to me clear that the words in the bill of lading do not take away the ordinary right of bringing an action if the terms of the bill of lading are departed from. It seems to me that it would be unreasonable to say that the landing of these goods was the sole remedy. Supposing the sole cause of the non-delivery was that the trucks were not ready, it would be hard to throw upon the master the responsibility of saying that the delay was so great that he could not allow it to continue; and, on the other hand, if the trucks could not be supplied by the railway company, I am by no means sure that the hardship would not be on the consignees of the goods. It would be far more reasonable to say that the ordinary remedy of the shipowner remained the same, but that he had an alternative option which he could have exercised. In this case he does not seem to have exercised it, and I do not think the learned judge was right in holding that that debarred him from bringing an action to enforce his ordinary rights under the bill of lading.

Then comes the question whether or not we are able under the circumstances to enter judgment for the plaintiffs. I think we are, because what is said now is that judgment ought not to be entered for the plaintiffs because there is some defence which the defendants either have set up or might have set up. I do not know that they might not possibly have raised in the court below a defence other than that which they have raised; but in the court below they did raise the defence as to the non-supply of trucks by the railway company, and clearly also raised a further defence—namely, that they were justified in taking the average quantity of goods discharged per day of similar cargoes as a test of their own obligations under the bill of lading—and I think it is too late for them now to come forward and say that a totally different defence might have been raised. It appears to me clear that no such defence ought to be successful. The plaintiffs showed, without contradiction, what the capacity of their steamer was, and then it was shown further that the delay arose from the dearth of waggons. That, I think, made out a *primâ facie* case in favour of the plaintiffs. It may well be that the obligation of the consignee was to take delivery as fast as the steamer could deliver, having regard to the mode of delivery and the state of the appliances with which delivery could be taken; but then if their answer was that they had done all they could, and that the delay arose from no default on their part, and that they did everything on their part, then they ought to have shown that. It was upon them to do so. But the moment the plaintiffs showed that but for the want of waggons they could have delivered at a certain rate, then, if the defendants could have shown that by no fault of theirs, but by the fault of other people, such as the want of railway trucks, the delay was caused, it would have been a different matter; but they did not attempt to show that. I do not agree that the question of average quantity was material here, though, in taking into consideration what the steamer could do, you have to consider the actual state of things—the appliances of the port, and the mode of delivery; still, that does not relieve the defendants from their liability to show that they have done all they could, and that it was not their fault. A *primâ facie* case is made out against them, and there is no answer either set up, or which, to my mind, can be set up, to meet the case of the plaintiffs. In these circumstances I am prepared to give judgment for the plaintiffs. The figures work out at 41*l.* as the amount, on the plaintiffs' evidence, which they are entitled to recover. I think, therefore, the proper course will be to reverse the judgment of the court below, and give judgment for the plaintiffs.

BARNES, J.—I agree with the learned President as to the construction of the bill of lading, and also, on the facts, I think with him that the plaintiffs made a *primâ facie* case of non-acceptance or non-taking of delivery from the ship by the consignees, immediately after arrival,

as fast as steamer can deliver, whether the words "as customary" are implied or omitted. They made a *primâ facie* case that they were ready to deliver, and to deliver easily at a rate which they say could have been exceeded. No answer is made to that by the defendants upon the facts. No explanation is given, and there is nothing to show that they could not have discharged the ship as fast as customary, assuming those words to be inserted in the bill of lading. All that they have done is to attempt to set up a case of delivery of average quantities of similar cargoes, the contracts respecting which are not dealt with in the evidence before us, and there is an attempt to make out a case of a fair and reasonable amount. They do not seem to have answered the *primâ facie* case made out by the plaintiffs, and, therefore, I agree that there should be judgment for the plaintiffs.

Solicitors for the appellants, *Spence, Chapman,* and *Co.*, agents for *John R. Richards*, Swansea.

Solicitors for the respondents, *Botterell* and *Roche*, agents for *William Cox*, Swansea.

Feb. 2 and 9, 1904.

(Before Sir F. JEUNE, President, and BARNES, J.)

THE NORMANDY. (a)

Damage to pier by ship—Action by owner of pier—County Court jurisdiction—Writ of prohibition—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3.

By sect. 3, *sub-sect.* 3, *of the County Courts Admiralty Jurisdiction Act* 1868 *it is provided that County Courts having Admiralty jurisdiction shall have jurisdiction as to any claim for "damage by collision."*

The plaintiff was the owner of a pier, and brought an action in the County Court against the defendants for damage done by their vessel to his pier. The defendants moved for a writ of prohibition.

Held, that there was no jurisdiction under sect. 3, *sub-sect.* 3, *for the County Court judge to determine the action, and that a writ of prohibition must therefore go.*

MOTION on behalf of the owners of the steamship *Normandy* for a writ of prohibition to the judge of the County Court of Barnstaple to restrain proceedings.

The plaintiff, Reginald Joseph Weld, who, being a person of unsound mind, sued by his committees, was the owner of a pier at Ilfracombe, and the action was brought to recover 200*l.* for damage alleged to have been done by the defendants' steamship to the pier. The action was brought under sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868, which gives to any County Court having Admiralty jurisdiction power to hear and determine causes as to any claim for "damage by collision."

The defendants contended that the words "damage by collision" referred only to collisions between ships, and that, although the amending Act of 1869 extended the Admiralty jurisdiction of County Courts to damage to ships, whether by collision or otherwise, yet it did not give the court power to deal with claims for damage to a fixed object such as a pier.

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

Sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) is as follows:

> Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes): (3) As to any claim for damage to cargo or damage by collision—Any cause in which the amount claimed does not exceed three hundred pounds.

Sect. 4 of the County Courts Admiralty Jurisdiction Act 1869 (32 & 33 Vict. c. 51) is as follows:

> The third section of the County Courts Admiralty Jurisdiction Act 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds.

The defendants now moved the court for a writ of prohibition to prohibit the learned County Court judge from hearing and determining the action.

Dawson Miller, for the defendants, in support of the motion.—Sect 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868, under which the action is brought, gives a County Court jurisdiction to hear and determine causes as to any claim for "damage by collision." Collision must be a collision between ships. That is the ordinarily understood meaning of the word in the Admiralty Court:

> *Robson* v. *Owner of the Kate*, 59 L. T. Rep. 557 6 Asp. Mar. Law Cas. 330; 21 Q. B. Div. 13;
> *Everard* v. *Kendall*, 22 L. T. Rep. 408; 3 Mar. Law. Cas. O. S. 391; L. Rep. 5 C. P. 428.

It is true that sect. 4 of the County Courts Admiralty Jurisdiction Act 1869 extended the jurisdiction to damage to ships, "whether by collision or otherwise," but that would not include damage by a ship to a structure such as a pier.

Herbert Chitty and *H. Stuart Moore*, for the plaintiffs, *contra*. — The language used in *Robson* v. *Owner of the Kate* (*ubi sup.*) is only a dictum. The damage done there was to a pile-driving machine on a wharf on the bank, and the ground of the decision was that damage which had been done on land outside the ebb and flow of the tide could not have fallen within the jurisdiction of the Court of Admiralty, and therefore did not come within sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868. The intention of the Legislature was to give the County Courts the same jurisdiction as the High Court had:

> *The Zeta*, 21 C. C. C. Rep. 70; 68 L. T. Rep. 40; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468.

The High Court clearly has jurisdiction to try the action under sect. 7 of the Admiralty Court Act 1861. That was decided in

> *The Uhla*, 19 L. T. Rep. 89; 3 Mar. Law Cas. O. S. 148; L. Rep. 2 A. & E. 29n.

See also

> *The Excelsior*, 19 L. T. Rep. 87; 3 Mar. Law Cas. O. S. 151; L. Rep. 2 A. & E. 268.

The word "collision" has been used with regard to other objects than a ship—*e.g.*, in the case of damage done by a ship to a barge (*The Malvina*, 6 L. T. Rep. 369; 1 Mar Law Cas. O. S. 341; Lush. 493); by a ship to a ship (see *The Uhla*, *ubi*

sup.); by a ship to a wharf (*The Excelsior, ubi sup.*); collision by a ship with a keel (*The Sarah*, Lush. 549); and in *Union Marine Insurance Company* v. *Borwick* (73 L. T. Rep. 156; 8 Asp. Mar. Law Cas. 71; (1895) 2 Q. B. 279) it was held that a vessel which was driven on to a sloping bank formed of loose boulders to protect a breakwater was lost by collision and not by stranding, and therefore the loss came within the words of an insurance policy, "loss or damage through collision with . . . piers or stages or similar structures." See also

The Munroe, 70 L. T. Rep. 246; 7 Asp. Mar. Law Cas. 407; (1893) P. 248.

They also referred to

The Merle, 31 L. T. Rep. 447; 2 Asp. Mar. Law Cas. 402;
River Wear Commissioners v. *Adamson*, 37 L. T. Rep. 543; 3 Asp. Mar. Law Cas. 521; 2 App. Cas. 743;
Reg. v. *Judge of City of London Court*, 66 L T. Rep. 135; 7 Asp. Mar. Law Cas. 140; (1892) 1 Q. B. 273;
The Indus, 56 L. T. Rep. 376; 6 Asp. Mar. Law Cas. 105; 12 P. Div. 46;
The Robert Pow, 9 L. T. Rep. 237; 1 Mar. Law Cas. O. S. 392; Br. & L. 99;
The Merchant Shipping Act 1894, ss. 418, 419.

Dawson Miller in reply. *Cur. adv. vult.*

Feb. 9.—The judgment of the court was delivered by

BARNES, J.—This is a motion for a writ of prohibition to the judge of the County Court of Barnstaple to restrain proceedings in a suit by the committees of the estate of the plaintiff, the owner of a pier at Ilfracombe, in the county of Devon, against the defendants, the owners of the steamship *Normandy* of Liverpool. According to an affidavit filed in the case, the summons was issued by the plaintiff *in rem*, claiming 200*l.* against the steamship in respect of damage alleged to have been caused by the vessel to the pier, no part of which is afloat. The action was brought under sub-sect. 3 of sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, which is as follows: [His Lordship then read the section.] It was contended by counsel for the applicants, the defendants in the suit, that the suit was not a cause as to a "claim for damage by collision," within the meaning of the sub-section, and that the question raised was covered by authority. On the other hand, counsel for the respondent argued that the words in the sub-section, "damage by collision," include a claim such as that made by the plaintiff, and that the authorities cited on behalf of the defendants were distinguishable from the present case, and inconsistent with the judgments in the House of Lords in the case of *The Zeta* (*ubi sup.*). The simple question is whether the words "damage by collision" include damage done to a pier by a ship striking against it. The principal cases relied on by the applicants were *Everard* v. *Kendall* (*ubi sup.*) and *Robson* v. *Owner of the Kate* (*ubi sup.*). In the former case it was held that the Admiralty jurisdiction of the County Court in cases of collision was not more extensive than that of the High Court of Admiralty, and, as the Court of Admiralty had no jurisdiction in the case of a collision on the Thames between two barges propelled by oars only, the County Court had no such Admiralty jurisdiction. In the course of his judgment Montague Smith, J. said (22 L. T. Rep., at p. 409; 3 Mar. Law Cas. O. S., at p. 392; L. Rep. 5 C. P., at p. 432): "What is the meaning of 'damage by collision'? We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sustained by a ship from another ship coming in contact with it." The late Master of the Rolls, then Brett, J., said the Act of 1868 "gives the County Court power to try in a particular way questions of salvage, claims for towage, necessaries supplied to ships, and wages, and claims for damage to cargo or damage by collision. Damage by what collisions? Looking at sects. 7 and 22 of the Act of 1868, it seems to me that it means a collision between two vessels—such vessels as were formerly dealt with in the Admiralty Court." These dicta are favourable to the defendants' contention in this case; but the case is not conclusive in their favour, because the basis of the decision appears to have been that it was not the intention of the Legislature to give the County Courts Admiralty jurisdiction over Admiralty causes other than those over which the Admiralty Court had jurisdiction, and that the Court of Admiralty had no jurisdiction in respect of such a collision as that in question in the case. It did not decide what jurisdiction the County Courts have within their limit of amount in cases of damage done by a ship in which the Admiralty Court has jurisdiction. In *Robson* v. *Owner of the Kate* (*ubi sup.*) it was held that damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river was not "damage by collision" within sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868, so that a County Court had no Admiralty jurisdiction in respect of such damage. Wills, J. in the course of his judgment said (59 L. T. Rep., at p. 558; 6 Asp. Mar. Law Cas., at p. 330; 21 Q. B. Div., at p. 14): "It is not necessary to define the word 'collision.' The words 'damage by collision,' used, as here, in an Act the object of which is to confer an Admiralty jurisdiction, cannot be construed as including damage which has taken place on land, outside the ebb and flow of the tide, and which would certainly not have fallen within the original jurisdiction of the Court of Admiralty in respect to collision"; and Grantham, J. said: "In *Everard* v. *Kendall* (*ubi sup.*), which was a proceeding by way of prohibition under this Act, Montague Smith, J. is reported to have said"—he then quotes the passage I have already referred to, and adds: "This explanation seems to me well founded, and I think the preceding words 'damage to cargo,' which obviously refer to damage to cargo while on board a ship, tend to show that the intention of the Legislature was to confine the newly conferred jurisdiction to cases of collision between ships." The reason given by the latter judge for his decision is applicable to the present case; but the basis of the judgment of Wills, J. is that the damage was on land, outside the ebb and flow of the tide, whereas, if there be any distinction in the case before us, the damage is to a structure which stands in the sea. The case mainly relied on by counsel for the plaintiff was

The Zeta (*ubi sup.*), in which it was held that the jurisdiction given by sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, and extended by sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869, included a claim for damage to a ship by collision with an object which was not a ship—*e.g.*, a pier-head. That case turned on sect. 4 of the amending Act of 1869. The argument for the appellants, the Mersey Docks and Harbour Board, which succeeded in the House of Lords, was that sect. 4 of the Act of 1869 had clear words which gave the County Courts jurisdiction in "all claims for damage to ships, whether by collision or otherwise," and that the Admiralty Court had jurisdiction over such cases. The respondents do not appear to have disputed that the case fell within the language used in sect. 4, but argued that it was not intended to confer jurisdiction beyond that possessed by the Court of Admiralty, and that the action was not within that jurisdiction. The judgments were to the effect that the Admiralty Court had jurisdiction over claims of the character of that in question in the case, and that the claim fell within the words of sect. 4. Reference was also made by counsel for the plaintiff to expressions in some judgments in which the word "collision" has been used in a general way in relation to the impact of a ship against another object, and to some other cases which have only an indirect bearing on the present case; but in my opinion little assistance is to be derived from these references. I may here observe that the true meaning of collision is not a mere striking against, but a striking together; and to me it seems more correct to speak of a vessel stranding, or running, or striking upon or against rocks or the shore, than colliding therewith; and the same, to my mind, is true when the contact is by a vessel with some structure erected on the rocks or shore, and I notice that the use of the word "collision" in sects. 418 and 419 of the Merchant Shipping Act 1894 appears to refer only to collisions between ships.

If this matter were clear of all that has been said in other cases, the question would appear to me to be a simple matter of construction, and having regard to the object of the Act of 1868, and its general scope, and the ordinarily understood meaning of the words "damage by collision" in the Admiralty Court, where the term "causes of damage" is the general expression for damage cases, I should come to the conclusion that the word "collision" referred to collision between ships. This opinion is in accordance with the case of *Everard* v. *Kendall* (*ubi sup.*) and *Robson* v. *Owner of the Kate* (*ubi sup.*), and there is nothing of substance to conflict with this view unless the argument based on the case of *The Zeta* (*ubi sup.*) does so. That argument comes to this, that the Admiralty Court had jurisdiction in 1868 in causes of damage received by or done by a ship which included a case of the present kind, and that the Act of 1868 gave similar jurisdiction to the County Courts within a limited amount; but in my opinion that argument seeks to establish too much. It has been decided in several cases that the County Court Acts of 1868 and 1869, while conferring Admiralty jurisdiction upon County Courts up to certain limited amounts, conferred no greater jurisdiction, except with regard to charter-parties, than was possessed by the Admiralty Court: (see *The Dowse*, 22 L. T. Rep 627; 3 Mar. Law. Cas. O.S. 424; L. Rep. 3 A. & E. 135; *Allen* v. *Garbutt*, 4 Asp. Mar. Law Cas. 520n.; 6 Q. B. Div. 165; and *Reg.* v. *Judge of the City of London Court*, *ubi sup.*). The arguments and judgments in these and other cases show that the question has in such cases not really been whether the particular claim came within the ordinary meaning of the words of the County Court Acts, but whether the claim was one in respect of which the Admiralty Court had jurisdiction, and, if not, it was considered that it could not have been intended to confer Admiralty jurisdiction in such a case in the County Courts, as these Acts were to confer Admiralty jurisdiction, though sect. 2 of the Act of 1869 in certain matters gave a somewhat wider jurisdiction: (see *The Alina*, *ubi sup.*). I am not aware whether the words "damage to cargo," in sub-sect. 3 of the Act of 1868, have yet been considered: (see *The Victoria*, 56 L. T. Rep. 499; 6 Asp. Mar. Law Cas. 120; 12 P. Div. 105). So also in *The Zeta* (*ubi sup.*) the real question was not whether the claim fell within the ordinary meaning of the words of sect. 4 of the Act of 1869, or as to the meaning of the word "collision," but whether the words of sect. 4 should have a restricted interpretation on the ground, as was contended, that the case was not within the jurisdiction of the Admiralty Court. It was held, however, in the House of Lords, overruling the Court of Appeal, that the case was within the jurisdiction of the Admiralty Court, and thus any difficulty in the construction of the Act of 1869 was removed. In the present case the difficulty does not arise upon any question as to the jurisdiction of the High Court. It is clear from the terms of the Admiralty Court Act 1861, and the decisions thereon, that the High Court has Admiralty jurisdiction in respect of this claim as being damage done by a ship (see *The Uhla*, *ubi sup.*; and *The Excelsior*, *ubi sup.*); but the question is whether the wording of the Act of 1868 is sufficient to give similar jurisdiction to the County Court within the limited amount in such a case. Now, it is quite clear that the Acts of 1868 and 1869 do not give Admiralty jurisdiction within the limited amounts in all cases in which the Admiralty Court has jurisdiction. For instance, no jurisdiction is given in causes of possession, co-ownership cases, mortgage or bottomry, and it cannot therefore be inferred that the County Courts were intended to have Admiralty jurisdiction in all Admiralty causes up to limited amounts. On the contrary, care is taken to specify exactly what causes may be brought in the County Court. Whatever the old Admiralty jurisdiction was at the time when the Act of 1868 was passed, the Acts of 1840 and 1861 had enacted that the High Court of Admiralty should have jurisdiction over all claims for "damage received by any ship or sea-going vessel," and "over any claim for damage done to any ship," and nothing would have been easier than to have used similar words in the County Courts Admiralty Jurisdiction Act of 1868, whereas the words adopted in that Act are "damage by collision." We have only, therefore, to consider what is included in these words. All cases of damage done by a ship cannot, in my opinion, be so included. It has been held, for

instance, that injury to a diver who was caught by the paddle-wheel of a steamer (*The Sylph*, 17 L. T. Rep. 519; 3 Mar. Law Cas. O. S. 37; L. Rep. 2 A. & E. 24), approved in *The Beta* (20 L. T. Rep. 988; L. Rep. 2 P. C. 447), which, however, was dissented from in the case of *Smith* v. *Brown* (24 L. T. Rep. 808; L. Rep. 6 Q. B. 729); damage done to a cable in freeing it from a vessel's anchor by which it had been fouled (*The Clara Killam*, 23 L. T. Rep. 27; 3 Mar. Law Cas. O. S. 463; L. Rep. 3 A. & E. 161); and damage to a vessel through grounding to avoid another vessel owing to negligence in the navigation of the other vessel (*The Industrie*, 24 L. T. Rep 446; 1 Asp. Mar. Law Cas. 17; L. Rep. 3 A. & E. 303) could be sued for in the Admiralty Court; but clearly these cases could not properly be called cases of damage by collision. Other illustrations may be put analogous to the last case, though probably they are rather cases of damage received by a ship than of damage done by a ship. Possibly the plaintiffs' argument need not be put so high as to include in damage by collision all cases of damage done by a ship, but only cases of damage done by one ship to another, or by a ship to some other object by striking against it; but even then the word "collision" in the ordinary meaning, and as ordinarily used and understood in the Admiralty Court, would not be properly applicable to the latter case. Cases of striking something which is not engaged in navigation are very rare, and it is not unreasonable to assume that, in using the word "collision," the framers of the Act intended to deal with the class of case which forms the ordinary subject of a collision suit. It was urged that it would be strange if, as held in *The Zeta* (*ubi sup.*), the owner of a pier or dock could be sued in the County Court for damage caused to a ship by the negligence of the servants of such owner, and yet that such owner could not in the County Court sue for damage to the structure by negligence on the part of the ship's people; but the answer appears to be that the amending Act of 1869 covers the one case but not the other. The collocation of the words "damage by collision" and "damage to cargo" in the sub-section, to my mind, also intends to show that the sub-section was only dealing with ships, though what is included in "damage to cargo" is not a subject for present consideration. For these reasons I am of opinion that the writ of prohibition must go, and that the applicants are entitled to their costs of this motion against the respondents.

Solicitors for the applicants, *Botterell* and *Roche*, agents for *John J. Richards*, Swansea.

Solicitors for the respondents, *Eland*, *Nettleship*, and *Brett*, agents for *Ffinch* and *Chanter*, Barnstaple.

Feb. 29, *March* 1, 2, 4, 8, *and* 15, 1904.

(Before BARNES, J. and TRINITY MASTERS.)

THE MERCEDES DE LARRINAGA. (*a*)

Collision—Compulsory pilotage—Port of Liverpool — Vessel proceeding through the port to Manchester—8 *Anne, c.* 8—*Mersey Dock Acts Consolidation Acts* 1858 *and* 1899 (21 *&* 22 *Vict. c.* 92 *and* 62 *&* 63 *Vict. c.* 172)—*Upper Mersey Navigation Act* 1876 (39 *&* 40 *Vict. c.* 104) *ss.* 4, 51—*Manchester Ship Canal Act* 1885 (48 *&* 49 *Vict. c.* 188)—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 605, 633.

Pilotage is compulsory on a vessel inward bound from the sea through the port of Liverpool to Manchester until she enters the Ship Canal at Eastham.

Sect. 128 *of the Mersey Dock Acts Consolidation Act* 1858 *requires that "the pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool."*

The fact that a vessel anchors for the purpose of waiting for the tide does not put an end to the compulsory services of the pilot.

Semble, *pilotage is also compulsory on vessels going out from Eastham through the port of Liverpool to the sea.*

ACTION for damage by collision brought by the owners of the Swedish steamship *Bifrost* against the owners of the steamship *Mercedes de Larrinaga*.

The *Bifrost* was a steamship of 2122 tons gross register, and at the time of the collision was on a voyage from Skutskar to Manchester with a general cargo on board, and manned by a crew of twenty-five hands all told. The *Mercedes de Larrinaga* was a steamship of 4154 tons gross register, and was on a voyage from Galverston to Manchester with a cargo of cotton, and manned by a crew of thirty-four hands all told. While on her way up the Mersey she stopped and anchored in order to wait for the tide before entering the Eastham Docks.

The collision occurred in the Eastham Channel, river Mersey, near the No. 4 buoy. Both vessels at the time were in charge of pilots.

Barnes, J. came to the conclusion on the facts that the collision was caused by the negligent navigation of the *Mercedes de Larrinaga*, and held that the fault was that of the pilot alone.

The defendants alleged that the pilot was compulsorily in charge at the time, and that they were not therefore liable for the collision.

The material sections of the various Acts of Parliament dealing with the question are as follows:

By sect. 3 of 8 Anne, c. 8—an Act for making a convenient dock or basin at Leverpoole for the security of all ships trading to and from the said port of Leverpoole—the limits of the port are defined as:

The limits and extent whereof are as far as a certain place in Hoyle-Lake called the Redstones, and from thence all over the river Mersey to Warrington and Frodsham Bridges.

Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. 92):

Sect. 118. The board shall have the whole and sole regulation and management of pilots and of pilot boats, and of the pilotage annuity fund, and one of the committees to be appointed by them under or by virtue of the powers vested in them by the Mersey Docks and Harbour Act 1857, and of this Act, shall consist of not less than twelve persons, who shall be called the pilotage committee. . . .

Sect. 121. The board may examine any person, being of the age of eighteen years and upwards, who shall have served as an apprentice in any of the Liverpool

(*a*) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

pilot boats for not less than three years . . . and every such apprentice or other person who upon any such examination shall be found to be qualified to act as a pilot, and shall be approved of by the board, shall receive a licence in writing, signed by the secretary of the board, certifying that he is duly qualified to act as a pilot for the port of Liverpool. . . .

Sect. 123 provides for a penalty on persons acting as pilots without a licence.

Sect. 124 provides that pilots misbehaving themselves are to have their licences recalled.

Sect. 125. If any pilot, after being personally required, or after a proper signal shall be made by the master of any inward bound vessel, shall refuse to take the charge of such vessel . . . or shall without reasonable cause refuse to afford any extraordinary assistance required by the master of any vessel in distress from the boat of such pilot or the crew thereof, such pilot shall for every such offence be liable to a penalty of not exceeding ten pounds, and may, at the discretion of the board, be deprived of his licence.

Sect. 127. Every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool, through the Queen's Channel, so far to the westward as the buoy commonly called or known by the name of the Formby North-west Buoy, or Fairway Buoy of the Queen's Channel; and, if sailing through the Rock Channel, pilot the same so far to the westward as the north-west buoy of Hoyle; and any pilot who shall in any case refuse to pilot such vessel to such distances as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also at the discretion of the board be deprived of his licence.

Sect. 128. The pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to receive five shillings per day for such attendance.

Sect. 130. In case the master of an inward bound vessel, other than a coasting vessel in ballast or under the burthen of one hundred tons, shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose, such master shall pay to such pilot, or if more than one then to the first of such pilots who shall have offered his services, the full pilotage rates which would have been payable to him if he had actually piloted such vessel into the port of Liverpool.

Sect. 133. The board may from time to time determine, vary, and alter and fix rates of pilotage to be paid to pilots for piloting vessels, such rates to be according to the draught of water of such vessels, and to be within the limits following—that is to say, . . .

Sect. 138. If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake, or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of five shillings and no more; provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage, or being inward bound shall enter the river Mersey.

Mersey Docks (Pilotage, &c.) Act 1899 (62 & 63 Vict. c. 172).

Sect. 3. Where a vessel outward bound from the port of Liverpool calls at any stage in the river Mersey to the northward of an imaginary straight line drawn from the Dingle Point on the Lancashire shore of the Mersey to the New Ferry Slip on the Cheshire shore or anchors or moors in the river to the northward of such line . . . the duties of the pilot shall extend to and include the taking her to and from and attending her at every such stage or mooring.

Sect. 4. The duties of a pilot in charge of any vessel inward bound shall extend to and include the taking her to and from and attending her to any stage, anchorage, or mooring in the river Mersey to the northward of the imaginary line hereinbefore mentioned to which she may go for the purpose of discharging any passengers, crew, animals, or cargo, or while waiting for tide or weather, or otherwise for any purpose incidental to the voyage before entering any wet dock, and the obligation of the master to employ a pilot when inward bound shall extend to and include an obligation to employ a pilot to perform the duties above mentioned.

Sect. 5. When a vessel is neither inward bound nor outward bound the master shall be obliged to employ a pilot (*a*) For her navigation or movement. Provided, further, that this section shall not apply to any vessel when passing to or from any place lying to the northward of the said imaginary line from or to (i.) Garston Weston Point or Ellesmere Port; (ii.) any of the Manchester Ship Canal Company's docks at Runcorn; (iii.) any dock, quay, or wharf lying to the southward of the said imaginary line and being within the jurisdiction of the Upper Mersey Commissioners.

Schedule.—Pilotage rates.—(2) In the case of vessels referred to in the section of this Act of which the marginal note is "Pilots to be employed when moving vessel in the river," for each time a vessel is navigated or moved in the river Mersey northward of the imaginary line hereinbefore mentioned, a sum not exceeding . . . 2*l*.

Upper Mersey Navigation Act 1876 (39 & 40 Vict. c. 104):

Sect. 4. This Act shall apply to that part of the river Mersey lying between an imaginary straight line drawn across that river from the Eastham Ferry Slip to a point on the north-east bank of that river distant twenty chains measured along that bank in a south-easterly direction from the lighthouse at Garston, and another imaginary straight line drawn across the river at a place called Bank Quay in Warrington in the county of Lancaster, and which part of the river Mersey is in this Act referred to as the Upper Mersey.

Sect. 51. Saving always and reserving to the Mersey Dock and Harbour Board . . . all their several and respective rights and interests, in as full and ample a manner as they or any of them could or might have held or enjoyed the same if this Act had not been passed, except so far as by this Act is declared.

Manchester Ship Canal Act 1885 (48 & 49 Vict. c. 188):

Sect. 3. From and after the completion and opening for traffic of the canal by this Act authorised the said canal and so much of the navigable waters of the rivers Mersey and Irwell as lie between Hunt's Bank in the township and parish of Manchester and the limit of the port of Liverpool at Warrington, and all channels, canals, cuts, docks, and works of the company within those limits shall be and are hereby constituted the harbour and port of Manchester, and the company shall be the harbour authority of that harbour and port.

Sect. 211. Nothing in this Act shall take away, alter, or prejudicially affect any power, jurisdiction, or authority of the Mersey Docks and Harbour Board.

Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 605 (1). The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that

district shall be exempted from any obligation to employ a pilot in that district, or to pay pilotage rates when not employing a pilot within that district. (2) The exemption under this section shall not apply to ships loading or discharging at any place situate within the district or at any place situate above the district on the same river or its tributaries.

Sect. 633. An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

The following is the "Notice to Pilots" issued by the Mersey Docks and Harbour Board:

Piloting of vessels inward bound.—The pilots are hereby reminded that it is the duty of the pilot in charge of any inward bound vessel to pilot her into some one of the wet docks within the port, whether belonging to the board or not, without making any additional fee for so doing. Note.—Wet docks within the port include (*inter alia*) the docks at Garston and the locks to the Ship Canal at Eastham. If, before pilotage is completed, a master wishes to supersede the pilot, the pilot must warn the master that he and any unqualified person he may intend to employ will be committing a pilotage offence, and the pilot must also distinctly offer to complete his pilotage services. If the master still persists, the pilot must then take such course as he may deem best, and report the circumstances at the first possible opportunity.—By order, (Signed) MILES K. BURTON, General Manager and Secretary, Dock Office, Liverpool, July 22, 1902.

Evidence was called from which it appeared that the river Irwell, which enters the canal at Woden-street Bridge, is absorbed into the river Mersey at Mersey Weir. The Manchester Docks are on a portion of the canal which has availed itself of the bed of the Irwell, and the docks are entirely supplied by water from that river.

Aspinall, K.C. and *Noad* for the plaintiffs.—It is submitted that the port of Manchester, as it is connected with the port of Liverpool by a canal, is not situated "on the same river or its tributaries" within the meaning of sect. 605 (2) of the Merchant Shipping Act 1894. If so, pilotage is not compulsory. The case is not covered by the provisions of the Mersey Dock Acts Consolidation Act 1858, because that Act only deals with vessels inward bound to or outward bound from the port of Liverpool. The terminus must be the port of Liverpool, and beyond that the Mersey Docks and Harbour Board have no power to impose terms. The terms "outward bound" and "inward bound" only apply to vessels doing business with the port of Liverpool. The intention of the Act of 1858 was to deal with the class of larger vessel which did not, and could not at the time the Act was passed, go beyond Liverpool. The sections form a complete code based on the requirements of the port of Liverpool, and it is submitted none of the provisions apply to vessels going to Manchester. As soon as the *Mercedes de Larrinaga* came to anchor the duties of the pilot were at an end:

The Servia and Carinthia, 78 L. T. Rep. 54; 8 Asp. Mar. Law Cas. 353; (1898) P. 36.

The *Mercedes de Larrinaga* anchored when she was to the northward of the imaginary line laid down in sect. 3 of the Mersey Docks (Pilotage, &c.) Act 1899. She was not proceeding to a wet dock, for she was out of the region of wet docks. The Eastham Locks cannot be said to be in any sense a wet dock. Wet docks must mean docks of such a nature that they can be used for loading and discharging cargo in or repairing ships. The Legislature has expressly granted exemptions to vessels passing through pilotage districts. See sect. 605 of the Merchant Shipping Act 1894 and sect. 5 of the Mersey Docks (Pilotage, &c.) Act 1899. The whole scheme of the latter Act deals with vessels to the northward of the imaginary line laid down in sect. 3. The pilot can refuse to take the vessel on any further, or if he does take her on he is entitled to demand further payment. The case is not within the principles laid down in *The Charlton* (73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29). In that case and the earlier case of *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237; L. Rep. 4 Ex. 238) it was held that the owners were not responsible for the fault of the pilot because at the time of the collision it was not established that the relationship of master and servant existed at the time of the collision between the owners and the pilot. Unless an Act of Parliament says so in clear language the courts are always slow to say that there is an obligation to take a pilot.

Pickford, K.C. and *Dawson Miller*, for the defendants, *contra*.—According to the plaintiffs' contention if a ship bound to Manchester arrives off the bar at a time when she may get through to the Eastham Locks without having to stop and anchor for the tide then she may be under compulsory pilotage, but if she does stop and anchor, pilotage is not compulsory after she has come to anchor. Sect. 128 of the Mersey Dock Acts Consolidation Act 1858 is not a complete code of the duties of the pilot. All that it provides is the additional obligation that the pilot shall move and take a vessel into a wet dock. The works at Eastham are a wet dock within the meaning of the Act. See the notice to pilots issued by the Mersey Docks and Harbour Board. As an inward bound vessel the *Mercedes de Larrinaga* was bound to take a pilot, and she was no less an inward bound vessel because she was bound through the port. Mere temporary anchorage does not put an end to the terms of service on which the pilot is employed:

The Rigborgs Minde, 49 L. T. Rep. 232; 5 Asp. Mar. Law Cas. 123; 8 P. Div. 132.

If the plaintiffs' contention is right, the words "inward bound" must be limited to a vessel bound to a wet dock in the port of Liverpool. They also referred to

The Maria, 16 L. T. Rep. 717; L. Rep. 1 A. & E. 358;
The Annapolis, 4 L. T. Rep. 417; 1 Mar. Law Cas. O. S. 69; Lush. 295;
The *London Gazette*, Jan. 2, 1894, setting out the Treasury warrant of Nov. 21, 1893, defining the limits of the port of Manchester.

Aspinall, K.C. in reply.—The works at Eastham were expressly taken out of the limits of the port of Liverpool by sect. 3 of the Manchester Ship Canal Act 1885, and therefore the locks cannot be said to be a wet dock within the limits of the port of Liverpool.

Cur. adv. vult.

March 16.—BARNES, J.—This case is one which one may say bristles with points, and in giving my judgment I have to deal with it in the way it stands and after such argument as I have had. I feel, however, that there may be some points which may have escaped my attention, and possibly the attention of counsel, too. My opinion of the case has been come to upon the argument which I have had, and I now proceed to deliver it. The collision in this case took place between the *Bifrost* and the *Mercedes de Larrinaga* on Monday, the 21st Dec. last, in the Eastham Channel of the river Mersey, near a buoy which is marked No. 4 on the chart. I think it is the last buoy in coming in towards Eastham before the Eastham Ferry is reached. Of course, the place where this collision took place is material. Both the vessels were proceeding to the Eastham Locks on the way to Manchester, and both of them were in charge of duly licensed Liverpool pilots. The conclusion of fact to which I came on hearing the case, with the assistance of the Elder Brethren, was that so far as the navigation was concerned the *Mercedes de Larrinaga* was alone to blame for the collision, and that the fault was the fault only of her pilot, and as the defendants, the owners of the *Mercedes de Larrinaga*, had pleaded a plea of compulsory pilotage, the point was then raised as to whether, the fault having been the fault of the pilot alone, he was compulsorily in charge of the ship so as to exclude the owners from responsibility. Therefore the question now to be determined is whether the pilot of the *Mercedes de Larrinaga* was compulsorily in charge of the ship. The main point that was made on behalf of the plaintiffs was that a vessel inward bound from the sea to Manchester, *viâ* the Ship Canal, is not subject to compulsory pilotage in the port of Liverpool. That is a point of very considerable importance, because it appears to me that it affects the whole question of pilotage of ships, other than coasting vessels in ballast or under 100 tons burden, inward bound from the sea to Manchester, *viâ* the Ship Canal, and that, although not directly, yet indirectly, it practically touches upon the question of pilotage of vessels outward bound from Manchester, *viâ* the Ship Canal, to sea. The place which I have mentioned as being the place of the collision is in the port of Liverpool. I noticed—this was one of the reasons for further discussion—on looking at the plan of the Manchester Ship Canal and river Mersey, that there is a line to distinguish the limits of the powers of the Upper Navigation Commissioners, and drawn across the river from Eastham Ferry to a point above Garston. But that does not affect this case at all, because I have been informed by counsel that practically those powers deal with the buoying and so forth of part of the Mersey which is in the port of Liverpool. Then, again, there is another line drawn across the same map from a point on the Lancashire side called Dungeon Point to a point on the opposite side called Ince Ferry—one side being in the port of Liverpool and the other in the port of Manchester, and that, I understand, is only a line drawn for Customs purposes, and does not affect the question in this case at all.

The point that has to be considered turns principally, if not entirely, on the Mersey Dock Acts Consolidation Act of 1858. Now, one of the early Acts relating to the port of Liverpool is the statute of 8 Anne, c. 8, and the port is there defined in sect. 3. [His Lordship then read the section.] I need not concern myself with Frodsham, because, if I understand rightly, that is on the Weaver. So that the port includes the whole of the river Mersey from the sea, according to this definition, up to Warrington. One of the contentions that was made in this case was in connection with the suggestion that Eastham Locks at the end of the canal might be treated as in the port of Liverpool, and as a wet dock in the port of Liverpool. But, since the matter was first discussed, it was yesterday pointed out that the Manchester Ship Canal Act of 1885 has made a difference about this, because sect. 3 of that Act is as follows: [His Lordship then read the section.] I do not know what that latter proviso really preserves. It is suggested by Mr. Pickford that, notwithstanding the provision that the canal is in the port of Manchester, it still remains in the port of Liverpool for certain purposes, because of the proviso that "nothing in this Act shall be deemed to affect any of the rights or privileges of the port or harbour of Liverpool," &c. It seems to me difficult to construe exactly what this was intended to do, but I can hardly regard that which is part of the port of Manchester as still being within the port of Liverpool. There is another section which was referred to in the Manchester Ship Canal Act of 1885—namely, the 211th section. I do not myself at present see that that section really affects the present question. Now, the sections of the Mersey Dock Act of 1858 which bear directly upon the present question come under part 6 of the Act, which is headed, "With respect to pilots and pilot boats"; and the sections which deal with inward bound vessels were considered by me in the case of *The Servia and Carinthia* (*ubi sup.*). Some of those sections cover the cases both of inward and outward bound vessels, and some only relate to outward bound vessels. Considering for the moment that I am dealing with an inward bound vessel, the sections that are material are the 121st, which gives power to the board to licence persons to act as pilots for the port of Liverpool, the 123rd, which imposes a penalty upon any person who shall pilot any vessel into or out of the port of Liverpool without a licence, and the 124th section, which imposes penalties upon any pilot who shall refuse to take charge of any inward bound vessel upon a proper signal being made for a pilot, and of any outward bound vessel upon the request of the master thereof. Those sections apply to both inward and outward bound ships, but the 125th section applies only to inward bound ships. That section imposes a penalty upon any pilot refusing to conduct an inward bound vessel. I think that clearly refers to a vessel bound from sea into the port of Liverpool, having regard to the terms of the 123rd section. The 128th section is as follows—and this gives rise to one of the arguments addressed to me—"The pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river

Mersey and before going into dock, in which case he shall be entitled to receive 5*s*. per day for such attendance." Sect. 130 provides that in case the master of any inward bound vessel other than a coasting vessel in ballast, or under the burden of 100 tons, shall refuse to take on board or employ a pilot, such pilot having offered his services for the purpose, such master shall pay the full pilotage as if the vessel had been piloted into the port of Liverpool. That, again, clearly applies to inward bound ships coming in from the sea, and coming into the port of Liverpool. Sect. 133 gives power to the board to fix rates for pilotage as stated in it. There are rates for piloting distances from Great Orme's Head to the port of Liverpool, at not less than 5*s* and not more than 8*s*. per foot, according to the draught of water, and from any greater distance into the port of Liverpool at not less than 6*s*., nor more than 9*s*. per foot. Those are the sections which I think deal with the inward bound ships, and it has been held that under those sections vessels, other than the small coasting vessels which are referred to, are obliged to employ pilots coming into the port of Liverpool; and, as I have already said, the principal question in the case is whether the present case comes within those sections. I think it is desirable to refer to the sections which apply to outward bound vessels, because they throw light upon the "inward bound" sections. The 1st section which deals more particularly with the outward bound vessels in addition to those I have already referred to, which seem to cover and deal also with the case of inward bound vessels, is the 127th, which specifies the distance to which vessels are to be piloted when they are sailing out of the port of Liverpool. It makes no mention of where the pilot is to take charge. I have had already to refer to the 126th section. It does not matter very much in this case. The next section which deals with outward bound vessels is the 133rd, which gives, again, power to the board to fix rates for pilotage, and gives the rates for piloting a vessel out of the port of Liverpool. The 139th section also deals with the case of outward bound ships, and in that the provision is that in case the master of any vessel being outward bound and not being a coasting vessel in ballast, or under the burden of 100 tons, for which provision is otherwise made, shall proceed to sea and shall refuse to take on board or to employ a pilot, he shall pay the full pilotage rates. Those seem to be the material sections which deal with both inward and outward bound vessels, and I think it is to be observed that generally the wording of the sections does not confine them to vessels which are bound to or from Liverpool. I am now referring to those sections in a general sense, but I think if all the sections are examined that general sense, which is one which pervades them, is that those sections deal with vessels which are either coming out of or going into the port of Liverpool, without saying what is to become of those vessels after they have come into the port of Liverpool, or where they are to start from in the port of Liverpool. There seems no doubt that the general effect of those sections is that every vessel, with the exception of the small vessels which are dealt with otherwise, coming into the port of Liverpool is bound to take a pilot; and so also it seems to me that every vessel outward bound which goes out of the port of Liverpool is bound to take a pilot for that purpose, although that is not a point which has to be determined in this case. The view which I take of the broad point put forward by the plaintiffs is that the pilotage is not to be confined to vessels which simply come out of some dock or anchorage through the port of Liverpool, or are bound into some dock or anchorage in the port of Liverpool; because it seems to me to make no difference with regard to these sections whether the vessel, after having come into the port of Liverpool, passes into some other jurisdiction which is not to be treated as being in the port of Liverpool. I cannot help thinking that that is the correct view to take of these sections, although, of course, it is obvious that one is applying these sections to a state of things which did not exist at the time when the Act of 1858 came into force. Whatever the view which may be entertained about compulsory pilotage, and I am quite aware that many people object altogether to the law of compulsory pilotage as administered in England, I am not here to express an opinion upon such a question. It is urged that it would be better to allow ships to be navigated by their masters and officers, and that although it might be desirable to compel them to employ a pilot and have him on board for the purpose of advice, yet it is not a satisfactory state of things that he should take charge, and they should be compelled to leave him in charge. Whichever view is the correct view to take as to what is advantageous, the law is that the pilotage is compulsory; and again, whichever view you take about it, whether it is to be compulsory in the sense that he is in charge, or only in the sense that he is put on board as adviser, the general consideration for having a pilot on board at all applies with equal force for the purpose of navigation, whether the ship is coming simply into a dock, or anchorage in any port of the river Mersey which is in the port of Liverpool, or whether she is going through the same waters and afterwards going on to Manchester. The difficulties of navigation are precisely the same, and the advantage of having someone on board who knows the locality is precisely the same in each case. So my conclusion with regard to this first point, this main point, is that the *Mercedes de Larrinaga*, was compelled to take a pilot into the port of Liverpool.

The next contention which the plaintiffs put forward was based on sect. 605 of the Merchant Shipping Act. They contended that this vessel was passing through a pilotage district between two places outside that district—namely, the sea on the one hand and the port of Manchester on the other. I am not quite sure whether that section strictly applies where the employment is not compulsory in the district in the sense in which the matter was discussed yesterday; because in some cases one finds that the pilotage is made compulsory for a district, and in others, like this Mersey case, one finds it is made compulsory on ships doing certain things—namely, moving in or out. But if the first part of the section does apply then the question would be whether the exemption under the section does or does not apply to this ship, because she was discharging at a place situate above the district on the same river or its tributaries. Now, one has with regard to this question to look at the facts, and I have had

evidence which shows this state of things—first of all that the Irwell is a tributary of the Mersey. The Irwell pours its waters into the Manchester Ship Canal Docks at Manchester, and the waters then run down to a place where the Mersey joins the canal, and I understand that the canal really runs along the old bed of the Irwell till it joins the Mersey. Then the waters of the Mersey and the Irwell run on together until they come in the canal to a place called Rixton Junction, where they pour out into the Mersey as it still exists, and the only water which goes on down the canal from that point is the water which is used for lockage purposes. This matter was dealt with by the engineer of the Ship Canal, who was called as a witness by the plaintiffs. The effect of that is to leave the Manchester Docks as situate on a tributary of the river Mersey, and the result is that this vessel was going to discharge at a place above the port of Liverpool on a tributary of the river Mersey, and so it seems to me that the exemption which is referred to in the 605th section cannot be brought into force. In fact, Mr. Aspinall, who argued the case for the plaintiffs, although he contended that the 605th section applied, was candid enough to admit that he did not think there was any argument of weight which would support that contention.

The third point is a minor point, but one of very considerable difficulty, and is this: If a vessel bound in from sea into the port of Liverpool is bound to take a pilot into the port, yet in a case like the present, where the ship anchored before she got to Eastham, the compulsory service then comes to an end. Of course this argument assumes that there was compulsion to begin with, as I have already held. In this case the vessel anchored off Laird's yard, which is, if I remember rightly, just a little above the Woodside Ferry, and she did so to await a suitable tide, in order to go on to Eastham. I think, speaking from recollection of the evidence, that the plaintiffs' vessel did something of a similar character. Both vessels had to anchor for a similar object, and the collision happened afterwards when they were going up to the entrance to the Eastham Locks. The point made about this is made under the 128th section of the Act of 1858, and is that the compulsory services ceased so soon as the vessel came to an anchor, because it is said that that section only requires a pilot to moor a ship at anchor in the Mersey and to pilot her into one of the wet docks of the port of Liverpool, whether belonging to the board or not, without making any additional charge for doing so. The argument was that as soon as she was brought to anchor in the river Mersey the compulsory pilotage finished, because she was not going on to a wet dock in the port of Liverpool, and therefore the pilot had nothing more to do. The way in which that argument was met by the defendants at first was this: That the ship was bound to a dock in the port of Liverpool, because the Eastham Locks might be treated as being a wet dock within the port of Liverpool. But that now seems rather to be got rid of by the section of the Manchester Ship Canal Act, which seems to make the end of the canal within the port of Manchester. I think if this case were to turn simply upon the construction of sect. 128 it would be very difficult to say that this was a wet dock within the port of Liverpool, within the meaning of that section, although the term wet dock might not unreasonably in such circumstances be held, according to the definition in the dictionaries and so forth, to include a place which admitted ships and then excluded the tide if required. But the argument for the plaintiffs was further supported by reference to the case of *The Servia and Carinthia* (*ubi sup.*), to which I have already referred, and it was contended that the decision in that case had the effect of showing that compulsory services must in such a case as this come to an end at any rate when the vessel anchored. I remember that case very well, and I have also read the judgment in it, and it does not, in my opinion, really determine the case in the way the plaintiffs contend, because the question there was as to additional remuneration in circumstances which are stated shortly in the headnote to that case. The headnote is as follows: "The Mersey Docks and Harbour Board, as the pilotage authority for the port of Liverpool, has under sect. 221 of the Mersey Dock Acts Consolidation Act 1858 power to fix, in addition to the ordinary compulsory pilotage rates, a reasonable charge by way of 'extra' remuneration for a pilot licensed by the board taking an outward bound vessel from a dock alongside a landing stage to complete her loading, as in the case of embarking passengers, their baggage, and the mails. The board has also power to fix an additional charge as extra remuneration (besides the charge per day for attendance whilst a vessel is necessarily lying in the river in the course of her navigation inward or outward) in the case of an inward bound vessel taken by a pilot to a landing stage to land passengers, baggage, and mails, before discharging the rest of her cargo, including the case of vessels disembarking cattle and sheep at certain landing stages in pursuance of the orders made under the provisions of the Diseases of Animals Act 1894. *Semble*, that in the case of an outward bound vessel compulsory pilotage will not commence until the vessel proceeds from the stage to sea, and that, in the case of an inward bound vessel, the employment of the pilot by compulsion of law will cease or be suspended as soon as the vessel deviates to the stage from the route which she would otherwise follow to the dock." The real point that was raised in that case was simply a question as to extra remuneration of pilots, and it arose in the case of inward bound ships, in consequence of the vessels bringing cattle to Liverpool going first of all into the river, then to a stage where the cattle was landed, and then into one of the docks, and, with regard to outward bound vessels coming out of dock first and then proceeding to one of the stages—I think the Prince's Landing Stage—for the purpose of taking up passengers, cargo, and mails, and then proceeding to sea. It was contended that these were onerous and difficult duties for the pilots and they were entitled to extra remuneration, and that in such circumstances they were doing something which was not contemplated as part of the pilot's duties without extra remuneration. It does not appear to me when that case is examined very carefully, that it really affects in any material degree the question which I have to decide now. Going back to the 128th section, I think it is necessary to construe it in connection with the other sections, and one must face this sort of point. First of all,

with regard to a vessel which comes in from the sea and is going straight up to the Eastham Locks, she is an inward bound vessel, bound in from the sea to the port of Liverpool. She does not come to an anchor at all, and it seems to me she is bound to take a pilot coming in. Then the question must be raised, if so, where does his duty as compulsory pilot cease? I put that point to Mr. Aspinall, and I do not think, with the greatest deference to his argument, that it was answered in any way satisfactorily, because all I could get from him in substance was that compulsory pilotage ought to cease when the vessel had passed the position in which she would be going into any wet dock in the port of Liverpool. But that, it seems to me, is not a satisfactory answer, and leaves such a serious difficulty open as to the determination of the services. It certainly does not cover the case of a vessel which is bound up to Garston. The answer to that probably is that such a vessel is within the 128th section because she is going to a wet dock which, although not belonging to the board, is within the words, "Whether belonging to the board or not." But it seems to me that, with regard to a vessel going straight up to Eastham, the only sensible conclusion is that the pilot taking charge at sea must take her on to Eastham, where her navigation in the port of Liverpool is to cease. I cannot come to any other reasonable conclusion upon the matter. I myself am not able to see how it can reasonably be argued in practice or dealt with under the sections in any other way than that. The ship is being taken to a spot in the river Mersey which is at the end of her necessary navigation in the port of Liverpool; and this construction does not seem to me to put any undue strain upon the sections which have been considered in this case. Then that gets rid of anything, such as was suggested in the course of the case, as to whether the compulsion is to exist in case a vessel goes to Eastham direct, or is to exist up to the time that she anchors, because assuming that there was compulsion to begin with the plaintiffs would contend, as I understand, that if the vessel is going up to an anchorage the compulsion would last till she anchored, but if she was going to Eastham direct there would not be any compulsion at all, and how is anybody to know that when the pilot comes on board outside the bar. It is impossible to be certain in all cases whether a vessel would have to anchor or go straight on. A thick fog, for instance, might prevent her going straight on. Then, again, with regard to the argument about anchorage, it is said that if the vessel comes to an anchor she has finished her navigation so far as the river is concerned, and that therefore the pilotage ceases to be compulsory. That may be true enough if the anchorage is the final point of destination, so far as navigation at that time is concerned, but I do not see how it can be treated as coming to an end if the anchorage is only anchorage in the itinerary towards the destination which it is necessary to get to in the ordinary course of navigation. Because if that were to be held, the moment a vessel dropped her anchor in the Mersey, even though she did so compulsorily, and yet was going to a second anchorage as her final destination, according to Mr. Aspinall's argument that first anchorage would put an end to the compulsory services. This vessel came to an anchor for navigation reasons until the tide permitted her to proceed, and it seems to me that such temporary anchoring is only in the itinerary towards the destination in the river to which she is entitled to have a pilot to take her. I have already referred to the point made with regard to this question of the wet dock, and that difficulty I do not think I need say anything more about, because the Ship Canal Act appears to have altered the position with regard to that point. It may be possible to hold that for pilotage purposes the end of the canal is still to be treated as within the port of Liverpool, and for such purposes is a wet dock, but I do not feel that it is necessary to base my decision upon it, and I feel great difficulty because of the Manchester Ship Canal Act of 1885. There is this matter to be observed with regard to outward bound vessels. that no point of departure is mentioned in any of the sections which deal with the employment of pilots on outward bound ships. It seems to me, having regard to their generality, that any vessel proceeding to sea out of the port of Liverpool would have to take a pilot, and there is no such difficulty, as suggested with regard to inward bound vessels in consequence of the terms of sect. 128, in applying compulsory pilotage to vessels proceeding to sea from Eastham. They would have to take a pilot on leaving Eastham, and it would be strange if one had to construe the Act in such a way that inward bound vessels would not have to employ a pilot right up to Eastham. There are other points which possibly require, and possibly may have at some future time, some further consideration, but at present it does not seem to me that any of the points which have been somewhat slightly touched upon affect the view which has been taken upon the general sections. There is, for instance, the 114th section of the Act of 1858, which deals with who is liable to pay pilotage. If that section had in any way restricted the recovery of pilotage as against persons who were in the port of Liverpool or against ships in the port of Liverpool, one might have felt that pilotage ought only to be applied to such ships as the rates could be recovered against and such persons as were connected with those ships in the port of Liverpool. But the section is quite general, and, although there may be difficulties about enforcing it against persons or ships not in the port of Liverpool, I cannot see myself that it affords sufficient answer to the argument which contends for the pilotage being compulsory in the way I have thought that it is.

There is one other matter to consider, and that is the effect of the statute of 1899. That Act was passed in order to meet the difficulty which was pointed out in the case of *The Servia and Carinthia* (*ubi sup.*). It recites that "whereas by the Mersey Dock Acts Consolidation Act 1858 the masters of vessels inward bound for and outward bound from the port of Liverpool are, subject to the exemptions by the said Act granted, required to employ pilots." Then it deals with the difficulties raised in the case of *The Servia and Carinthia* (*ubi sup.*), and it proceeds to legislate so as to get rid of those difficulties and free the matter from the doubt which that case raised. Counsel for the plaintiffs relied upon this recital as showing that

the Act of 1858 was only dealing with vessels inward bound to and outward bound from the port of Liverpool. But if one compares that recital with the terms of the Act of 1858 it cannot be said, I think, that the recital is strictly correct, because one does not find in the Act of 1858 the words "inward bound for and outward bound from" the port of Liverpool, but it deals with vessels "bound into and out of" the port of Liverpool. That does not seem to admit so readily, as if that recital were correct, a consideration that the Legislature was only dealing with vessels which had Liverpool for their termination *a quo* and *ad quem*. I do not think that Act has any real bearing upon the present case. Of course it may be that under sect. 5 it may deal with vessels passing from Manchester to Liverpool, or simply from Liverpool to Manchester. I am not concerned to consider that point at all. Counsel for the plaintiffs suggested, broadly speaking, that there was great difficulty in working out this matter if it was held that pilotage was compulsory. I myself see no difficulty whatever. It is a simple matter. Every vessel, if I am right, bound in from the sea, except small vessels exempted, to the port of Manchester and going into the canal at Eastham is to take a pilot; and so, though I have not to decide that, has, apparently, every vessel going out from Eastham to the sea. There is no difficulty whatever in the application of the Act. If I am right, the result is that although the fault in this case was the fault only of the pilot of the *Mercedes de Larrinaga*, the defendants' plea of compulsory pilotage, it appears to me, is established. The plaintiffs' claim will, therefore, be dismissed without costs, and the defendants' counter-claim dismissed with costs.

Solicitors for the plaintiffs, *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the defendants, *Forshaw* and *Hawkins*, Liverpool.

March 17 *and* 18, 1904.

(Before BARNES, J. and TRINITY MASTERS.)

THE SUSSEX. (a)

Collision—Failure to stand by and give name—Compulsory pilotage—Limits of port of Liverpool—8 Anne, c. viii.—Mersey Dock Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.)—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 422, 586, 603, 633.

The fact of a vessel after collision with another vessel not standing by and giving her name, as required by sect. 422 *of the Merchant Shipping Act* 1894, *does not render her owners liable, if at the time she was compulsorily in charge of a pilot, whose negligence was the sole cause of the collision.*

The Queen (20 *L. T. Rep.* 855; 3 *Mar. Law Cas. O. S.* 242; *L. Rep.* 2 *A. & E.* 354) *followed.*

By sect. 127 *of the Mersey Dock Acts Consolidation Act* 1858, "*every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel so far to the westward as the . . . Fairway Buoy of the Queen's Channel.*"

Since the date of the Act the buoy has been removed, and for the purposes of pilotage the Bar Lightship, which occupies a position outside of that occupied by the buoy, is treated as the westward limit.

A collision occurred between the Bar Lightship and the place where the buoy used to be.

The defendants pleaded that their vessel was at the time of the collision compulsorily in charge of a pilot.

Held, that, the Fairway Buoy having been removed, the Bar Lightship occupied the same place relatively for the purposes of sect. 127 *of the Act of* 1858, *that the collision occurred in pilotage waters, and that pilotage was therefore compulsory.*

ACTION for damage by collision brought by the owners of the steamship *Gladestry* against the owners of the steamship *Sussex*.

The collision occurred about 12.45 a.m on the 20th Dec. 1903, about one mile S. ½ E. of the Mersey Bar Lightship.

The *Gladestry* was a steamship of 2360 tons gross register, and at the time was on a voyage from Savannah to Manchester with a cargo of cotton and phosphate rock, and manned by a crew of twenty-four hands all told.

At the time of the collision she had a Liverpool pilot on board, and was at anchor, heading about S.S E., and exhibiting the regulation anchor lights.

The *Sussex* was a steamship of 5474 tons gross register, and was on a voyage from Liverpool to London with a general cargo, and manned by a crew of fifty-nine hands all told. She was at the time of the collision in charge of a duly licensed Liverpool pilot.

The defendants admitted that the collision was caused by the negligent navigation of the *Sussex*, but alleged that it was occasioned solely by the fault of the pilot in charge, and that the collision took place within a district in which pilotage is compulsory by law.

Barnes, J. came to the conclusion on the facts that the collision was solely caused by the negligence of the pilot in charge of the *Sussex*.

It appeared from the evidence of the pilot of the *Gladestry* that the Fairway Buoy, which marked the entrance to the Queen's Channel in 1858, had been about three-quarters of a mile nearer in than the position of the present Bar Lightship.

A lightship was first placed near the bar in 1873, and the lightship and Fairway Buoy co-existed until 1875, when the latter was removed and nothing put in its place.

In 1884 the Bar Lightship was moved to its present position.

It was also alleged by the plaintiffs that those in charge of the *Sussex* after the collision failed, without reasonable cause, to stand by and give the name of their vessel, and to comply with the provisions of sect. 422 of the Merchant Shipping Act 1894.

Sect. 422 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) is as follows:

(1) In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), (*a*) to render to the other vessel, her master, crew, and

(a) Reported by CHRISTOPHER HEAD, Esq., Barrister-at-Law.

passengers (if any), such assistance as may be practicable, and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no need of further assistance; and also (*b*) to give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound. (2) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

The plaintiffs contended that at the time of the collision the *Sussex* was not compulsorily in charge of her pilot on the ground that she was outside the district in which pilotage is compulsory.

By sect. 3 of 8 Anne, c. viii.—an Act for making a convenient dock or basin at Leverpoole for the security of all ships trading to and from the said port of Leverpoole—the limits of the ports are defined as:

The limits and extent whereof are as far as a certain place in Hoyle-Lake called the Redstones, and from thence all over the river Mersey to Warrington and Frodsham Bridges.

The material sections of the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. 92) are as follows:

Sect. 121. The board may examine any person, being of the age of eighteen years and upwards, who shall have served as an apprentice in any of the Liverpool pilot boats for not less than three years . . . and every such apprentice or other person who upon any such examination shall be found to be qualified to act as a pilot, and shall be approved of by the board, shall receive a licence in writing, signed by the secretary of the board, certifying that he is duly qualified to act as a pilot for the port of Liverpool. . . .

Sect. 123 provides for a penalty on persons acting as pilots without a licence.

Sect. 124 provides that pilots misbehaving themselves are to have their licences recalled.

Sect. 127. Every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool, through the Queen's Channel, so far to the westward as the buoy commonly called or known by the name of the Formby North-West Buoy, or Fairway Buoy of the Queen's Channel; and, if sailing through the Rock Channel, pilot the same so far to the westward as the North-West Buoy of Hoyle; and any pilot who shall in any such case refuse to pilot such vessel to such distance as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also, at the discretion of the board, be deprived of his licence.

Sect. 133. The board may from time to time determine, vary and alter and fix rates of pilotage to be paid to pilots for piloting vessels, such rates to be according to the draught of water of such vessels, and to be within the limit: that is to say, (*a*) as to British vessels: For piloting a vessel from the distance of the Great Orme's Head or the coast of Wales to the port of Liverpool, not less than five shillings nor more than eight shillings per foot; for piloting a vessel any greater distance to the port of Liverpool, not less than six shillings nor more than nine shillings per foot; for piloting a vessel out of the port of Liverpool, not less than three shillings and not more than four shillings per foot; for piloting a coasting vessel, including therein vessels trading with Ireland, the islands of Faro or Ferro, Guernsey, Jersey, Alderney, Sark, and Man, either into or out of the port of Liverpool, one half only of the above rates respectively.

Sect. 139. In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast, or under the burthen of 100 tons, for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same the full pilotage rate that would have been payable for such vessel if such pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same.

By sects. 586, 603, and 633 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) it is provided as follows:

Sect. 586 (1). A pilot shall be deemed a qualified pilot for the purposes of this Act if duly licensed by any pilotage authority to conduct ships to which he does not belong. (2) Every qualified pilot, on his appointment, shall receive a licence containing his name and usual place of abode, a description of his person, and a specification of the limits within which he is qualified to act. (4) Every qualified pilot acting beyond the limits for which he is qualified by his licence shall be considered an unqualified pilot.

Sect. 603 (1). Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from compulsory pilotage shall continue to be in force. (2) If within a district where pilotage is compulsory the master of an unexempted ship after a qualified pilot has offered to take charge of the ship, or has made a signal for the purpose, pilots his ship himself without holding the necessary certificate, he shall be liable for each offence to a fine of double the amount of the pilotage dues that could be demanded for the conduct of the ship.

Sect. 633. An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

The pilotage certificate which had been given to the pilot of the *Sussex* was as follows:

Pilot of the first class.—Pilot boat No. 3.—Licence No. 104.—The Mersey Docks and Harbour Board Pilotage Department.—To all whom it may concern, be it known that George F. Parkinson, aged sixty-five years, being 5ft. 8in. in stature, having a fair complexion, and whose place of abode is 20, Sandown-road, Seaforth, having in pursuance of the provisions of the Mersey Dock Acts Consolidation Act 1858 been duly examined and found to be qualified to conduct any vessel into or out of Liverpool, Holyhead, Beaumaris, Chester, Fleetwood, Pile of Foudre, and the Isle of Man, is by this certificate duly licensed to act as a pilot of the first class for the port of Liverpool, from the date thereof until the 1st day of June 1904, provided that he shall comply with the provisions of the said Act, and of all other Acts binding upon him in relation to pilotage, and with every order or by-law made by the said board, and shall conduct himself with propriety and prudence.—Given by the said board.—MILES K. BURTON, Secretary.

Pickford, K.C. and *Balloch* for the plaintiffs.—The *Sussex* must be found to blame as she failed to stand by and give her name after the collision, as required by sect. 422 of the Merchant Shipping

Act 1894. It may be that, if it is shown that the collision was solely the fault of the pilot, then there is proof to the contrary within the meaning of the section:

The Queen, 20 L T. Rep. 855; 3 Mar. Law Cas. O. S. 242; L. Rep. 2 A. & E. 354.

[BARNES, J.—I think that, assuming the pilot was compulsorily in charge at the time of the collision, there is proof to the contrary that the collision was caused by the negligence of the master.] The *Sussex* at the time was not compulsorily in charge of the pilot. She was going out through the Queen's Channel, and the collision happened outside the place where the Fairway Buoy used to be—that is to say, outside the limits fixed by sect. 127 of the Act of 1858. It is true that the rate charged by the Mersey Docks and Harbour Board is to the Bar Lightship, but the board have no power to extend the limits fixed by the Act. If the Dock Board see fit to remove the landmarks, it may make it more difficult to tell when the vessel is outside the district in which pilotage is compulsory, but that does not alter the liabilities of the parties. The fact of the pilot remaining on board after the spot where the buoy used to be is immaterial. The cases of *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237; L. Rep 4 Ex. 238) and *The Charlton* (73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29) are not in point. In those cases the collision took place in a district in which the pilot was licensed to act, and he was paid a rate fixed for the whole district. In the present case he was licensed to take vessels into and out of the port of Liverpool. Under sect. 133 the Mersey Docks and Harbour Board only have statutory power to levy rates for the pilotage of vessels into and out of the port of Liverpool. It may be said that if you take a pilot you pay him for piloting your vessel to the Bar Lightship, and therefore he is never your servant, but that would apply equally to a provision for piloting vessels to Holyhead, or any other place outside the port of Liverpool. It is to be noticed that the terms of the licence are for the port of Liverpool only.

Aspinall, K.C. and *Noad*, for the defendants, *contra*.—The real test is whether the owner has a choice and is allowed to say whether or not he will take a pilot, or whether he is obliged to take one, whether he will or not. As Lord Esher, M.R. says in *The Charlton* (73 L. T. Rep., at p. 51; 8 Asp. Mar. Law Cas., at p. 30): "When therefore he took this pilot on board, he must have taken him in the ordinary way by giving notice at the pilotage station at Bristol that his ship was going out from Bristol, and would require a pilot. He does not select a pilot; he is not allowed to; he is obliged to take the pilot whom he does not select, and that, in itself, makes that pilot compulsory." It will be seen from the licence that the pilot had knowledge of various ports. What the authorities were dealing with was the requirements of their own port. It was necessary that the pilot should have knowledge of the neighbouring ports. There is here an obligation to take a pilot into and out of the port of Liverpool, and Parliament has seen fit to give the Mersey Docks and Harbour Board powers to license pilots to act far outside their own port. In 1858 the conditions were such that it was well known where the Fairway Buoy was. They have since altered, and the Harbour Board have adapted their regulations to the change of circumstances. The Bar Lightship has taken the place of the Old Fairway Buoy. It is submitted that there is nothing in the Act that prevents the Harbour Board from varying the limits of the pilotage district. The ship cannot be deemed to be in fault under sect. 422 of the Merchant Shipping Act 1894, because if the pilot was compulsorily in charge there is "proof to the contrary."

Pickford, K.C. in reply.—The argument of the defendants comes to this: If the shipowner treats the pilot as compulsorily in charge because he has been compelled to take him originally, then he is not liable for his negligence. There is no authority, no principle of law to support such a proposition. It does not matter whether you mean to make a man your servant or not; you must show that you were obliged to employ him and put him in charge; and, unless you are compelled to do so, you are liable. If the pilot's licence does not extend beyond the place mentioned in sect. 127 of the Act of 1858, then he becomes an unqualified pilot as soon as that place has been reached. See

Sect. 586, sub-sect. 4 of the Merchant Shipping Act 1894.

There is nothing in sect. 133 which gives the Dock Board the power contended for. This is clearly shown by the words, "such rates to be according to the draught of water of such vessels, and to be within the limits following, &c."

BARNES, J.—This is a case of collision which took place on the 20th Dec. last, at a little before one o'clock in the morning, between the steamship *Gladestry* and the steamship *Sussex*, about one mile S. ½ E. of the Mersey Bar Lightship. The *Gladestry* is a screw steamer belonging to the port of West Hartlepool, of 2360 tons gross register, and, whilst on a voyage from Savannah to Manchester with a cargo of cotton and phosphate rock, had anchored at the spot where the collision took place. I understand she had a Liverpool pilot on board, but nothing turns on the question of what was done on board her. Her regulation lights were burning—that is to say, the regulation lights for a vessel over 150ft. in length, at anchor, according to the rules which govern the river Mersey. Whilst in that position, at anchor, she was run into by the *Sussex*. The stem of the *Sussex* struck the port side of the *Gladestry* forward of the fore rigging. The *Gladestry* at the time was heading about S.S.E., and the tide was about ebb, running about a knot. The defendants' vessel, the *Sussex*, is a screw steamer of 5474 tons gross register, and was bound out from Liverpool to London. She was—I am using the term in the neutral sense at present—in charge of a duly licensed Liverpool pilot, who had, I presume, been obtained in the usual way; because the master of the defendants' ship, in answer to this question: "Had they (the brokers in Liverpool) notified the pilotage authorities that you would require a pilot?" said "I instructed them to" and "A pilot came on board."

The question in this case is whether the owners of the defendant vessel are responsible for the damage which was thus occasioned to the

plaintiffs' ship. The defendants' ship, according to the captain's evidence, suffered no damage at all. The charges that are made by the plaintiffs in the statement of claim impute negligent navigation to those on the *Sussex*, and they also impute a breach of the 422nd section of the Merchant Shipping Act 1894. The defendants in their defence say as follows: "The defendants admit that the plaintiffs have suffered damage by a collision between their steamship *Gladestry* and the steamship *Sussex*, belonging to the defendants, and that such collision was solely caused by the negligent navigation of the *Sussex*. They deny that such negligent navigation was by themselves or their servants or by any person for whose acts they are responsible at law." Then they plead in the second paragraph the usual plea of compulsory pilotage and allege that the damage was occasioned by the fault or incapacity of the pilot in charge of the *Sussex*. They say that the pilot, "though the lights of the *Gladestry* were reported to him when the *Sussex* was more than a mile distant from the *Gladestry*, so navigated the *Sussex* that she ran into the *Gladestry*, which was lying at anchor." That is the state of the pleadings. The plaintiffs' vessel being at anchor, with proper lights showing—there is no dispute as to that—and the defendants' vessel having navigated into her in weather that was quite clear enough for the moving vessel to keep clear of the one at anchor without the slightest difficulty, it is quite obvious that the defendants' vessel is to blame for this collision, and that the defendants would be liable for this collision unless they are exempted by reason of the vessel being in charge of a compulsory pilot at the time. I think it will appear when I come to deal with the case of *The Queen* (*ubi sup.*) before Sir Robert Phillimore that that question of compulsion, or non-compulsion, determines both questions in the case—namely, the responsibility for the navigation of the *Sussex* and the point raised under the 422nd section of the Merchant Shipping Act 1894.

The first point to determine is one which I have aready given my view about—namely, whether the pilot was alone to blame. There is not, to my mind, the slightest doubt about that. [His Lordship then dealt with the evidence as to this, and as to whether there had been a breach of the provisions of sect. 422 of the Merchant Shipping Act 1894.] The pilot, who was called here, was not asked any question about this part of the case at all, and so I have nothing but the evidence about it to which I have already referred. Now, I do not think, after considering the evidence, that the master of the defendants' ship intentionally wished to run away or keep his name dark. It would not have been the slightest use trying that, because there was a pilot on board, who had been taken on board in the usual way, and it must have been known all about afterwards. But what is the explanation which he gives himself. He said he was excited and worried. But the question is whether a master in charge of a large vessel like this is entitled to be excited and worried, and not stand by simply for that reason. In my judgment, there was in fact a failure to stand by and give the name, under sect. 422, and the question that then comes to be considered is whether a reasonable cause for such failure has been shown. Both I and the Elder Brethren, who are much better judges about this than myself, think that no reasonable cause has been shown for this failure. If we were to allow cause to be shown on such facts as these, every shipmaster would be able to show cause. In my judgment there has been no reasonable cause shown for failure to comply with some part of sect. 422, at all events.

That brings me to the law applicable to the case. The position is this: There was, from what I have shown, in my opinion negligence on the part of the pilot alone which caused the collision. There was failure to comply with sect. 422, and there has not been sufficient cause shown for that failure. But as the pilot was in charge in fact, then, if he were compulsorily in charge the negligence of the pilot alone would not render the owners responsible for the navigation of the vessel, and the failure to comply with sect. 422 would, in my judgment, according to Sir Robert Phillimore's decision in the case of *The Queen* (*ubi sup.*), not make the collision one deemed to have been caused by the master or any other servant of the shipowners. Sub-sect. 2, it will be remembered, says that if the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act or default. Now, Sir Robert Phillimore, in dealing with the corresponding section of the older Act (25 & 26 Vict. c. 63, s. 33), in which the words are "person in charge," said (20 L. T. Rep., at p. 855; 3 Mar. Law Cas. O. S., at p. 242; L. Rep. 2 A. & E., at p. 355): "It has been argued on behalf of the *Lord John Russell*"—one of the ships in that case—"that the *Queen* is not entitled to claim this exemption upon two grounds. First, upon the construction of sect. 33 of 25 & 26 Vict. c. 63. And this upon two grounds. First, it is said that the 'person in charge' intended by that section must, having reference to the context, be deemed to be the master, and with this part of the argument I agree. Secondly, it is contended that whereas the master has been guilty, as in this instance, of a violation of his duty in offering no assistance to the other vessel which came into collision, he is, by the words of the statute, to be deemed alone to blame for the collision, and that it follows by necessary implication that the pilot-exemption, so to speak, is taken away. With this portion of the argument I am quite unable to agree. There is no doubt, on the assumption, of course, that the pilot is alone to blame for the collision, that his liability and the exemption of the master attached when that fact took place; and if it was intended by the statute to say that the subsequent misconduct of the master would remove the exemption and fix the liability of the collision upon the master, the language, in order to produce this result, ought to have been much clearer and plainer than I now read it to be." Even assuming that the failure was to be treated as that of the master—I am not concerned for the moment in considering whether it is or is not because the effect of the decision that the pilot is solely responsible is that proof to the contrary has been shown, and it clears the master and other servants of the shipowners. Because the wording of the subsection is: "The collision shall, in the absence of

proof to the contrary, be deemed to be caused by his wrongful act or default." The master and other servants of the shipowner are not responsible, and the collision cannot be deemed to have been caused by their wrongful act or default. Now that, I think, both counsel have agreed, leaves the question to be determined, which governs both points, Was the pilot in this case compulsory or not? The pilot was, in fact, navigating, and the question is reduced to this: Was he compulsorily in charge? Or, perhaps, having regard to the defendants' argument, I might say, Was he in charge in such circumstances that the owners are not liable for his acts? That covers the various points taken by Mr. Aspinall in connection with the various cases cited. This question turns upon a certain curious state of facts, and also upon the Mersey Dock Acts Consolidation Act of 1858, some of the sections of which were recently considered in this court. Now, that Act makes pilotage compulsory for outward bound ships. I need not go into the question here of inward bound ships. We have had that discussed already. The sections which apply to this subject are sects. 121, 123, 124, in particular sect. 127. and sects. 133 and 139. The general effect of those sections—I am only summarising them—is that, so far as outward bound ships are concerned, the pilotage is compulsory, and a pilot must be employed to pilot the vessel out of the port of Liverpool. The port of Liverpool is defined by the old statute of 8 Anne, c. 8, in these words: [His Lordship then read the section.] The vessel is under pilotage out of that port. Now, the collision in this case, I think there can be no doubt, took place outside the port of Liverpool. The spot which I have already stated as being the place of the collision is to the westward, considerably, of the place called the Redstones. The particular section under which the present difficulty arises is the 127th section, which provides that every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot the said vessel, if sailing out of the port of Liverpool, through the Queen's Channel, as far as the buoy commonly called or known as the Formby N.W. Buoy, or Fairway Buoy of the Queen's Channel, &c., and that every pilot who shall in any such case refuse to pilot such vessel shall forfeit his right to receive the pilotage rates and at the discretion of the board be deprived of his licence. At the time that the Act of 1858 was passed it appears to be the fact that there was a buoy called the Fairway Buoy, and it seems to have been placed on the charts by the name of the Bell Beacon, at the outside end of the Queen's Channel, which appears to be that part of the Crosby Channel to the westward, the Formby Channel going more to the N. or N.W. That Bell Beacon is shown on the oldest chart that has been furnished to me, corrected up to May 1870, and it is shown as a little outside the five fathom line. It is shown well clear of the bar, as it then existed, and it has been agreed in the course of the argument that that is about, or I may take it that is about, the position of the Bell Beacon or Fairway Buoy in 1858. I do not suppose it is precisely the same, because changes of a slight character may have been made from time to time; but at any rate it is sufficiently near for the purposes of the present case. Now, that position has been transferred by the Elder Brethren, for me, on to the latest chart I have been furnished with—namely, one published on the 21st Dec. 1903; and it will be found that that position puts the old site of the Fairway Buoy a little to the eastward of what is marked on the present chart as QB 2 gas light fixed and black buoy on the northern side of the channel, and a little to the S. and W. of Q 3, and almost on top of a very shallow sounding on the banks. The state of things at the present time is that that buoy has been removed and has been removed for some considerable time, as I understand, and in recent years the bar has extended itself further and further out to sea, as far as one can judge from these charts; and in still more recent years the channel has been dredged somewhat to the westward of the old site of the Fairway Buoy, and is now marked on the chart as "dredged cut"; and there are four gas buoys marking that dredged cut, and they are marked as Q 2 and Q 1 on the northern side and B 1 and B 2 on the southern side. Those buoys are all inside the five fathom line. Now, the place of the collision, which has also been marked for me on the chart, is shown on the chart which I am referring to as about half to three-quarters of an inch below the centre of the word Bidstone, just between the two figures 5 and 5¼. There is now, and has been for a long time—I think it has been said since 1884—the Bar Lightship, which is shown on the 1903 chart to the westward a little of the five fathom line and the northern exit of the Queen's Channel. So that if you run on past these gas buoys Q 2 and Q 1 and completely cross the bar, and then pass over the five fathom line, in a very short distance you come upon the Bar Lightship. So that the place of the collision is outside the old position of the Fairway Buoy and inside the position of the Bar Lightship.

The point is now made that under sect. 127 of the Act the pilot's duties ceased, and compulsory pilotage ceased, as soon as the vessel passed the position in which the old Fairway Buoy was when the Act of 1858 was passed. There is one point, before dealing with that main point in the case, which I will dispose of shortly. Mr. Aspinall contended that sect. 133 gave the Dock Board power to extend the limits to which ships had to be taken. That section states that the board may from time to time vary and fix the rates to be paid for pilotage, and his contention was that as the board had done something—namely, treated the Bar Lightship as the place to which the pilots had to go—they had extended the distance to which ships have to be taken, by virtue of the 133rd section. I do not myself regard that section as having any such effect as contended for by Mr. Aspinall. Pilotage is compulsory on vessels outward bound, as I have already said, except in the case of certain small vessels, and I regard this section as a section which only deals with the rates which, within certain limits, the board may fix. I do not think that section has any application to the present case. Now, so far as the Dock Board is concerned, what has been done with regard to this matter appears to be that they have taken away the old beacon, they have placed the Bar Lightship in the position which I have described, they have placed the gas buoys which I have referred to, they have

deepened the channel, and they have fixed pilotage rates. The sheet before me gives the compulsory pilotage rates outward: Liverpool to Bar Lightship, or Horse Channel Fairway Buoy. So far as the present case is concerned the rate is Liverpool to Bar Lightship. The evidence shows that the pilot in this case was taken to pilot the ship to the Bar Lightship. The master said in his evidence that the pilot wanted to be engaged to take the ship to Point Lynas, but that he had replied that he wanted him to take the ship to the Bar Lightship—that he had another man. Some pilotage cards were put in—one dealing with pilotage to the bar and the other with pilotage from the Bar Light-vessel—and it seems clear that the Bar Lightship is at present treated as the place where vessels are to be taken to. The matter, therefore, as far as the facts are concerned, I have dealt with, and the question comes to be, What is to be the law applicable to the case? At present I do not regard this case as on all fours with the two cases which Mr. Aspinall relied upon. The first of those two cases is that of *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (*ubi sup.*). Shortly stated, it is the case of a ship coming up the Channel to London and taking a pilot on board at Dungeness. Before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with another ship through the pilot's negligence. The defendants' ship belonged to the port of London, and there was a question as to where the port of London extended. But the substance of the case was this, that she was in a district in which she was bound to take a pilot to Gravesend, when she took him on board, and to pay him to Gravesend; that when she got to a certain distance she was within the exemption of vessels navigating within their own port; and that, as soon as she passed across a certain imaginary line, she was not, in the strict sense, under compulsory pilotage. But it was held that, there having been an obligation to take a pilot on board to begin with, and to pay him up to the end, and he remaining in charge as pilot, the shipowner was not responsible for the collision which took place. It is shortly put by Byles, J., who delivered the judgment of the court, as follows: "If the master of the defendants' ship wanted to go to Gravesend, or beyond, he could not take a pilot for a shorter distance. It was compulsory on him to take a pilot for that distance at least. The pilot could insist on being paid all the way to Gravesend, and could insist on being carried to Gravesend. There had been in effect a contract between the captain and the pilot that the pilot should go to Gravesend, should be paid to Gravesend, and should act as pilot to Gravesend." Then he says: "Suppose a storm, a fog, or other emergency to have arisen, endangering the life not only of the crew, but of the pilot himself, surely the pilot could have insisted not only on being carried to Gravesend, but on piloting the vessel thither according to his contract. It is plain that during the first portion of the transit between the Downs and Gravesend the relation of master and servant did not exist between the owner of the defendants' vessel and the pilot; and we cannot see any indication of a fresh contract as to the latter portion of that transit." The other case is that of *The Charlton* (*ubi sup.*). I summarise the facts as they strike me. The defendants' pilot was employed to take the ship out of Bristol, and I think she was going to Cardiff. The pilotage was compulsory in the port of Bristol, which did not extend as far as the place of the collision. But the Bristol Channel District extended to further than the place of collision, and the pilot had a licence which covered the port of Bristol and the Bristol Channel District. So the collision took place in a district in which the man was licensed to act; he had been originally taken on board under compulsion; he was paid, as I understand, a rate fixed for the whole district; and practically that case appears to me to be on all fours with the case of the General Steam Navigation Company. I do not think it is put in quite the same way in the judgment, though there are some passages which would seem to do so. But even if it is not so put, there is a distinction between that case and the point raised in the present case. Because the Master of the Rolls (Lord Esher), in the course of his judgment (73 L. T. Rep., at p. 51; 8 Asp. Mar. Law Cas., at p. 30), said: "Then, looking at this statute, and the order of 1891, when the vessel had passed out of the port of Bristol, when she had gone through the port and was outside the port, I have no doubt myself that he was no longer a compulsory pilot. Therefore, when the accident happened, he no longer was a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot, and, although he had passed out of the limits where he was a compulsory pilot, he still was in charge as pilot, and in charge without any alteration of the relations between himself and the master of the ship. He was still the pilot. He was in charge of the ship, for they had not gone to such a place that he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port where he was a compulsory pilot, it is under such circumstances that the master could not properly be called upon to determine whether the compulsion had ceased or not. Then the necessities of the case require that you should not make him a servant of the owners when they had no real opportunity of determining whether he was or was not their servant. They were compelled to take him without his being their servant, and they had no real opportunity of seeing that that relationship which had been put upon them had ceased." Apart from the question of payment, there is this, that the pilot was still a pilot acting within a district for which he was licensed, and the court held in the circumstances that the case came within the section of the Merchant Shipping Act which exonerates the shipowner. There is a considerable distinction, I think, at the outset, between that case and this particular case, because the pilot here was duly licensed to act as a pilot of the first class for the port of Liverpool. Now, if one reads those words in their restricted meaning, that would be only in the port of Liverpool. But, having regard to the Act of 1858, it does not seem to me possible to read those words in such a restricted meaning, because the pilot has to take the ship out of the port of Liverpool to a point outside it; and on coming in, for instance, the master of a ship is bound to employ a pilot from the pilot stations fixed by by-laws, and

I think, if I remember rightly, one of those is right out at Great Orme's Head, and another is Point Lynas. So, to take a vessel in or out, the pilot must act partly outside the port. Therefore his licence means to do those duties which are necessary for the purpose of navigating a vessel into and out of the port of Liverpool. But that is all. Then, going out, the pilot has to take the ship to a certain distance, and there his duties cease, and he does not become a pilot licensed for a district at that point at all. He is licensed to a point in a certain place, and this Act is not like those Acts which refer to Bristol and London, where I think it will be found that persons navigating the districts must be qualified. So those cases do not seem to me to be precisely in point in the present case.

That still leaves a very important question to be determined—namely, whether this pilot was still acting compulsorily in charge of the ship because of the state of things which exist at the present day. I do not think it necessary to decide this case upon the point which the plaintiffs raised. The reason I have come to my conclusion is this: I do not think that the strict construction which the defendants endeavoured to put upon the 127th section of this Act can be maintained. If it is construed strictly, the limit to which a pilot has to go is the Fairway Buoy of the Queen's Channel—in other words, a spot where the Fairway Buoy rested in the year 1858. To my mind that construction would be unreasonable, and not within the fair contemplation of those who must have framed this section, and not within that which is necessary for the purpose of working out the subject with which we are dealing and the employment of pilots. My reasons are these: Construed strictly—and if you once construe it strictly you must do it entirely strictly—the Fairway Buoy of the Queen's Channel would be that which was then there. Of course that cannot be. The buoy has been removed. But if construed strictly it must mean the identical spot when the Act received the Royal Assent. That cannot be so, because we are dealing with a port which has a well-known estuary where there are banks of sand, which, I suppose, from time immemorial have been existing and shifting in a great variety of ways, and probably, from the nature of the locality, extending and silting up the port and rendering necessary what has been done—namely, the dredging of a deep cut out to the bar. It seems clear to my mind that the bar has gradually extended itself. Take the case that must be presented on a strict construction, and assume that a Fairway Buoy is left to mark the Queen's Channel. That Fairway Buoy means a buoy which shows you are well out of the channel and clear of danger. If the bar extends from time to time, and I am still dealing only with the Fairway Buoy, that must inevitably be moved by those who have charge of the entrance of the port, to suit the state of the channel. What, then, is the legitimate conclusion to draw? I thing it is that, although that buoy has been moved, something has taken its place—namely, the Bar Lightship—which, although not a buoy in the strict sense, is the substitute, to my mind, for the buoy. It is remarkable to find, and I hope I have made it clear in stating its position, that it is placed, having regard to the state of the bar, in almost the same position as the Fairway Buoy occupied with regard to the channel which it was intended to guard. That is the explanation, I have not the least doubt, why the lightship is now treated as being the boundary to which the pilots have to go, why the rates are stated in the pilot sheet to be Liverpool to the Bar Lightship, and why the contract is made in such a form as to be a contract to take the ship out to the Bar Lightship. I think, myself, that is the reasonable interpretation to place upon this Act, having regard to the necessary shifting of the place and the nature of the exigencies which have to be dealt with; and it is shown by those conversant with the locality that that is the manner in which the matter is acted upon. To my mind the evidence of the pilot really tends to establish that position. The result therefore, to my mind, is that in this case the pilot was still compulsorily in charge at the time when the collision took place, and that answers the whole of the questions raised in this case. I have given the best consideration I can to the case, and I hope I have made clear the points which I think material and upon which this case is to be decided. The result must be, in my judgment, that the defendants succeed in this case.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *W. A. Crump* and *Son*.

HOUSE OF LORDS.

Feb. 23, 25, *and May* 17, 1904.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN and LINDLEY.)

STEEL, YOUNG, AND CO. *v.* GRAND CANARY COALING COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Construction — Time for loading —Stoppage by strike—"Stoppage for six days from time of vessel being ready to coal"—Right to cancel charter.

By a charter-party it was agreed that a ship of the appellants should load a cargo of coal for the charterers "to be loaded in 140 running hours, commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load." The charter-party also provided that in the event of a stoppage caused by a strike "continuing for a period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage."

Due notice was given that the ship was ready to load, and, after the expiration of the time allowed for loading, a stoppage caused by a strike commenced, and continued for six days. No cargo had been shipped, and the charterers gave notice that the charter-party was cancelled.

Held, that the charter-party contemplated a stoppage in existence at the beginning of the loading time, and that the charterers were not entitled to cancel the charter on the occurrence of a stoppage at a later period.

Judgment of the Court of Appeal reversed.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), reported 87 L. T. Rep. 321; 9 Asp. Mar. Law Cas. 326; 7 Com. Cas. 213, who had reversed a judgment of Phillimore, J., reported 6 Com. Cas. 240, in favour of the appellants, the plaintiffs below.

The action was brought by the appellants, as owners of the steamship *Nith*, against the respondents for breach of a charter-party. The facts of the case and the material clauses of the charter-party appear from the headnote above, and from the judgments of their Lordships.

The ship was ready to load on the 8th Aug. 1900, and due notice was given to the respondents. The loading time expired on the 15th Aug., but no cargo had been loaded.

On the 20th Aug. a colliery strike caused a stoppage of the coal intended for the ship, and this stoppage continued for more than six days.

On the 28th Aug. the respondents gave notice that the charter was cancelled.

The ship could not obtain another charter till the 3rd Sept., and then at a lower rate of freight. The plaintiffs claimed damages for the delay from the 8th Aug. to the 3rd Sept. and also for the difference in freight. The defendants paid into court a sum for demurrage at the rate fixed by the charter-party from the 8th Aug. to the 26th Aug.

Carver, K.C. and *L. Noad* appeared for the appellants.

J. A. Hamilton, K.C. and *Montague Lush*, K.C for the respondents.

Carver, K.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the whole question seems to turn upon a very narrow point—namely, the true construction of the charter-party. I have tried to see whether the language literally construed according to the ordinary plain meaning of words and sentences is susceptible of any other meaning than that which the plaintiffs attribute to it. I am unable to come to the conclusion that it is. Although I am not insensible to some of the inconvenience which may result from a literal interpretation of the words, I cannot say that any alternative interpretation that I can suggest is fit for your Lordship's adoption. No other construction can be placed upon the words than that contended for by the plaintiffs; to my mind they are not susceptible of any other meaning. The parties have placed their own interpretation upon them, and it appears to me impossible to contend under those circumstances that there is any other construction to be given to the charter-party than that for which the plaintiffs contend. If that is the true view of the charter-party, the facts raise no question which can be debated, when once you give that interpretation to the charter-party. I can give no other construction to it than the literal meaning which the words convey, and, therefore, I move that the judgment of the Court of Appeal be reversed.

Lord MACNAGHTEN.—My Lords: The question in this case depends on the true construction of one clause in a charter-party, under which a screw steamer called the *Nith* was engaged to carry a cargo of coal from Newport in Monmouthshire to Santa Cruz or Las Palmas. The charter makes provision for the avoidance of the contract in the event of a stoppage occasioned by a strike or any cause beyond the control of the charterers continuing for six running days from the time of the vessel being ready to load, subject, however, to this proviso—that no cargo had been shipped on board. The point to be decided is whether the stoppage to be effective for the purpose of avoiding the contract must be in existence at the beginning of the loading time or whether it may commence at any time within a reasonable limit after notice given of the vessel being ready to load. The former construction was adopted by Phillimore, J.

The Court of Appeal has taken the other view. The clause in question, so far as material, is in the following words: "3. The cargo to be loaded in 140 running hours . . . commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load. . . . Any time lost through riots, strikes, lock-outs . . . or by reason of . . . any cause beyond the control of the charterers not to be computed as part of the loading time unless any cargo be actually loaded during such time." I pause for a moment to point out that here the charter itself contemplates the possibility of cargo being loaded during a stoppage—a thing which might very well occur, even though it were intended that the cargo should consist of nothing but coal. The clause proceeds as follows: "In the event of any stoppage or stoppages arising from any of these causes continuing for six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages." Of course, if a charter were to be annulled after cargo had been shipped on board difficulties must arise, and it would be by no means easy to provide for the rights of the parties. It is, therefore, only reasonable and, indeed, necessary, that any provision annulling a charter should not apply when once cargo is shipped. It can make no difference whether cargo actually on board has been shipped before the commencement of the stoppage or during the stoppage. The expression "such stoppage" must mean a stoppage continued for the full period of six running days. These considerations seem to make it plain that the words "previous to such stoppage or stoppages" mean previous to the completion, not previous to the commencement, of the period which may give occasion for the avoidance of the charter. It cannot, I think, be disputed that if the language of clause 3 is to be taken in its natural and ordinary signification a stoppage to be effective must be one reckoned from the commencement of the loading time. On any other view the words "from the time of the vessel being ready to load" would be wholly idle and superfluous. So much out of place would they be that I cannot imagine any draftsman, however careless, inserting them or allowing them if inserted to remain uncancelled. The argument on the

other side is that the literal construction is to be rejected and a less accurate meaning given to the word "from," because the proviso at the end of the clause shows as it is contended, that the parties must have contemplated that there would occur between the commencement of the loading time and the six days' stoppage an interval of time during which cargo might or might not be put on board. It seems to me, however, that there is not much force in this argument, if you bear in mind that the parties contemplated the possibility of cargo being put on board during a stoppage. And the force of the argument is, I think, altogether destroyed when you find that by a note in the margin of the charter, which seems to be part of the printed form—for it also occurs in the substituted charter of the 3rd Sept.—the charterers are at liberty to put on board twenty tons of general cargo. The loading of general cargo would not necessarily, or even probably, be prevented by a strike, lock-out, or accident which might interfere with loading coal. It appears to me, therefore, that, even without resorting to a suggestion which is rejected by the Court of Appeal as a vain imagination of counsel, ingenious, but wholly unfounded, there is nothing to justify a departure from the natural and ordinary meaning of the language employed to define the commencement of a stoppage which may operate to put an end to the contract. The result is not unreasonable. There are two provisions relating to stoppages occasioned by a cause beyond the control of the charterers—a general provision and a special provision. In all cases of stoppages, partial or otherwise, the charterer may exclude from the loading time the time during which no loading takes place. In the special case of the charterer being met by a stoppage in existence at the commencement of the loading time, which is just as likely to happen as the occurrence of a stoppage afterwards during the loading time, the contract may be annulled. Looking at the matter from a charterer's point of view, that, I think, is all that can be required. From a shipowner's point of view the other construction would seem, occasionally at any rate, to offer a premium on dilatory tactics. As regards the measure of damages, it seems to me that Phillimore, J. was right. There was, in my opinion, a repudiation of the contract on the one side and an acceptance of that repudiation on the other. I am, therefore, of opinion that the appeal should be allowed with the usual consequences.

Lord LINDLEY.—My Lords: The expression "loading time," which occurs in this charter, means the 140 running hours within which the ship is to be loaded; and these 140 hours begin to run after written notice that the ship is ready to load. Any time lost in loading through strikes, &c, is not to be computed as part of the loading time, unless some cargo is actually loaded during such time. So far the charter-party seems clear enough. Then if any strike, &c., continues for six days "from the time of the vessel being ready to load" the charter is to become null and void, unless any cargo shall have been shipped prior to the stoppage. The expression "six days from the time of the vessel being ready to load" points to the earliest time when she is ready, and not to any time after she is ready. I quite see the inconveniences which may arise in other cases from adhering closely to the words of the clause on which the controversy between the parties turns. But I see no absurdity or injustice in construing the clause in its most obvious and natural sense in this particular case. The case is peculiar and unusual. The ship was ready to load and her time for loading had expired before there was any strike, and the strike had lasted six days before the charterer began to load, and he then insisted that the charter had become null and void. That is the case with which your Lordships have to deal. This case does fall within the clause if construed according to its most obvious meaning. I leave other cases to be dealt with when they arise. The appellants have the advantage of being able to rely on the words as they stand, and I see no sufficient reason for extending them. As regards the damages, the correspondence shows a refusal by the charterer to load on the 28th Aug., persisted in from that time onwards, and I see no reason for holding that the damages have been improperly assessed. In my opinion, therefore, the appeal should be allowed, with costs here and below, and the judgment of Phillimore, J. should be restored.

Judgment appealed from reversed. Judgment of Phillimore, J. restored. Respondents to pay to the appellants the costs here and below.

Solicitors for the appellants, *W. A. Crump* and *Son.*

Solicitors for the respondents, *Botterell* and *Roche*, for *F. Vaughan*, Cardiff.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Dec. 16, 17, 1903, *and Feb.* 3, 1904.

(Present: The Right Hons. Lords MACNAGHTEN and LINDLEY, Sir ARTHUR WILSON, and Sir JOHN BONSER.)

OWNERS OF THE CITY OF LINCOLN v. SMITH. (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

Unseaworthiness — Exceptions in charter-party— Negligence of owner.

Exceptions in a charter-party will not free a shipowner from liability for the consequences of personal negligence in loading the ship whereby she is rendered unseaworthy unless such exceptions are expressly applicable to the owner.

Judgment of the court below affirmed.

APPEAL from a judgment of the Supreme Court of the colony of Natal affirming, with a variation, a judgment of the Circuit Court in favour of the respondent, the plaintiff below, in an action brought by him against the appellants to recover damages for the non-delivery of cargo carried in the appellant's ship under circumstances which appear fully in the judgment of their Lordships.

Robson, K.C. and *D. Stephens* for the appellants.

Sir *R. Reid*, K.C., *Scrutton*, K.C., and *Clavell Salter* for the respondent.

Stephens in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Feb. 3.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—This is an appeal in the name of the master and owners of the steamship *City of Lincoln* from an order of the Appeal Court in Natal. The order appealed from upholds a verdict and, subject to a variation in the assessment of damages, affirms a judgment obtained in the Durban Circuit Court by the respondent Charles George Smith. The action was brought to enforce a claim for damages for non-delivery of cargo by the *City of Lincoln* in breach of a charter-party dated the 1st Dec. 1899, and expressed to be made in Buenos Ayres between W. Samson and Co., "on behalf of the owners," and "T. S. Boadle and Co., charterers." The *City of Lincoln* belonged to W. Samson himself, and this appeal is brought on his behalf. The respondent was represented by T. S. Boadle and Co. The charter provided that the vessel, being tight, staunch and strong, and everyway fitted for the intended voyage, should with all covenient speed, being discharged, proceed as ordered by the charterers or their agents to the undermentioned places, and receive from them, in the port of Rosario, a quantity of hay in export bales; thereafter, in La Plata, a quantity of live stock on deck, which cargo the charterers bound themselves to ship not exceeding what the vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded should therewith proceed to Port Natal, South Africa, and deliver the cargo on being paid a lump-sum freight of 6500*l*. The owners were to appoint the stevedore. The charterers were to have the full reach and burthen of the steamer with the exception of space for 1200 tons of coals for ship's use which were to be carried in steamer's holds and bunkers. The charter and bills of lading contained a series of exceptions and provisions in favour of the owner. Average, if any, was to be payable according to the York-Antwerp Rules of 1890, which negative any claim in respect of cargo carried on deck. In pursuance of this charter-party the *City of Lincoln* commenced loading on the 7th Dec. 1899, at Rosario. There she took on board some 20,000 bales of hay. She then proceeded down the river and entered La Plata on the 16th, where she took in more hay and fodder and received her cargo of live stock —270 bullocks, 100 horses, and 400 sheep. She started on her voyage on the 21st Dec. 1899, leaving Ensenada on the afternoon of that day. She arrived at Port Natal on the 15th Jan. 1900 short of her cargo of hay by 578 bales, and without a single one of the bullocks, horses, and sheep shipped by the respondent. The respondent's case was that the *City of Lincoln*, though in herself and as a ship tight, staunch and strong, and fitted for the voyage, was not properly ballasted, and was therefore unseaworthy when notice was given that she was prepared to receive her cargo and when she started on her voyage; that this unseaworthiness was attributable to negligence or want of reasonable care on the part of the owner himself, and was the direct cause of the loss complained of. On the other hand, the owner maintained that the vessel was properly ballasted, and perfectly seaworthy at starting, and, moreover, he contended that, even assuming that she was unseaworthy, he was protected from liability by the exceptions and provisions of the charter-party.

The action came on to be tried in April 1901 before Beaumont, J. and a special jury. The trial lasted several days. There was a good deal of evidence on both sides, oral and documentary, including the depositions of witnesses taken on commission, the captain's diary, the rough log, and the chief officer's log-book. The learned judge seems to have been under a misapprehension as to the position of the charterer. He appears to have thought that the vessel was "handed over" to the charterer on the date of the charter-party, the 1st Dec., and that from that date she was under his orders, and that the charterer "arranged to his own liking as to the loading of the vessel." He was prepared to hold, as a matter of law, that in any event the owner was excused by the exceptions in the charter-party. But although that was his opinion he summed up the case to the jury in a manner to which no objection can be taken, and he proposed to the jury a series of questions in framing which he invited the assistance of the learned counsel on both sides. The material questions put to the jury, with the answers given by them, are as follows: (1) Q. Was the steamship *City of Lincoln* as a ship tight, staunch and strong, and every way fitted for the intended voyage at the time she was chartered before she was loaded?—A. Yes. (2) Q. Was she seaworthy after loading and before leaving dock at Ensenada?—A. No. (3) Q. If not, in what respects did she become unseaworthy and from what cause?—A. She was unseaworthy being top heavy, having insufficient dead weight in her bottom to counteract the weight above the water line. (4) Q. Was the shipowner in any way responsible for such causes, if any, by want of reasonable care on his part?—A. Owner is responsible, as he should have seen that more dead weight was put in the bottom of the steamer. (7) Q. What were the causes of the loss of cargo?—A. The vessel being in an unseaworthy condition as per answer No. 2 was not able to stand the ordinary rough weather experienced. (8) Q. Were such causes due to unseaworthiness at starting or to perils of the sea?—A. To unseaworthiness at starting. On these findings the learned judge gave judgment for the charterer, observing that but for the condition in the charter to which perhaps (he said) he attached too much weight, there could be no doubt the verdict of the jury would be perfectly right. The opinion of the Supreme Court on Appeal was delivered by Broome, J. in a written judgment which has their Lordships' entire approval. The conclusion at which the court arrived was that, on the questions of fact, there was ample evidence to support the findings of the jury, and that there was nothing in the charter-party to relieve the owner from consequences resulting from want of reasonable care on his part. In the argument before their Lordships very little was said about the exceptions in the charter-party. Indeed that point was hardly open then. It had been practically concluded by what occurred in *Westall's* case, *Anglo-Argentine Live Stock and Produce Agency Limited* v. *Westall*, unreported. There a ship was chartered to carry cattle from La Plata to England. The charter was identical in its terms with the charter

of the *City of Lincoln*. The ship was overburdened and rolled so heavily that the cattle were lost. Mathew, J. held the owner liable. He thought the owner had been personally negligent, and that there was nothing in the charter to excuse him from the consequences of personal negligence. On appeal, both in the Court of Appeal and the House of Lords, it was held that the owner was protected, not because personal negligence was covered and excused by the conditions of the contract, but because there was no case of personal negligence at all. It appeared that at the time when the charter was made and at the time when the vessel was being loaded the owner was in this country. He had left the management of the vessel in the hands of duly qualified and competent persons. Against the consequences of negligence on the part of servants and agents the conditions of the charter-party were a protection. In the present case no one but the owner had anything to do with the loading of the vessel. The charterer had no right to interfere. It was not his province to load or to stow the vessel. His business was to provide a cargo in accordance with the conditions of the charter-party. To do the owner justice, he did not attempt to excuse himself by throwing the blame on the stevedore or the captain or anybody else. He did not for a moment dispute his responsibility in regard to loading or ballasting. His case was that the ship was properly loaded and ballasted. She was loaded (he said) and ballasted "as proposed." Indeed he went so far as to declare that he would have no hesitation, in the event of a similar cargo being offered, to load the *City of Lincoln* in the same way and ballast her in the same manner. The findings of the jury on the questions of fact were impeached in a very able argument on behalf of the appellant, but their Lordships see no reason to differ from the conclusion at which the Supreme Court arrived. Their Lordships have not to decide whether the jury were right or wrong in their view of the facts. They have merely to determine whether there was evidence on which reasonable men properly instructed by the judge could have come to the conclusion at which the jury arrived. It seems to their Lordships that there cannot be any doubt upon that point. [His Lordship discussed the evidence, and concluded as follows:] Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of the appeal.

Solicitors: for the appellants, *Holman, Birdwood*, and *Co.*; for the respondent, *Edell* and *Gordon*.

May 17, 18, 31, *and June* 22, 1904.

(Present: The Right Hons. Lords MACNAGHTEN and LINDLEY, and Sir ARTHUR WILSON.)

TURNER AND ANOTHER *v.* HAJI GOOLAM MAHOMED AZAM. (*a*)

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

Charter-party—Sub-charter—Lien for freight—Bill of lading—Notice of charter-party.

Notice of a charter-party given to a shipper has not the effect of incorporating into the bill of lading any terms inconsistent with it, which the captain was not bound to embody in it.

Therefore a shipowner is not entitled to a lien for freight payable under a time charter on goods shipped by a person not a party to that charter, whose goods were carried in the ship under a sub-charter and bill of lading.

Judgment of the court below affirmed.

APPEAL from a decree of Jenkins, C.J. and Tyebji, J., sitting as a Court of Appeal, allowing the appeal of the present respondent against a decree of Russell, J. in favour of the present appellants in a suit in which the respondent was plaintiff and the appellants were defendants.

The appellant Glanville was the registered managing owner of the steamship *Bombay*, and the appellant Turner was master. The *Bombay* was by a charter-party dated the 20th Aug. 1898 (hereinafter called the time charter) let for six months to Messrs. Issabhoy, Thaver, and Co., and was by an agreement of the 26th Aug. 1898, which was subsequently embodied in a charter-party (hereinafter called the sub-charter), sublet by Messrs. Issabhoy, Thaver, and Co. to the respondent for a round voyage. By the time charter a lien was given to the owners of the *Bombay* upon all cargoes for freight or charter money due under the charter. The respondent had notice of the time charter and its terms.

During the currency of the time charter, on the 2nd Feb. 1899, the *Bombay*, in prosecution of the round voyage for which she was sub-chartered to the respondent, arrived at Bombay having on board two consignments of sugar, one of 13,431 bags and the other of 17,076 bags, which had been shipped by the respondent at Mauritius, and in respect of which the respondent was himself the holder of the bills of lading. There was then due to the owners of the *Bombay* a month's hire amounting to 18,000 rupees, equivalent to 1197*l.*, and for this freight or charter money the appellant Turner, on the instructions of his owners, exercised a lien on the sugar.

The respondent thereupon instituted this suit by plaint dated the 8th Feb. 1899 against the appellant Turner and one Chabildas Lulloobhoy as one of the owners of the *Bombay*. The claim of the respondent was that the defendants to the suit might be ordered to deliver to him the sugar or to pay him five lacs of rupees, its value, and costs of suit, and such further or other relief as the nature of the case might require. The respondent alleged that the detention of the sugar was wrongful, that the bills of lading admitted that the freight was paid in Port Louis, and that he was entitled to receive delivery of the sugar without payment of any freight.

By judge's order dated the 16th Feb. 1899 the respondent, upon depositing 18,000 rupees in court, was appointed receiver to sell the sugar, and to deal with the proceeds. The sum was deposited, and the respondent accordingly obtained possession of the sugar. By a further judge's order dated the 9th March 1899 the name of the appellant Glanville was substituted by amendment for that of Chabildas Lulloobhoy as a defendant to the suit.

The appellant Turner by his written statement contended that he was lawfully entitled to exercise the lien given by the time charter for the

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

hire of the steamer against the goods claimed by the plaintiff, and was also lawfully entitled to exercise a lien upon the goods for freight for all the goods mentioned in the bills of lading specified in the list annexed to the written statement. He also alleged that the respondent was aware of the terms of the time charter which conferred the lien, and further that he, the appellant Turner, was induced to sign the bills of lading without receiving any freight by a misrepresentation of the respondent's agents.

The appellant Glanville by his written statement contended that all the cargo shipped by the plaintiff upon the vessel was the subject of the lien given to the owners by the time charter, and that the captain of the vessel rightly exercised the lien upon the cargo for the amount of 18,000 rupees, and further that the captain had no authority to sign the bills of lading in the plaint mentioned without providing that the freight payable in respect of the goods shipped thereunder should be paid to the captain or the agents of the owner, and further that the signature of the captain to the bills of lading was obtained at Mauritius by misrepresentation on the part of the agents of the respondent, and that without prejudice to any of the foregoing defences the respondent was bound to pay reasonable freight for the goods shipped under the bills of lading, and that the captain was justified in exercising a lien upon the goods of the respondent, and that the lien exercised by the captain was good at least for the amount of such freight which this appellant estimated at the sum of 11,798.6.7 rupees.

The most material provisions of the time charter were as follows:

Clause 4. That the charterers should pay for the use and hire of the vessel at the rate of 7*s.* 6*d.* per gross register ton per calendar month. This amounted to 1197*l.*, or 18,000 rupees, per month.

Clause 8. That payment was to be made in cash monthly in advance to owners' agents in Bombay, and that in default of such payment the owners or their agent should have the faculty of withdrawing the steamer from the service of the charterers.

Clause 14. That the captain (although appointed by the owners) should be under the orders and direction of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to this charter.

Clause 21. That charterers were to have the option of subletting the steamer.

Clause 22. That the owners should have a lien upon all cargoes for freight or charter money due under this charter.

On the 25th Aug. 1898 the time charterer gave to the respondent a firm offer of the vessel on charter for a round voyage from Rangoon or Saigon to Réunion, thence to Mauritius, and back to Bombay; and this was accepted by the respondent on the 26th Aug. 1898, and a sub-charter was drawn up which embodied the agreement thus arrived at. This was dated the 13th Oct. 1898. The freight under the sub-charter was to be calculated upon the amount of cargo carried by the vessel from Saigon to Réunion. The sub-charter contained the following provisions:

Clause 15. The captain, if necessary, to sign bills of lading at any freight without prejudice to this charter-party.

Clause 24. Time charterers to have a lien on the cargo for freight and demurrage (if any).

The respondent arranged with the time charterers that he should himself make payment of the monthly hire payable under the time charter to James Mackintosh and Co., the agents of the owners of the vessel in Bombay. In pursuance of this arrangement the monthly hire was paid by the respondent to Mackintosh and Co. on the 22nd Oct., the 21st Nov., and the 21st Dec. 1898. On the last-mentioned date the sum paid by the respondent was 8205 rupees instead of 18,000 rupees by reason of a detention of the vessel at Singapore for repairs. This deduction was claimed by the respondent, and was allowed by the owners' agents pursuant to a clause (17) in the time charter providing for the ceasing of payment of hire if loss of time resulted from damage to the vessel and similar causes.

On the 19th Jan. 1899 another month's hire became due. The vessel was then at Mauritius loading sugar for Bombay, the final stage of her voyage under the sub-charter. The respondent had by letters of the 26th Nov. 1898 informed his agents at Réunion and Mauritius that he (the respondent) was making the monthly payments of 18,000 rupees each month, and on the 18th Jan. 1899 he telegraphed to the agents at Mauritius: "Take steamer's freight Mauritius." The bags of sugar in question in this suit were shipped for and on account of the respondent, and on the requirement of his agent the master signed a bill of lading for 13,431 bags dated the 20th Jan. 1899, making them deliverable to the respondent or to assigns "paying freight for the said goods at the rate of six annas of seventy-five kilograms gross French weight shipped paid in Port Louis"; and also a bill of lading for 17,076 bags dated the 21st Jan. 1899 in like terms except that the freight was stated to be "payable in Port Louis." The master was induced to sign the bills of lading in this form on the faith of representations of the respondent's agents at Réunion and Mauritius that the respondent was paying the hire of the vessel under the time charter in Bombay. The instalment of hire due on the 19th Jan. 1899 had not, however, in fact been paid, and it never was paid. Also no part of the freight reserved in the two bills of lading was ever paid. The vessel sailed from Mauritius on the 22nd Jan. 1899, and arrived at Bombay on the 2nd Feb. 1899, when the lien was exercised and this suit instituted.

The suit came on for hearing before Russell, J. on the 22nd Feb. 1900. The evidence consisted to a large extent of documents and correspondence. Oral evidence was also adduced before the learned judge, and before the hearing of the suit the master and chief engineer of the *Bombay* were examined before the judge himself, and evidence was also taken on commission at Réunion and Mauritius.

On the 10th March 1900 the learned judge gave judgment in favour of the appellants, and after further consideration on the 22nd March 1900 pronounced a decree declaring that the appellants were entitled to a lien for the sum of 15,411.12.8 rupees, and were entitled to be paid the costs of the suit by the respondent, and that the moneys in court should be applied towards satisfaction of

this sum and costs. The learned judge held that the respondent was at all material times aware of the time charter and its terms, and that his goods were not exempt from the lien conferred by that charter; also that the bills of lading were signed by the master in the form employed without authority of the owners, and that the signature of the master was obtained by misrepresentation and was affixed by mistake, and that the bills of lading had no validity as against the appellants. The learned judge further found that under any circumstances the respondent was not entitled to demand his cargo or to maintain the suit without tendering the amount due under the terms of the sub-charter, and that no tender was made by the respondent.

On the 4th April 1900 the respondent, feeling himself aggrieved by the said decree, filed a memorandum of appeal against the same.

On the 11th April 1901 the appeal came on for argument before a Court of Appeal consisting of Jenkins, C.J. and Tyebji, J., who on the 19th April 1901 gave judgment allowing the appeal, and varying the decree passed by Russell, J. by declaring that there was a lien against the respondent only for the balance of the sub-charter freight, which amount was to be determined thereafter, and that if on such inquiry it was found that the balance due was less than 6000 rupees then the respondent was to be entitled to damages to an amount to be ascertained. Further consideration and costs were reserved with liberty to apply.

The Court of Appeal accepted the view of Russell, J., or assumed for the purpose of their judgment that the plaintiff had knowledge of the time charter and its terms. But the court was of opinion that this fact was in the circumstances immaterial, and that the shipowner having by the time charter authorised the subletting of the vessel, their lien was limited to the freight for which the time charterer had a lien—that is to say, for the freight due under the sub-charter. The court was also of opinion that there had not been misrepresentation inducing the signing of the bills of lading, but in the view of the court these bills of lading were mere acknowledgments of the receipt of the goods, and the rights of the parties were fixed by the sub-charter. The court found that the respondent was ready and willing to pay 6000 rupees to the appellants in respect of the amount due under the sub-charter, and that if the amount so due was less than 6000 rupees the respondent was entitled to damages.

Carver, K.C. and *A. Adair Roche* for the appellants.

J. A. Hamilton, K.C. and *Lauriston Batten* for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 22.—Their Lordships' judgment was delivered by

Lord LINDLEY.—The question raised by this appeal is whether the appellants, who are shipowners, are entitled to a lien for freight payable under a time charter on the goods of the respondent, who was no party to that charter, but whose goods were carried in the appellants' ship under a sub-charter and bill of lading. The judge of first instance decided this question in favour of the appellants. His decision was reversed by the Court of Appeal in Bombay, and the present appeal is from the decision of that court. The undisputed facts are as follows: The appellant Glanville was the registered owner of the steamship *Bombay*, and the appellant Turner was her captain. By a charter dated the 20th Aug. 1898, and entered into by the agents of the owners and some Bombay merchants named Issabhoy, Thaver, and Co., the owners agreed to let and the charterers agreed to hire the ship for six calendar months. She was placed at their disposal with a full complement of officers and men at Bombay for employment in the Indian Ocean and other Eastern waters as the charterers or their agents should direct, on certain conditions of which the following are important: (2) The owners were to pay the captain and crew. (4) The charterers were to pay freight monthly in advance at the rate of 7*s.* 6*d.* per ton, which came to 18,000 rupees. (8) In default of such payment the owners were entitled to withdraw the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have against them. (14) The captain, although appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency, or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to that charter, and the captain was to attend daily, if required, at their offices to do so. The charterers were to indemnify the owners from all consequences or liabilities that might arise from the captain doing so except for short delivery. (21) The charterers were to have the option of subletting the steamer. (22) The owners were to have a lien upon all cargoes for freight or charter money due under the charter, and the charterers were to have a lien on the ship for all moneys paid in advance and not earned. The 14th, 21st, and 22nd conditions are those which have given rise to the controversy between the parties; but, before considering them, it will be convenient to state what was done, and, for the purpose of avoiding confusion, the charterers under this charter will be referred to as the "time charterers" in order to distinguish them from the respondent, who is their sub-charterer. Shortly after the time charter was made the ship was sub-chartered to the respondent for a round voyage from Saigon to Réunion and back from Mauritius to Bombay. She was to take rice from Saigon to Réunion, and sugar from Mauritius to Bombay. Freight was to be payable for the whole voyage at the rate 1.8 rupees per bag of 168lb., calculated only on the cargo shipped from Saigon to Réunion. There was to be no freight payable by the sub-charterer to the time charterer for any other cargo. On account of the freight thus estimated, 37,500 rupees were to be paid at Bombay before the steamer sailed from Saigon, 25,000 rupees at Réunion or Mauritius, and the balance was to be paid at Bombay after delivery of the cargo there. It will be observed that neither of these documents took the ship out of the legal possession of the owners so as to deprive them of the power of detaining goods on board, and of enforcing any lien to which they might be entitled. The captain retained possession for the owners,

and was in a position to enforce the lien expressly conferred by the time charter if it was properly enforceable against the goods in question. The steamer completed this voyage, and on the 2nd Feb. 1899 she arrived at Bombay, having on board a quantity of sugar put on board by the sub-charterer at Mauritius, for which he had received bills of lading from the captain. The freight payable by these bills of lading was at the rate of six annas per seventy-five kilograms, and this freight was prepaid by the sub-charterer in Mauritius, so that when the ship arrived in Bombay nothing remained to be paid by the sub-charterer to the owners in respect of the bill of lading freight. It appears, however, that something was due from the sub-charterer to the time charterers for money payable under the sub-charter. There was also due to the owners a month's freight—*i.e.*, 18,000 rupees (1197*l.*)—from the time charterers under the time charter, and the owners claimed a lien for this amount on the sub-charterer's sugar. Hence the dispute between the parties. The sub-charterer brought an action to recover his sugar or its value, and damages for its detention, and the shipowners defended the action relying on their lien. So far there is no dispute about the facts. The shipowners, however, also defended the action upon the ground of misrepresentation alleged to have been made by the sub-charterer to the captain before the sugar was shipped, on the faith of which he is said to have signed the bills of lading. This alleged misrepresentation was denied, and a considerable amount of evidence upon it was adduced. The judge of first instance thought the defence proved. But the Court of Appeal took a different view. The evidence has again been laid before their Lordships, and they have carefully considered it. It appears that the sub-charterer had paid to the agents of the shipowners some of the freight payable in advance under the time charter, and there was undoubtedly some misunderstanding on the part of the captain as to similar payments being made in future. But their Lordships are not satisfied that the sub-charterer made any false statement to the owners' agents or to the captain, nor any representation or promise which could confer on the owners any lien on the sub-charterer's goods other than such as the documents above referred to entitle them to assert. Their Lordships, however, agree with both courts in India in their conclusion that the sub-charterer knew, in a general way, of the time charter, and that the freight payable under it by the time charterers was 18,000 rupees, payable monthly in advance.

Bearing these conclusions in mind, their Lordships will consider the legal position of the parties. The first question which is raised is the effect of the bills of lading. Apart from them there was no contract between the shipowners and the sub-charterer. But he shipped his sugar on board the steamer on the terms of those bills of lading, and the captain was authorised by the time charter to sign them. Whether he signed them for the shipowners or for the sub-charterer he had express authority from the shipowners to sign them. Under these circumstances the shipowners appear to their Lordships to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bills of lading. This distinguishes the present case from *Colvin* v. *Newberry* (1 Cl. & Fin. 283), where the bill of lading given by the captain of a chartered ship was held to bind the charterer only, although the shipowners retained possession of the ship by the captain. Nor is the present case governed by *Small* v. *Moates* (9 Bing. 574) and other cases of that class, where the holder of the bill of lading had no better title than the charterer who was himself the captain of the ship and the original shipper of the goods. It further appears to their Lordships that the bills of lading in this case are not mere receipts for goods given to a charterer already bound to the shipowner by a charter-party entered into between them from which the captain had no authority to depart. Unless, therefore, the fact that the sub-charterer had notice of the time charter makes a difference, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading freight. This was decided in *Fry* v. *Chartered Mercantile Bank of India* (14 L. T. Rep. 709; 2 Mar. Law Cas. O. S. 346; L. Rep. 1 C. P. 689), which was followed in *Gardner* v. *Trechmann* (53 L. T. Rep. 518; 5 Asp. Mar. Law Cas. 558; 15 Q. B. Div. 154). In both of these cases the bill of lading expressly referred to the charter-party, but not in such a way as to incorporate either the obligation to pay the charter freight or the lien for it. These cases, and others like them, show that notice by a shipper of a charter-party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it, and which the captain was not bound to embody in the bill of lading. If the charter-party shows that the captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter-party. If the shipper knew that there was a charter-party, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents. In the present case the time charterer had authority to let other persons have the use of the ship for six months for any voyage in the waters mentioned in the time charter. The captain was not only empowered to sign but was bound to sign bills of lading at any rate of freight which the charterers or their agents might direct, but without prejudice to that charter. These words introduce a difficulty. It is said that they limit the authority of the captain to sign bills of lading which do not preserve to the owners the power to withdraw the ship under condition 8 of the time charter and their lien on all goods under condition 22. This construction is a possible construction, but it has long ago been rejected both by commercial men and by judicial decision. There can be no doubt that the sub-charterer must, for this purpose, be regarded as an agent of the charterer. The words "without prejudice to this charter" mean that the rights of the shipowners against the time charterers, and *vice versâ*, are to be preserved. That this is the true meaning and legal effect of the words "without prejudice to this charter" has often been the subject of controversy and of judicial decision, and has long been treated as settled by authority. In *Hansen* v. *Harrold Brothers* (70 L. T. Rep. 475; 7 Asp. Mar. Law Cas. 464; (1894) 1 Q. B. 612), Lord Esher, M.R. said that its meaning was "that it is a

term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." It means no more. Condition 8 in the time charter, empowering the owners to withdraw the ship, cannot mean that, after the captain has shipped goods for Bombay and given bills of lading for them to persons other than the time charterers, the owners can refuse to allow the ship to go to Bombay and deliver the goods there as agreed by the bills of lading. So as regards condition 22 giving a lien upon all cargoes for freight or charter money due under that charter. This is a stipulation binding on the time charterer, and gives the shipowner a more extensive lien than he would have for freight payable in advance. But this clause does not override or limit the power of the captain to issue bills of lading at different rates of freight, or entitle the shipowners to a lien on the goods of persons who have come under no contract with them conferring a lien for the freight payable under the time charter. A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a court of justice can be expected to recognise it. If their Lordships had taken a different view of the legal effect of the bills of lading there might have been more difficulty in the case, for there is great force in Mr. Carver's argument that, if the bills of lading were mere receipts for goods put on board, the sub-charterer could have had no greater rights than those which the time charterers had themselves. It is not, however, necessary to solve the difficulties which would have arisen if there had been no bills of lading. For the reasons above stated, their Lordships are of opinion that the claim of the shipowners cannot be supported, and that the order appealed from ought to be affirmed. Their Lordships observe that the Court of Appeal gave the shipowners the benefit of any lien which the time charterers had on the goods of the sub-charterer. This seems right, and the sub-charterer's counsel did not contend that it was not. Their Lordships will therefore humbly advise His Majesty to dismiss the appeal, and the appellants must pay the costs.

Solicitors: for the appellants, *Maples, Teesdale, and Co.*; for the respondent, *Waltons, Johnson, Bubb, and Whatton.*

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, March 5, 1904.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

BOULTON AND OTHERS *v.* HOULDER BROTHERS AND CO. AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Discovery—Production of documents—Marine insurance—Underwriters' right to discovery and production—Action by underwriters against assured to recover over-payments.

In an action by underwriters to recover the amount of overcharges which they had paid to the assured in respect of claims upon policies of marine insurance, which overcharges they alleged had been obtained by means of false and fraudulent accounts:

Held (allowing the appeal), that the underwriters were entitled to have as full discovery from the assured as they would have been entitled to in an action brought against them upon the policies.

APPEAL of the plaintiffs from the order of Bucknill, J. made at chambers.

This action was brought by a number of underwriters against the defendants to recover the amount of alleged overcharges made in claims under policies of marine insurance underwritten by the plaintiffs; and also to recover damages for conspiracy to defraud the plaintiffs.

The defendants were Houlder Brothers and Co., Houlder Brothers and Co. Limited, C. F. Hartridge, C. K. Etheridge, W. C. Beard, James Littlefield and Co., A. G. Inrig, Inrig and Chester, the Globe Electrical Company, and the Queen's Dock Electric Works Limited.

The plaintiffs had underwritten a large number of policies upon steamers, the insurances being effected by Houlder Brothers and Co. in their own names.

Houlder Brothers and Co. were the managing owners of the steamers, and made many claims under the policies of insurance and had received payment from the underwriters.

The plaintiffs alleged that some of these claims were fraudulent; that the defendants, other than Houlder Brothers and Co., had made out excessive claims for repairs, and that Houlder Brothers and Co. had supported those claims by means of false accounts for the purpose of defrauding the underwriters. The plaintiffs alleged that they had in consequence paid amounts much larger than the repairs had really cost, and they claimed repayment of the overcharges.

Some of the steamers in respect of which claims were made were owned by single-ship companies. These companies went into voluntary liquidation for the purpose of amalgamation into one company—the Houlder Line Limited.

The Houlder Line Limited were not made parties to this action.

Houlder Brothers and Co., while denying liability, paid a large sum of money into court, which they alleged to be sufficient to satisfy the plaintiffs' claim.

An order was made, on the application of the plaintiffs, that the defendants should give particulars of the payment into court.

Particulars were given, but they did not sufficiently show in respect of which policies and underwriters the payment into court was made.

An affidavit of documents was made on behalf of the defendants, on the 11th Jan. 1904, in which it was sworn that the defendants Houlder Brothers and Co. and Houlder Brothers and Co. Limited had formerly in their possession as managers of certain single-ship companies certain specified policies of insurance; that all the said policies had in April 1903, pursuant to an order of Buckley, J., been deposited in court and subsequently handed over to the liquidator of the said companies; that the said policies were in the exclusive possession and custody and control

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

of the said liquidator as such; and that the defendants were not able to produce the said policies; and that the defendants, who formerly constituted the firm of Houlder Brothers and Co., had in their possession solely as directors of the Houlder Line Limited, and not otherwise, certain specified policies which were the property of and in the possession, custody, and control of that company.

On the 18th Jan. 1904 the master made an order that the defendants Houlder Brothers and Co., Houlder Brothers and Co. Limited, and C. F. Hartridge should within six weeks from the 2nd Dec. 1903 file their affidavit of discovery; and that the defendants should produce the several policies for inspection by the plaintiffs and their solicitors within one week on usual notice, subject to any order of Buckley, J. as to any documents in the custody of the court or of the liquidator.

The defendants Houlder Brothers and Co. Houlder Brothers and Co. Limited, and C. F. Hartridge appealed, and Bucknill, J., at chambers, made an order that the order of the master should be varied "by limiting the discovery to the policies in the possession or control of the defendants as such, excluding those which are in the possession of the liquidator and Houlder Line Limited."

The plaintiffs appealed, with leave.

Rufus Isaacs, K.C., *Sims Williams*, and *T. Mathew* for the appellants.—In this action the plaintiffs are entitled to the fullest possible discovery — that is, they are entitled to the same order for discovery as they would be entitled to in an action brought against them as underwriters upon the policies of insurance. The right of underwriters to the largest measure of discovery is well settled by a series of cases extending over a long period:

Janson v. *Solarte*, 2 Y. & C. 127; 47 R. R. 374;
Rayner v. *Ritson*, 6 B. & S. 888;
China Traders Insurance Company v. *Royal Exchange Assurance Company*, 78 L. T. Rep. 783; 8 Asp. Mar. Law Cas. 409; (1898) 2 Q. B. 187;
China Transpacific Steamship Company v. *Commercial Union Assurance Company*, 45 L. T. Rep. 647; 8 Q B. Div. 142;
West of England Bank v. *Canton Insurance Company*, 2 Ex. Div. 472;
London and Provincial Insurance Company v *Chambers*, 5 Com. Cas. 241.

The reason of the rule is that the underwriters are necessarily in ignorance as to all matters connected with the ship, whereas the shipowner knows or has the means of knowledge, and the underwriters are entitled to rely on the good faith of the assured. Underwriters, therefore, are entitled to discovery not only of all documents in the possession of the assured, but also of all documents of which the assured can get possession by any reasonable means. The same principle must apply to the present action, in which the underwriters are seeking to recover overcharges which, relying on the good faith of the assured, they have paid without inquiry, and their position is the same as if they were resisting a claim upon the policies:

Boulton v. *Houlder Brothers and Co.*, 9 Com. Cas. 75.

Inspection of the indorsements upon the policies will enable the plaintiffs to ascertain whether the sum which the defendants have paid into court is sufficient to repay all the overcharges which they have paid.

J. A. Hamilton, K.C., *Bremner*, and *G. Hay Morgan* for the respondents.—The order made by the learned judge was right. The rule applicable to actions upon policies against underwriters is not applicable to a case of this kind. This is not an action upon a policy of marine insurance. It is an action in which the plaintiffs allege fraud and conspiracy, and the plaintiffs are not entitled to this discovery. The rule applicable to actions upon policies of marine insurance has never been applied in any other kind of action; that practice is strictly confined to the particular class of actions:

Henderson v. *Underwriting and Agency Association*, 64 L. T. Rep. 774; (1891) 1 Q. B. 557;
Thomson v. *Weems*, 9 App. Cas. 671;
Cory v. *Patton*, 26 L. T. Rep. 161; 1 Asp. Mar. Law Cas. 225; L. Rep. 7 Q. B. 304;
Twisell v. *Allen*, 5 M. & W. 337.

The defendants have no power to produce the documents in the possession of the liquidator or of Houlder Line Limited; and they cannot be ordered to produce those which are in their possession only as agents for others:

Williams v. *Ingram*, 16 Times L. Rep. 451.

Sims Williams in reply.

COLLINS, M.R.—This is an appeal from the order of Bucknill, J. on a claim for discovery by the plaintiffs. There is this peculiarity about the case, that the plaintiffs in this case are underwriters, and they are seeking to recover from the defendants sums which they say they have overpaid to the defendants, who were the assured of these underwriters. It is the fact and it is common ground now that the defendants, being the assured of these underwriters, did demand and receive from the underwriters sums in respect of damage to ships insured by them in excess of the sums really due from these underwriters. Now, the case is complicated in this way. The persons who received these sums and claimed them under policies effected by them with the underwriters were themselves agents for certain companies, and were also partly acting for themselves, and if in those proceedings on those policies the underwriters had resisted the claims or had thought it desirable to investigate the claims against them, there is no doubt whatever, and it has not been disputed in this case, that those underwriters would then have been entitled to the fullest possible discovery which is now asked for in this case. That is common ground, and that discovery would, according to a long series of cases, have imposed the obligation on the part of the person suing the underwriters to produce, or, failing their ability to produce, to give reasons thoroughly satisfactory to the court on oath explaining their inability to do so, those documents which were not in their own custody, or which were in their custody merely as agents for other persons. They would have had to account for the inability to produce them or they would have to satisfy the court that they had taken the utmost possible means in their power to enable them to give to the underwriters all information with respect to them and apper-

taining to them. That would have been the obligation had these underwriters for any reason sought to sift and investigate the liability asserted by the assured in suing upon the policies. The underwriters, dealing with the assured not only as honourable men but as men whose servants and agents were not likely to make mistakes in their own favour, did not demand the discovery which they were entitled to, and they paid without further investigation claims which were made against them, and it turns out now that those claims were largely, or at all events to a considerable extent, in excess of the sums which were due. In that state of things the underwriters who have so paid became aware of the fact that they had been called upon to pay, and had paid, large sums which really represented losses that had not occurred—that is to say, that they had been called upon to pay sums which were largely in excess of the damages that had been sustained by the assured. Under those circumstances they have brought an action to recover that excess, and in form have alleged a fradulent conspiracy to exact from the underwriters sums in excess of those which were really due. Being now the plaintiffs in an action, they demand the same discovery, and no other, that they would have had from the same persons had they been the defendants sued by those persons, and the only reason they did not get it before is because, to use a neutral term, owing to the mistatements of the assured they were ready to forego their unquestioned right of getting this discovery from the assured in the first instance. They say now that they are not to be placed in a worse position as to their right to discovery because they forewent their right to demand it when the claim was made by the assured; that it was through the conduct of the assured that they have been obliged now to put themselves into the position of plaintiffs to get back from the assured that which never ought to have been paid them, and which was paid them on their misrepresentations.

Then it was contended for the defendants that the court ought not to give in an action for conspiracy a right of discovery which is only given in an action of marine insurance, and ought not to extend that inspection to the plaintiffs. I say that we ought to do so, because in substance this really is an action on a policy of marine insurance. It is, as I have pointed out, entirely brought about by the defendants that the position of the parties has been changed and shifted from plaintiff to defendant. It seems to me that where that change has taken place and is to be imputed only to the misstatements made by the assured to the underwriters, the underwriters, in a proceeding to repair that fault, ought not to be in a worse position than that in which they would have been if but for the misrepresentation of the plaintiffs they had been allowed to sift and had sifted the case according to their rights. Therefore it seems to me that I am not really extending the principle which lies at the bottom of these matters at all. I am treating the case as one bringing into suit the rights as between assuror and assured. It does not matter, it seems to me, for that purpose which of the parties is plaintiff or defendant. The relation between underwriter and assured is such that this discovery is the due of the underwriter against the assured. The reasons for it have been repeatedly given by various judges, and we have had the authorities cited to us going back for a long time. Mr. Hamilton sought to insist that it was merely some special provision owing to the fact that at one stage in the cases an order for consolidation was required and that certain terms were introduced upon the giving of that order. Now, it may be perfectly true that that was the occasion which gave the courts the opportunity of enforcing this particular obligation upon persons suing underwriters, but it was not the ground of that intervention at all. It was the opportunity of putting into practice a principle derived from the fact of a special relation between assured and underwriter. Originally in the courts of equity to which the underwriter formerly had to go for discovery, and subsequently as a matter of course in the courts of common law, there has been adopted and recognised this large discovery incident to the contract of insurance. That being so, it seems to me there is no dangerous extension whatever in applying in this case, which is a litigation between assured and underwriter, the principle of this discovery, which is the right of the underwriter when he is sued by the assured. Now, the reason why this larger discovery is sought in this case is that many of the documents, the policies of insurance in particular, are said to be in the custody of the defendants only as agents for other persons, although they are themselves interested, and some of them are in the custody of the liquidator of some of the companies. I am clearly of opinion, for the reasons I have given, that the plaintiffs here are entitled to this discovery. The particular form which it ought to take is a matter of some nicety, and therefore we shall leave the form of the order to be drawn up between the parties and settled by one of us if necessary; but it certainly ought to embrace a statement on oath by the defendants as to what steps they have taken to put themselves in a position to produce these documents to the plaintiffs, or, failing to produce them, to give them such information as to them as they can obtain by all reasonable exertions on their part. It appears clear to my mind that the plaintiffs here are entitled to the same measure of discovery that they would have been entitled to if they had been defendants in an action brought by the assured against the underwriter. That relief I think they are entitled to, and therefore I think that this appeal must be allowed.

ROMER, L.J.—I have felt considerable doubts in this case, and I cannot say that those doubts are wholly removed; but my brethren are clearly of opinion that the whole practice with regard to policies of marine insurance referred to in the authorities, as, for example, in the case of *West of England District Bank* v. *The Canton Insurance Company* (*ubi sup.*), can be and ought to be applied in this case as against the defendants. That being so, I shall not differ from them. My doubt arises owing to the fact that in this case the defendants appear to have effected the policies on behalf of certain limited companies who are not parties to the action, and that this action is one for damages for a fraud alleged to have been committed by the defendants. I am, however, very pleased to think that, on the merits of this case, apart from technical objections, there is no good reason, so far as appears why these

policies should not be produced by those who have the actual custody of them; and I think, moreover, that if the defendants do their best there is every reason to hope that they can in fact get them produced, and certainly the production of these documents is most important to the plaintiffs in this action.

MATHEW, L.J.—I am of the same opinion. As at present advised I think that there should be an order for the production of these documents, and also that the defendants must show by affidavit what exertions they have made to produce documents which they are unable to produce, and state what they know as to the contents of such documents and the indorsements thereon. This case is an important one, as it appears to be necessary to reiterate a well-established rule upon the subject. It is an essential term of a contract of insurance that the underwriters shall be fairly treated, not only with reference to the inception of the risk, but also in carrying out the contract. That has very often been laid down and has been constantly acted upon. Effect is given to that rule by the practice as to discovery of ship's papers, under which the assured suing upon a policy is made to give such very drastic discovery. It is suggested that the case is quite different when the underwriter sues the assured, but it seems to me that the contract being the same the underwriter is entitled to the same information. The defendants then contend that, as they are being sued for improper conduct and conspiracy, they ought not to be ordered to give this discovery. Then they say that, in respect of the companies in liquidation, they were only managers and cannot now do anything without the consent of the liquidator. That must be explained. Unless there is some very good reason to the contrary, the liquidator ought to permit the policies to be produced. I agree, therefore, that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Lewis* and *Lewis*.

Solicitors for the respondents, *W. A. Crump* and *Son*.

Monday, July 11, 1904.

(Before COLLINS, M.R. and STIRLING, L.J.)

THE CHEAPSIDE. (a)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Jurisdiction—Action in rem—*Salvage—Foreign plaintiffs—Counter-claim* in personam—*Demurrage—Order XIX., r.* 27.

An action in rem *was brought by the owners, master, and crew of a foreign steamship to recover remuneration for salvage services rendered to an English steamship. The owners of the English steamship put in a defence to the action, and also counter-claimed against the owners of the foreign steamship to recover demurrage alleged to be due to them under charter-parties entered into between the owners of the foreign ship and themselves. The owners of the English steamship could not have brought an action against the foreign owner in this country for the demurrage. The owners of the foreign steamship took out a summons to have the counter-claim struck out. The registrar of the Admiralty Court struck out the counter-claim on the ground that it tended to delay and interfere with the proper trial of the action. On appeal to the judge of the Admiralty Court the decision of the registrar was reversed. On appeal by the foreign owners to the Court of Appeal:*

Held, that the defendants the English steamship owners had a right to bring the counter-claim, and that the judge of the Admiralty Court, as a judge of the High Court, had jurisdiction to try such a counter-claim, and that he had rightly exercised his discretion in refusing to strike out the counter-claim.

Griendtoveen *v.* Hamlyn (8 *Times L. Rep.* 231) *followed.*

MOTION on appeal from a decision of Barnes, J. reversing a decision of the Admiralty registrar.

The plaintiffs were the owners, master, and crew of the steamship *Oscar Dickson*, and they sought to recover salvage for services rendered to the English steamship *Cheapside* and her freight in the river Petschora, in Northern Russia, in Sept. 1903. It appeared that the owners of the *Oscar Dickson*, the Nordryska Company, had chartered the *Cheapside* to proceed to Petschora, and there load a cargo of timber owned by the Nordryska Company, and the alleged salvage services had been rendered by the *Oscar Dickson*, which the Nordryska Company provided to pilot the *Cheapside* up and down the Petschora river. The writ in the salvage suit was issued on the 21st Nov. 1903, and the statement of claim was delivered on the 3rd Feb. 1904. On the 7th March a defence and counter-claim was delivered by the owners of the *Cheapside* by which they denied that any salvage was due to the plaintiffs, and alleged by way of counter-claim that the sum of 170*l.* was due to them from the Nordryska Company for demurrage under two charter parties dated the 24th July 1903 and the 23rd Feb. 1903, by which they had chartered the *Cheapside* to the Nordryska Company. On the 13th May 1904 the plaintiffs delivered a reply and a defence to the counter-claim, denying that any demurrage was due. On the 15th June the plaintiffs applied to the registrar of the Admiralty Court by summons asking that the counter-claim should be struck out on the ground that the court had no jurisdiction to try it. The registrar struck it out under Order XIX., r. 27, on the ground that the counter-claim tended to delay and interfere with the fair trial of the action. The defendants appealed to the judge, and on the 27th June Gorell Barnes, J., following the decision in *Griendtoveen* v. *Hamlyn* (*ubi sup.*), allowed the appeal and ordered the counter-claim to stand. Against this order the plaintiffs appealed to the Court of Appeal.

Dawson Miller for the plaintiffs.—The claim is a claim *in rem* for salvage. The Admiralty Court, as such, has no jurisdiction to try a claim for demurrage, and such a claim cannot be made by way of counter-claim. It has been decided that defendants *in personam* cannot be added in an action *in rem*:

The Bowesfield, 51 L. T. Rep. 128; 5 Asp. Mar. Law Cas. 265;

The Vera Cruz, 51 L. T. Rep. 24, 104; 5 Asp. Mar. Law Cas. 386.

The counter-claimants are not named, and are

(a) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law

unknown, for, the action being *in rem*, it is brought against "the owners of the *Cheapside*," and the plaintiffs are entitled to know who is counter-claiming. The court will not allow an action *in rem* and an action *in personam* to be tried together:

The Germanic, 73 L. T. Rep. 730; 8 Asp. Mar. Law Cas. 116.

Further, the counter-claim must delay the hearing of the action, and therefore it should be struck out.

D. Stephens for the defendants and plaintiffs on the counter-claim.—The Admiralty Court has jurisdiction to try the counter-claim under sub-sect. 3 of sect. 24 of the Judicature Act 1873. Since the passing of the Judicature Act the judge of the Admiralty Court has been a judge of the High Court of Justice, and as such has jurisdiction to try all causes which may be brought in that division, as well as all causes which might have been brought under the former Admiralty jurisdiction. That being so, it is a question of discretion, and the learned judge has exercised his discretion rightly in deciding to try both claim and counter-claim. It is admitted that an action could not have been brought on the facts which support the counter-claim against the Nordryska Company, but here the plaintiffs have sought the jurisdiction, and so the difficulty of service does not arise, and on the authority of *Griendtoveen* v. *Hamlyn* (*ubi sup.*) the counter-claim is in order. [He was stopped by the Court.]

COLLINS, M.R.—This is an appeal from a decision of Barnes, J., who has refused to strike out a counter-claim which he was asked to strike out. The action is brought *in rem* for salvage, and the owners of the salving vessel, which happened to be a pilot boat, are out of the jurisdiction. The defendants set up not only a defence but a counter-claim against the owners of the pilot boat for delay on their part as charterers of the defendants' vessel. That counter-claim undoubtedly is an action *in personam*, and not an action *in rem*, and accordingly the contention of the plaintiffs is that this is an attempt to join by way of counter-claim an action *in personam* with an action *in rem*, and they say that the Court of Admiralty has no jurisdiction to entertain any such counter-claim *in personam*. This point has, however, been raised before, and it has been decided that the judge of the Court of Admiralty does not cease to be a judge of the High Court because he is a judge in the Court of Admiralty, and that although as judge of the Court of Admiralty he has no jurisdiction to try an action for demurrage, as judge of the High Court he has, and whether or not he can blend those two jurisdictions is a matter for his discretion, subject to review by this court. The judge of the Court of Admiralty has endeavoured in this case to do justice by availing himself of the fact that he has a double jurisdiction, and by not dividing the two jurisdictions he is able to do justice in this way. The defendants would not be in a position to bring this counter-claim in a separate action for the simple reason that the plaintiffs are out of the jurisdiction. There would be great difficulty in serving them under our procedure. The defendants, therefore, desire to avail themselves of the fact that the plaintiffs have sought this jurisdiction, and for the reasons that were expressed in very forcible and clear language by Lord Coleridge in the case of *Griendtoveen* v. *Hamlyn* (*ubi sup.*) it is perfectly clear that that is a proper course for the defendants to take, and one which this court would sanction. Accordingly the learned judge, founding his judgment on that case, thought that, having the jurisdiction, as was decided in another case, *The Germanic* (*ubi sup.*), in his court, he would be abundantly justified in exercising it in this case. In this case there is no such difficulty as was felt in the case of the *Germanic*. The difficulty in that case was that if the court assumed in one action to try two causes of action, one brought *in rem* and one brought *in personam*, different legal standards would be applicable in those two causes of action, because questions of negligence and contributory negligence would arise, and therefore it would be necessary to apply the common law standard to one part of the case where questions of contributory negligence arose, and the Admiralty standard to another part of the case where contributory negligence did not arise. There would also be the complication of having a jury to try one part of the case and the judge to try another part. This case is entirely free from all those questions. To begin with, the question of contributory negligence does not arise, and the law to be applied, whether by the judge of the Admiralty Court or the High Court, is the same. Secondly, in regard to a jury trying one cause of action and a judge the other, that difficulty also does not exist, because the defendants, who seek to try what I may call a common law action, in which a jury may be forced on them, may themselves ask for a jury in substitution for the Admiralty Court Assessors, and if the judge thought the two cases could be better tried by a jury and the plaintiffs were to insist on the counter-claim against them being tried by a jury, the judge could, if he thought fit, have both causes of action tried by a jury. In my opinion the learned judge has properly exercised his discretion, and the matter was within his jurisdiction.

STIRLING, L.J., concurred.

Solicitors for the plaintiffs, *Trinder, Capron, and Co.*

Solicitors for the defendants, *Holman, Birdwood, and Co.*

July 23, 24, *and* 27, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L JJ.)

BARQUE QUILPUÉ LIMITED *v.* BROWN. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Detention at port — Loading— "Regular turn"—Custom of port—Delay caused by number of vessels chartered—Option.

A charter-party provided that a sailing vessel was to load a cargo of coal at N. "in regular turn" from B. Colliery or any of the collieries the freighters might name. No time for loading was fixed.

At the port of N. it was necessary to obtain a loading order from the colliery before a loading berth was allotted.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

When the vessel arrived, a great many vessels were waiting to load from B. Colliery, and in consequence sixty-seven days elapsed before a coaling order could be given to the vessel.

The charterers, who were the owners of B. Colliery, had sold a cargo of that coal to be shipped by this vessel.

Held, that the words "regular turn" referred to the colliery turn as distinguished from the port turn both upon their proper construction and also having regard to the regulations and practice of the port.

Held, also, that the defendants had not chartered an unreasonable number of vessels to arrive at the port about the same time so as to make it impossible that the vessel should be able to load within a reasonable time; and that the probability of delay was known to and contemplated by the shipowners when they entered into the charter-party.

Held, therefore, that the charterers had not acted unreasonably, and were not liable for the detention of the vessel.

Decision of Kennedy, J. affirmed.

APPEAL of the plaintiffs from the judgment of Kennedy, J. delivered the 2nd Dec. 1902.

The plaintiffs commenced the action to recover damages for detention of the sailing ship *Quilpué* at Newcastle, New South Wales, under a charter-party dated the 6th Feb. 1900, made between the plaintiffs, as shipowners, and the defendants, as freighters.

The charter-party, so far as material, provided that the ship should with all convenient speed proceed to Newcastle, "and there in the usual and customary manner load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the said freighters may name, a full and complete cargo, which the said freighters bind themselves to ship."

The defendants were the owners of Brown's Duckenfield Colliery, and chartered vessels to load with their coal

On the 6th April 1900 they sold a cargo of their coal to be shipped by the *Quilpué* to certain persons in Valparaiso.

At the port of Newcastle coals are shipped in large quantities from about twenty collieries, none of which can produce a greater daily output than 1100 tons, the coals from the Wallsend and the Duckenfield Collieries being in greater demand than from the others.

The collieries are all some distance from the port, and the coals are conveyed by railway to the loading place, which is called the Dyke, where the vessels are loaded by means of cranes, which are quite sufficient to load more than the output of the collieries, but there is no place at the Dyke for the storage of coals.

The loading is under the control of Railway Commissioners, and No. 2 of the port regulations provides: "Vessels requiring berths at cranes for the purpose of loading or unloading cargoes shall obtain same in the order of their arrival in port, provided . . . the necessary loading orders have been lodged."

The regulations also provide that the cargo must be shipped continuously, and that not less than a certain number of tons a day must be loaded under penalty of fines, and that steamers shall have preference.

Evidence as to the working of these regulations was taken on commission, and on this evidence Kennedy, J. found a well-established practice with reference to sailing vessels that the loading was "a loading in turn of their arrival *inter se*, subject to their being on what I may call colliery turn with the colliery from which they are chartered to receive their coal."

Under the regulations it is necessary in order to obtain a berth to lodge a coaling order from the colliery, but the colliery can only give an order in turn of the ships booked to it. Therefore a ship booked to the collieries whose coal is in greater demand was under greater risk of delay than a ship booked to one of the others. This practice was the necessary result of the nature of the colliery output, together with the absence of any facility for storage at the Dyke, and the necessity of sending the coal by the railway.

The *Quilpué* arrived at Newcastle on the 3rd Aug. 1900 (her cancelling date being the 31st Aug. 1900), and there were then over twenty ships waiting to load from Brown's Duckenfield Colliery. She was not berthed for loading until the 6th Oct. 1900, and the loading was finished on the 9th of that month.

As the result of the practice at Newcastle, twenty-seven vessels booked to other collieries which arrived after her were loaded before her, and eleven which arrived before her were loaded after her.

Kennedy, J. held that the defendants were not liable for the delay, as the words in the charter-party, "in regular turn from Brown's Duckenfield Colliery," referred to colliery turn; but that, if they referred to port turn, their effect was the same, having regard to the practice at the port, as the *Quilpué* was loaded in her turn on the books of the colliery. He also held that the defendants had not caused the delay by chartering an unreasonable or excessive number of vessels to load from their colliery and so caused a block of vessels, as it had been proved that in 1900 the number of vessels loaded from the Duckenfield Colliery was less than that for the three previous years, and that it was impossible in the case of sailing vessels to know their precise dates of arrival, especially having regard to the long cancelling dates provided for in their charter-parties.

The plaintiffs appealed.

Carver, K.C. and *Leck* for the appellants.—The question is what is the meaning of "regular turn" at Newcastle. *Primâ facie* it means port turn:

Lawson v. *Burness*, 1 H. & C. 396;
Stephens v. *Macleod*, 19 Sess. Cas. (4th series), 38.

At Newcastle, under the regulations of the port, a ship will get a loading berth in order of arrival if the cargo is ready, and the charterer is bound to have the coal ready. Vessels which arrived after the *Quilpué* were loaded before her. This colliery being the property of the charterers, it was not a reasonable performance of the contract to make arrangements which resulted in so many vessels arriving to be loaded at the same time. It is no defence to this claim that there was an unusual demand on the colliery:

Stephens v. *Harris*, 57 L. T. Rep. 618; 6 Asp. Mar. Law Cas. 192;

Kay v. *Field*, 47 L. T. Rep. 423; 4 Asp. Mar. Law Cas. 588; 10 Q. B. Div. 241;
Gardiner v. *Macfarlane*, 20 Sess. Cas. (4th series), 414;
Ogmore Steamship Company v. *Borner*, 6 Com. Cas., 104, 110;
Aktieselskabet Inglewood v. *Millar's Karri and Jarrah Forests Limited*, 8 Com. Cas. 196, 201;
Tillett v. *Cwm Avon Works Proprietors*, 2 Times L. Rep. 675;
Ashcroft v. *Crow Orchard Colliery Company*, 31 L. T. Rep. 266; 2 Asp. Mar. Law Cas. 397; L. Rep. 9 Q. B. 540.

The charterers had an option as to the coal with which the vessel might be loaded, and did not exercise it reasonably:

Tharsis Sulphur and Copper Company v. *Morel Brothers and Co.*, 65 L. T. Rep. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647;
Dobell v. *Green*, 82 L. T. Rep. 314; 8 Asp. Mar. Law Cas. 473; (1900) 1 Q. B. 526.

Scrutton, K.C. and *Balloch*, for the respondents, were not called on to argue as to the meaning of "regular turn."—With reference to the other points. It is impossible to know in the case of sailing ships when they will arrive. The charterers acted reasonably and chartered the other vessels in the ordinary course of business, and are not liable for the delay which took place:

Harrowing v. *Dupré*, 7 Com. Cas. 157;
Watson v. *Borner*, 5 Com. Cas. 377.

The *Quilpué* was only detained a reasonable time having regard to the number of ships which were waiting to be loaded from the Duckenfield Colliery. The purchaser of the coal refused to take any but the Duckenfield coal. The option to load with other coal was for the charterers' benefit, and they were not bound to consider the shipowners' convenience:

Robertson v. *Jackson*, 2 Com. B. 412, 426;
Tharsis Sulphur and Copper Company v. *Morel Brothers and Co.* (*ubi sup.*);
Bulman v. *Fenwick*, 69 L. T. Rep. 651; 7 Asp. Mar. Law Cas. 388; (1894) 1 Q. B. 179;
Dobell v. *Green* (*ubi sup.*).

Carver, K.C., in reply, referred to

Carlton Steamship Company v. *Castle Mail Packets Company*, 77 L. T. Rep. 332; 8 Asp. Mar. Law Cas. 325; (1897) 2 Q. B. 485; affirmed on appeal, 78 L. T. Rep. 661; 8 Asp. Mar. Law. Cas. 402; (1898) A. C. 488.

VAUGHAN WILLIAMS, L.J.—This is an action for detention of the sailing ship *Quilpué* at Newcastle, New South Wales, where she was detained for the purpose of loading for sixty-seven days. The plaintiffs allow a period of thirty days, and they claim damages for detention for the balance of thirty-seven days. Two questions, broadly, arise in this case. The first arises upon the construction of the charter-party, which provided that the ship should with all convenient speed proceed to Newcastle, "and there in the usual and customary manner load in regular turn from Brown's Duckenfield Colliery, or any of the collieries the said freighters may name, a full and complete cargo of coals which the said freighters bind themselves to ship." Mr. Carver addressed to us an argument in which he contended that "regular turn" there meant "in the order of the arrival of the ships." I do not agree with him. I do not think that is the meaning of the words here. He cited cases to us which do show *primâ facie*, and unless there is something to lead to a different conclusion, that these words "in regular turn" mean "in regular port turn"; but none of these cases show that "in regular turn" cannot mean in regular colliery turn as distinguished from regular port turn. In my judgment, in this case, the words "in regular turn from Brown's Duckenfield Colliery or any of the collieries the said freighters may name" do refer to colliery turn as distinguished from port turn. Indeed, not only does that seem to me to be, from a grammatical point of view, the meaning of these words, but when the condition of these collieries which are referred to in this charter-party are considered and also the regulations of this particular port, which were perfectly well known to all the parties to the charter-party, both the plaintiffs and the defendants, it is hardly possible, in the first place, to avoid the conclusion that the parties to this charter-party must all of them have contemplated that the ship would be loaded in accordance with colliery turn. The second rule of the port regulations provides: "Vessels requiring berths at cranes for the purpose of loading or unloading cargoes shall obtain the same in the order of their arrival in port, provided they are considered suitable by the berthing master and the necessary loading orders have been lodged, and their loading in such order will not in any way interfere with the loading of vessels then under and in turn before them except as hereinafter referred to." When that rule is considered, bearing in mind the fact, as found by Kennedy, J. and really obviously known to everybody concerned in this business, that no one of the collieries could load more than 1100 tons a day, because 1100 tons a day was the maximum output of each one of these collieries, one cannot help coming to the conclusion that the practice at this port must necessarily have been a practice governed and controlled by the colliery output. Under those circumstances I have not the least doubt but that Kennedy, J. was perfectly right in the construction which he put upon these words in this charter-party, and in the conclusion which he has arrived at as to what must guide one in determining what "regular turn" means here.

The second point in the case is, that in this contract, and in every other contract, there is an implied contract by each party to it that he will not do anything on his part to prevent the other party to the contract either performing the contract or to delay the other party in performing the contract. I agree. I think it may be generally said that there is an implied contract to that effect imported by the law into every contract, just in the same way as you import into every contract that the various things to be done by the one party and the other are to be done, if no time is specified, within a reasonable time. You may call that, in each of these cases, an implied contract. Perhaps it is, but I only wish to safeguard myself against supposing that the law easily implies any special affirmative contract. I think it is very rare indeed that the law either does or ought to imply such a contract. I agree that the particular contract which the plaintiffs rely upon is implied really in every contract so far as I know. It is said that, there being that contract, the defendants here made

breach of it, and did prevent, or unduly delay, the plaintiffs in the performance of the contract. The way in which it is put is twofold. First, it is said that if the defendants were under an obligation to load a cargo from this particular colliery and none other—that is, the Duckenfield Colliery—they really prevented the plaintiffs from loading it, because they entered into contracts with such a large number of ships to take coal from that colliery at or about the same time that the coal ought to have been loaded into the plaintiffs' ship as to make it impossible that the vessel should be able to load within a reasonable time; and it is said it does not matter whether that was done after the contract was entered into or before the contract was entered into; because a man not only contracts that he will not do anything to render the performance of the contract impossible or to delay it unreasonably, but he also warrants that at the time of the entering into the contract he has not already done acts rendering the performance of the contract impossible, or which would unduly delay the performance of it. I will assume that that is the proper way of stating the implied contract, although I am not at all sure that it is not too wide; but, assuming that, I ask myself, Did these people do anything of the sort? It seems to me that one ought, in a case of this sort, to take into consideration facts which are in the knowledge of all the parties. In the case of *Carlton Steamship Company* v. *Castle Mail Packets Company* (*ubi sup.*) Rigby, L.J. concurred with the majority of the court in the decision of the Court of Appeal. He says: "I do not think that a delay which arises from a contingency the probability of which must have been perfectly well known to and contemplated by the shipowners when they entered into the charter-party can be considered unreasonable." In this particular case it is perfectly plain that at the time when the shipowners entered into the charter-party under which they were to load in regular turn, meaning thereby regular colliery turn, they must have known not only that the charterers would have prior engagements which would delay the colliery turn of this particular ship, but they must have known also that a delay of the ship for loading for a number of days—certainly between forty and fifty days—was not an impossible or even an unusual thing in loading at this port of Newcastle in New South Wales from these collieries which exclusively supply this port. They must have contemplated that there very likely would be such a delay. Under those circumstances I agree with Kennedy, J. that there is nothing unreasonable here in the charterers making such a number of engagements for ships to go and load at this port of Newcastle, even taking the Duckenfield Colliery alone, as resulted in twenty ships being in waiting for cargoes; ships which had priority over this particular ship, the *Quilpué*, when it arrived. With regard to the additional suggestion that although this might be so, if the only coal which could be loaded was coal from the Duckenfield Colliery, that is not the case here, as the charterers had the option of loading from either of the collieries; and, having that option to select the coal, that option must be reasonably exercised. I think the reasonableness, if that is material, must be reasonableness at the time of the selection of the coal being notified to the ship, which probably was at Newcastle, and not at the time of the sale of the coal, which took place in April, four months before. Taking all this, and assuming in favour of the plaintiffs that the absolute option which in words is given to the charterers to select which coal they choose is an option which has to be exercised reasonably by them, as is stated by Romer, L.J. in his judgment in *Dobell* v. *Green* (*ubi sup.*), I see nothing to show me in the evidence that this option was unreasonably exercised. It is quite true that as things turned out, as possibly the charterers might have ascertained if they had made a full investigation, the loading might have been done somewhat more quickly if it had been from some other colliery, but, assuming all that, there is nothing to show me that this selection of the Duckenfield coal was unreasonably exercised. I do not think one must leave out of consideration, and it is not unreasonable to suppose, that the considerations which are to affect the charterer in his selection, even at the port of Newcastle, are to be quite irrespective of the contracts that have been previously entered into by the charterer. It would not be good for business if the charterer was put in such a position that he would not be able to deal with or sell his cargo until the arrival of the ship at Newcastle. Under those circumstances I think that the judgment of Kennedy, J. was quite right and ought to be affirmed.

ROMER, L.J.—I have come to the same conclusion. On the question of the construction of this charter-party, I agree that the provision in it as to the loading being in "regular turn from" the colliery means loading according to the regular turn of the colliery as found by Kennedy, J. With regard to the other points raised by the appellants, those points depend upon this: Can we find that the defendants hindered the plaintiffs in the performance of the charter-party or prevented them from carrying it out by selecting this particular colliery at the time it was selected by them; or by reason of the overcrowding at the port, and the consequent delay of the ship caused by their having chartered so many ships? In other words, Were the defendants guilty of such unreasonable conduct in the matter as would render them liable for such delay in loading as undoubtedly occurred? As to this, the learned judge in the court below came to the conclusion that the plaintiffs had not established on the facts any such case as was necessary for them to establish as against these defendants; and, after hearing the evidence, I am not satisfied that the learned judge in the court below came to a wrong decision of fact upon the point. That being so, I think that point also fails, and the appeal, as a whole, consequently fails.

STIRLING, L.J.—I am of the same opinion. I find it impossible to differ from the conclusions which have been arrived at by Kennedy, J. I do not think I can usefully add anything. I think the appeal must be dismissed.

Solicitors for the appellants, *W. A. Crump* and *Son*.

Solicitor for the respondents, *James Neal*.

July 27 *and* 28, 1903.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

JONES LIMITED *v.* GREEN AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Obligation of charterer to have cargo ready—No time fixed for loading—Cargo from specific source — Option of charterer—Knowledge of parties at time of contract.

A sailing ship was chartered to load at N. a "cargo of coals as ordered by the charterers," and they afterwards directed that it should be loaded with coal from W. Colliery. No time for loading was fixed. At the port of N. it was necessary to obtain a loading order from the colliery before a loading berth was allotted. The W. Colliery had a small output, and the coal was in great demand. These facts were known to the parties at the time of the contract. In consequence of the number of ships loading from W. Colliery the ship did not obtain a loading berth for a long time, and, in addition to being delayed at N., lost a charter-party elsewhere, as she did not arrive before the cancelling date.

The owners brought an action to recover damages for the loss thus occasioned to them.

Held, that the charterers were not bound to have a cargo of coal ready for loading immediately on the arrival of the ship; that the vessel obtained a loading order in due course in her colliery turn and there was then no delay on the part of the charterers, and therefore the cargo was provided within a reasonable time; that the option to select the particular coal was an option for the benefit of the charterers, who were not bound, in exercising it, to consider the benefit or otherwise of the shipowners; and therefore, all parties being acquainted with the practice at the port and the charterers having acted reasonably, they were not liable for the delay.

Decision of Kennedy, J. affirmed.

Little *v.* Stevenson (74 *L. T. Rep.* 529; (1896) *A. C.* 108) *considered.*

APPEAL of the plaintiffs from the judgment of Kennedy, J. delivered on the 2nd Dec. 1902.

In this action the plaintiffs claimed damages for the detention, at Newcastle, New South Wales, of the sailing ship *Snowdon*, which was chartered by the defendants by a charter-party dated the 14th Feb. 1900, which provided that

> The ship shall with all possible dispatch proceed to such loading berth as freighters may name at Newcastle, New South Wales, and after being in a loading berth as ordered, wholly unballasted and ready to load, shall there load in the usual and customary manner a full and complete cargo of coals, as ordered by charterers, which they bind themselves to ship.

The coal was to be conveyed to the west coast of America.

On the 25th May 1900 the defendants informed the plaintiffs that the ship was to be loaded with Wallsend coal.

The *Snowdon* did not arrive at Newcastle until the 1st Sept. 1900. There was a great demand for Wallsend coal, and she did not obtain a loading berth until the 15th Dec. 1900. The defendants had sold a cargo of Wallsend coal to be shipped by the *Snowdon*, and the buyers refused to accept coal from any other colliery.

The custom and circumstances under which coal is loaded at the port of Newcastle are reported in *Barque Quilpué Limited* v. *Brown* (*ante*, p. 596); but in this case the form of the charter-party was different, and the charterers were not the owners of the colliery.

The vessel had also been chartered to convey a cargo of nitrate from the west coast of America, but in consequence of the delay at Newcastle she arrived so long after the expected date that the charter-party was cancelled. The plaintiffs therefore also claimed damages for the loss thus occasioned to them.

Kennedy, J. held that the contract was to load the *Snowdon* in her regular turn at the Wallsend Colliery, and this had been done. He also held, on the evidence and the correspondence, that the plaintiffs knew what the custom was as to loading at the port; and that the defendants had not acted unreasonably either in selecting Wallsend coal or refusing to substitute another coal, as they had sold a cargo of Wallsend coal and could not induce the buyers to take the coal from either of the other Newcastle collieries.

The plaintiffs appealed.

Carver, K.C. and *Leck* for the appellants.—The charterers had no right to postpone the loading for any length of time. They chose the coal with which the vessel was to be loaded, and were bound to have it ready. They must take the risk of not being ready with that coal. The knowledge of the plaintiffs that the ship must take its turn does not excuse the defendants. The selection of the Wallsend Colliery as the one from which the coal was to come was not a reasonable selection, and when the *Snowdon* arrived thirty other ships were waiting:

Ardan Steamship Company v. *Weir and Co.*, 41 Sc. L. Rep. 230;
Harris v. *Dreesman*, 23 L. J. 210, Ex.;
Grant v. *Coverdale*, 51 L. T. Rep. 472; 5 Asp. Mar. Law Cas. 353; 9 App. Cas. 470;
Kearon v. *Pearson*, 7 H. & N. 386;
Carlton Steamship Company v. *Castle Mail Packets Company*, 78 L. T. Rep. 661; 8 Asp. Mar. Law Cas. 402; (1898) A. C. 486;
Re Richardson and M. Samuel and Co., 77 L. T. Rep. 479; (1898) 1 Q. B. 261;
Adams v. *Royal Mail Steam Packet Company*, 5 C. B. N. S. 492;
Stephens v. *Harris*, 57 L T. Rep. 618; 6 Asp. Mar. Law Cas. 192;
Kay v. *Field*, 47 L. T. Rep. 423; 4 Asp. Mar. Law Cas. 588; 10 Q. B. Div. 241;
Elliott v. *Lord*, 48 L. T. Rep. 542;
Gardiner v. *Macfarlane*, 20 Sess. Cas. (4th series), 414;
Lilly v. *Stevenson*, 22 Sess. Cas. 278;

Asquith, K.C. and *J. Fox* for the respondents.—There was no obligation on the charterers to have the coal ready. The plaintiffs were aware of the exceptional difficulties with regard to the loading of Wallsend coal at Newcastle during that year. The obligation to provide the cargo did not arise until the vessel was at its berth, and when it got there the coal was ready and was loaded. There was no obligation to provide coal

(a) Reported by W. C. Biss. Esq., Barrister-at-Law.

from any other colliery than that named in the charter-party:

Little v. *Stevenson*, 74 L. T. Rep. 529; 8 Asp. Mar. Law Cas. 162; (1896) A. C. 108;
Tharsis Sulphur and Copper Company v. *Morel Brothers and Co.*, 65 L. T. Rep. 659; 7 Asp. Mar. Law Cas. 106; (1891) 2 Q. B. 647;
Bulman v. *Fenwick*, 69 L. T. Rep. 651; 7 Asp. Mar. Law Cas. 388; (1894) 1 Q. B. 179, 183;
Dobell v. *Green*, 82 L. T. Rep. 314; 9 Asp. Mar. Law Cas. 53; (1900) 1 Q. B. 526.

Carver, K.C. in reply.

VAUGHAN WILLIAMS, L.J.—In this case the charter-party contains no mention of "regular turn," and runs thus: "The ship shall with all possible dispatch proceed to such loading berth as freighters may name at Newcastle, New South Wales, and after being in a loading berth as ordered, wholly unballasted and ready to load . . . shall there load in the usual and customary manner a full and complete cargo of" (then there is a blank in which the charterers had the right to insert the name of the Newcastle coals they wished to have, and they did insert "Wallsend coals") "as ordered by charterers, which they bind themselves to ship." Then follow the exceptions, but they are immaterial, because neither side relies on them. The case for the plaintiffs, who are the appellants, is that those words constitute an absolute undertaking on the part of the charterers that they would have the cargo of coals ready to put on board as soon as the loading berth was obtained according to the custom of the port, and it is said that a loading berth might have been obtained at a very much earlier date than in fact it was, if the charterers had not failed to perform their duty, and that their failure to perform their duty was the cause of the ship being so long in getting a berth. Now, if the appellants could show that the reason of the berth not being given was that the charterers failed in their duty, no doubt they would be entitled to succeed. But, according to my judgment, they have not done so. The case seems to be covered by the judgment of Lord Herschell in *Little* v. *Stevenson* (*ubi sup.*), which decided that it was not the duty of the charterer to have his cargo ready to load on the mere chance of getting a berth. Lord Herschell took the view that if in the ordinary course it might be expected that a berth would be available if the cargo was ready, and the charterer took upon himself the obligation of having a cargo ready, the loss of the berth would be due to a failure in duty by the charterer. For the appellants Mr. Carver relied, among other cases, on *Grant* v. *Coverdale* (*ubi sup.*). In delivering judgment in that case Lord Selborne draws a distinction between loading and that which is preliminary to loading having the cargo there ready to load, and he pointed out that where there are exceptions in the charter-party which relate to the loading, nothing in those exceptions would relieve the charterers or merchants from the obligation to have the cargo there ready to load. The decision in that case is shortly put by the Earl of Selborne, L.C. thus: "With that observation I proceed to notice that it is not denied, and cannot be denied, that, unless those words of exception according to their proper construction take this case which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not absolve him from the consequences of keeping the ship too long. That was decided under circumstances very similar in many respects in the case of *Kearon* v. *Pearson* (*ubi sup.*), and decided expressly on the ground, as was pointed out, I think, by all the learned judges, certainly by my noble and learned friend here present (Lord Bramwell), by Wilde, B., and by Pollock, C.B., that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing." But the present case is entirely different from the case referred to by Lord Selborne, for it is a case in which the source from which the coal was to come was expressly defined. When that is so, I think it is impossible to lay down an absolute rule that the charterer undertakes an unqualified obligation to have the cargo ready whenever it may be reasonably expected that there may be a berth for the ship if the cargo is ready. It may be so sometimes, but it is impossible to say that it must be so. Now, in the present case, what is the contract so far as the source of coal is concerned, and what is the knowledge of the parties to the contract? I take it that one cannot exclude the knowledge of the parties in the consideration of this matter, because, after all, what we have to consider here is, what was a reasonable time either for the provision of the cargo or for the commencement of the loading, and, when you are considering what is a reasonable time, it seems to me obvious that you must take into consideration those circumstances, which were known to both parties to the contract at the date of the contract, and were taken into consideration by both the parties as affording the basis and foundation of the contract. In the first place, the source of the coal is defined by this contract; first, the coal is to be loaded at Newcastle, New South Wales; secondly, the charterer is to have the right to name the particular colliery from which the coal is to come; thirdly, it was within the knowledge of all the parties that the port of Newcastle, New South Wales, serves a limited number of collieries which are adjacent to that port, and serves no other collieries whatsoever. The whole of the coal which is loaded at Newcastle, New South Wales, is the coal which is the product of these collieries. It was known also to both the parties to the contract that the output of these collieries was a very limited output, not exceeding 1100 tons a day; and also that if sailing ships went to this port of Newcastle, New South Wales, the loading would have to take place according to the regulations of the port there, and that a ship could only get a loading berth if what is called a "loading order" had been obtained from the colliery—that is to say, if the circumstances were such that according to the colliery turn that vessel was entitled to have such loading order. It was also known to both of the parties here that sailing ships undoubtedly were detained a very long time before they could in ordinary course get their loading order from the colliery. This very ship, the *Snowdon*, in the

year previous to the year of this charter-party, had to wait for eighty-three days in order to get a loading order according to the colliery turn. As the result of all that, I have come to the conclusion that all the parties to this contract assumed as the basis of the transaction that there would and must be more or less delay, according to the loading turn at the colliery. I have only one more word to say about this. It is true that the correspondence took place between the parties after February, which was the date of the charter-party, still, when it is considered, I cannot help seeing from that correspondence that the charterers and shipowners, both of them, were contracting in view of this state of things; and really as time went on and it came to the knowledge of the parties that there was likely to be a long "stem," as it is called in the correspondence, both parties assume that this long "stem" is a burden which both will have to bear, and that neither party takes upon himself the risk of the long "stem"; and, eventually, when it is certain that the waiting will be for a long time, the shipowners write to the charterers to ask the charterers to try, as a matter of grace, if they can get the purchasers of the cargo, who had purchased Wallsend, to change it to some other coal, and, although the charterers did their best, they were unable to effect this. It seems to me that all these things which I have referred to clearly bring this case within the authority of *Harris* v. *Dreesman* (*ubi sup.*), which is most admirably summarised by Mr. Carver in his book on Carriage by Sea, and the particular passage to which I desire to call attention is this. After dealing with what I may call the general duties of the shipowner and the charterer in the earlier section, he says (sect. 254): "On the other hand, the charterer cannot be assumed to have the cargo ready if it is expressly to be provided from a particular place and the charter has been made in view of circumstances by which, as the parties know, the procuring of a cargo from that place may be delayed. And if in such a case no arrangement is made as to the time in which the loading is to be done, the charterer will be allowed a reasonable time for getting the cargo, having regard to the known sources of delay." It seems to me that the present case exactly falls within this passage. It was a case of a cargo to be provided from a particular place. The charter was made in view of certain circumstances by which, as the parties knew, the procuring of a cargo from that place might be delayed. There is no arrangement in this case as to the time in which the loading is to be done, and under these circumstances, in my judgment, this charterer was entitled to a reasonable time for getting the cargo, having regard to the known sources of delay which I have already specified, with reference to these collieries adjacent to this port. Under these circumstances, what has the learned judge found? He has found as a fact—because really this is fact and not law—that there was nothing done unreasonably, and nothing left undone which the charterer reasonably ought to have done in this case. The only suggestion that is made as to anything the charterer could have done is that he could have substituted another coal. To my mind, he did all that he could be reasonably expected to do when he did his best to get the person who became the purchaser under a contract he made to agree to accept another and a different coal than the Wallsend coal. I will assume here another coal could have been got, but it seems to me on the authorities cited before us, which I really do not think I am bound to go into at length, that this option which the charterers had here to select the particular coal was an option which they had to exercise for their own benefit, and they had a right to determine what that coal was, not when the ship arrived in New South Wales, but at any period they chose which they found commercially convenient after the date of the charter-party. The observations which are made by Lord Wensleydale—Parke, B. as he was then—in *Harris* v. *Dreesman* (*ubi sup.*) are extremely pertinent, and, after all, they are to my mind summarised with perfect accuracy in the passage I have read from Mr. Carver's book. Under these circumstances I think that the judgment of Kennedy, J. in this case must be affirmed, and this appeal dismissed with costs.

ROMER, L.J.—I am of the same opinion. The first point taken on behalf of the appellants is that the charterers were bound to have their cargo of coal ready for loading immediately on the arrival of the ship at Newcastle; and, that being so, the charterers are liable for the delay in loading which in fact occurred. But when the charter-party here is looked at, it is clear that, when according to the option given to the charterers they selected the Wallsend as the colliery from which the coal should be loaded, the charter-party became one dealing with a cargo coming from that special colliery at the special port of Newcastle; and I may incidentally point out that it was a charter-party where no special time was fixed by agreement as to the loading and no special provision made as to it. Now, on the facts it is clear that both parties knew all the relevant facts connected with the practice of berthing ships at Newcastle in order to load coal from the collieries there; and I have no hesitation in saying that, in my opinion, it would not be carrying out the true intention of the parties and the true meaning of this charter-party if we did not hold, as I think it ought to be held, that the parties contracted with reference to that common knowledge. What the practice is as to berthing ships at the port of Newcastle has already been fully dealt with by this court in *Barque Quilpué Limited* v. *Brown* (*ante*, p. 596). Both parties knew of it; and clearly this contract of charter-party must be dealt with having regard to the common knowledge of what was the practice at Newcastle. I agree with what Vaughan Williams, L.J. has said as to the statement of the law contained in the passage of the well-known book by Mr. Carver, which he has read. I think the principle there laid down is a true principle, and is borne out by *Harris* v. *Dreesman* (*ubi sup.*), and also by the decision of the House of Lords in *Little* v. *Stevenson* (*ubi sup.*). Applying that principle to the present case, I think, subject to the question whether the charterers acted unreasonably in selecting this particular Wallsend Colliery, the shipowners cannot complain of the delay that arose in the loading berth being obtained. That delay arose by reason of the practice of the port known to both, and, as I have said, considered by both with reference to this contract and owing to circumstances which were

unavoidable as far as concerns the charterers. After the loading berth was obtained there was admittedly no delay on the part of the charterers, and under those circumstances it appears to me impossible for us to say the charterers had not got the cargo ready in a reasonable and proper time according to the true contract between the parties. I do not think the two Scotch cases which have been cited—viz., *Lilly* v. *Stevenson* (*ubi sup.*) and *Gardiner* v. *Macfarlane* (*ubi sup.*)—are authorities bearing upon the present case. In *Ardan Steamship Company* v. *Weir and Co.* (*ubi sup.*) no common knowledge of the practice of the port was alleged or proved; and the case of *Harris* v. *Dreesman* (*ubi sup.*) and the principle there referred to does not seem even to have been mentioned. The other Scotch case, *Gardiner* v. *Macfarlane*, as will be seen when the exact questions there decided are carefully considered, really has no bearing upon the question before us. That being so, the only other question in this case is whether in selecting the Wallsend Colliery the charterers acted unreasonably. All I need say is that that allegation is not proved to my satisfaction. In considering questions of this kind, the principle laid down by Bowen, L.J. in *Tharsis Sulphur and Copper Company* v. *Morel Brothers and Co.* (*ubi sup.*) ought always to be borne in mind. In that case, when dealing with the question as to whether the option given to a charterer has been properly exercised in reference to such cases as this, he said: "The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound, in exercising it, to consider the benefit or otherwise of the other party." Applying that principle here, it is clear to me that the learned judge in the court below came to the right conclusion, that the charterers did not act unreasonably.

STIRLING, L.J.—I am of the same opinion. It was not disputed that under this charter-party the charterers were bound to have a full and complete cargo of coals in readiness whenever the ship was in a loading berth. That duty has been fulfilled. No question arises as to that, but what is contended is that the defendants are liable in respect of the delay which occurred before the ship got into the loading berth. As to that, it seems to me that the obligations of the charterers are such as stated by Lord Herschell with reference to another, though very similar, charter-party, in the case of *Little* v. *Stevenson* (*ubi sup.*). He says: "Undoubtedly that would impose by implication upon the charterer the duty of doing any act that was necessary on his part, according to the custom of the port, to enable her to get a berth. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth when she was not there because the charterer himself had failed in some duty to do some act on his part to enable her to get there." And then, later on, he adds: "I do not for a moment deny that he is bound to do whatever is reasonable on his part with the view of getting the ship berthed at the earliest period that is reasonably possible." The question which it seems to me we have to decide is whether the defendants, the charterers, omitted to do anything that was reasonable on their part with a view of getting the ship berthed at the earliest period that was reasonably possible. It seems to me, regard being had to the facts proved in this case, and in particular to the circumstances which were known to all the parties to the charter-party when it was entered into, that to their knowledge the obtaining of a cargo at Newcastle might be delayed. I cannot think that the defendants failed in doing anything that was reasonably possible for the purpose which I have mentioned. With regard to the case of *Ardan Steamship Company* v. *Weir and Co.* (*ubi sup.*), it appears to me that, although the charter-party seems to have been in almost identical terms with the present, the facts which were established in that case were different. First of all the learned judge found that there was an absolute failure in the duty of the charterer to provide a cargo at the proper time; and, secondly, there was no evidence of such a state of knowledge as is proved in the present case, which, upon the authority of *Harris* v. *Dreesman* (*ubi sup.*), ought to be taken into consideration. I agree, therefore, that the appeal must be dismissed.

Solicitors: for the appellants, *W. A. Crump* and *Son*; for the respondents, *Parker, Garrett, Holman* and *Howden*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, June 9, 1904.

(Before BARNES, J. and TRINITY MASTERS.)

THE CAYO BONITO. (a)

Salvage—Lifeboat—Launchers—Right to recover salvage.

A vessel being in distress off the coast, lifeboats were launched with a view to salve either life or property. Under the regulations of the Royal National Lifeboat Institution, which owned the lifeboats, in the event of life only being salved the crews of the lifeboats are remunerated by the Lifeboat Institution, and in the event of property being salved the crews of the lifeboats are remunerated by the award which may be made for salving the property.

The lifeboats which ultimately rendered salvage services to property and not to life were launched with the assistance of certain men, members of a company of fishermen. These men brought an action against the owners of the property salved to recover salvage for the services rendered by them in assisting to launch the lifeboats.

Held, that those who assisted to launch the lifeboats were entitled to maintain an action for salvage.

IN this action two salvage suits were consolidated and tried together.

The plaintiffs in the first suit were the coxswains and crews of the lifeboats *Robert and Mary Ellis* and *Upgang*, which were owned by the Royal National Lifeboat Institution.

The *Robert and Mary Ellis* was stationed at Whitby, was manned by a crew of thirteen hands all told, and was of the value of 800*l*.

(a) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law.

The *Upgang* was stationed at Upgang, which is a little to the north of Whitby, was manned by a crew of fourteen hands all told, and was of the value of 800*l.*

The plaintiffs in the second suit were ninety-nine men, members of a company of fishermen and boatmen at Whitby, who man and launch the lifeboats *Robert and Mary Ellis* and *Upgang.* On a summons to man the boats, the members of the company who first assemble form the crew of the lifeboats, and the requisite number of the remainder assist in launching them.

The *Cayo Bonito* was a screw steamship of 3427 tons gross and 2213 tons net register, was fitted with engines of 1800 horse power effective, and was manned by a crew of thirty-one hands all told. At the time the services were rendered to her she was on a voyage from South Shields to Galveston in water ballast, with about 250 tons of slag ballast on deck, and fifty tons of slag ballast in her holds. The value of the *Cayo Bonito* was 34,000*l.*

About 9 p.m. on the 21st Jan. 1904 the *Cayo Bonito* while in charge of a North Sea pilot got ashore to the northward of Whitby on the Upgang Rocks.

About 9.30 p.m. word was brought to the coxswain of the *Robert and Mary Ellis* that the *Cayo Bonito* was ashore. The crew of the *Robert and Mary Ellis* were at once mustered, and with the help of forty-one of the plaintiffs in the second suit the lifeboat was launched. The tide at the time was about four hours ebb, the wind was from the N.W. by N. and a strong sea was running.

The *Robert and Mary Ellis* reached the *Cayo Bonito* shortly after 10 p.m., and, in answer to a hail from the master of the *Cayo Bonito,* the coxswain of the lifeboat boarded her and found that the ballast tanks had been run out and some of the slag ballast had been jettisoned.

The master of the *Cayo Bonito* then asked the coxswain of the *Robert and Mary Ellis* to do what he could to float the vessel. The coxswain thereupon got an anchor slung on to the bows of the lifeboat, and this was taken away to the N.E. and lowered with 120 fathoms of wire hawser attached to it.

Meanwhile the *Upgang* had been manned and launched by some forty of the plaintiffs in the second suit, and this was only accomplished after some difficulty, the lifeboat having to be recarriaged on one occasion.

The launch was, however, ultimately successfully accomplished, and the *Upgang* finally reached the *Cayo Bonito* and took an anchor and 125 fathoms of manilla on board. The *Robert and Mary Ellis* then towed the *Upgang* away to the N.E. by N. and the anchor was then dropped.

The jettison of the ballast proceeded, and at 2.30 a.m. on the 22nd Jan. when the tide made, the coxswain of the *Robert and Mary Ellis* told those on the *Cayo Bonito* to heave on their anchors, and after about an hour's heaving the engines of the *Cayo Bonito* were worked full speed astern, and the *Cayo Bonito* gradually came off, and about 4.30 a.m. was anchored in a place of safety.

The defendants admitted that salvage services were rendered by the crews of the lifeboats, and that they were engaged to lay out anchors, but they alleged that the warp attached to the anchor laid out by the *Upgang* parted almost at once, and that the anchors were of little use. They further alleged that the work done consisted in laying out the anchors only, and that it could have been done equally well by the crew of the *Cayo Bonito,* and paid into court the sum of 250*l.* which they alleged was sufficient to satisfy all claims of the crews of the lifeboats.

As to the claim of the men who assisted in the launching, the defendants denied that any salvage services were rendered by the launchers, and further alleged that if they had assisted in the launching the launch had taken place for the purpose of saving life, and that under the rules of the Lifeboat Institution, the lifeboats could not be used for the purpose of salving property until they reached the *Cayo Bonito.* They also alleged that the launchers were employed and entitled to be paid either by the Lifeboat Institution or by the crews of the lifeboats.

The general regulations of the Royal National Lifeboat Institution which deal with the launching of the lifeboats owned by the institution are as follows:

18. The lifeboat is never to be launched for any purpose other than for saving life without the direct sanction of the honorary secretary or of some other authority connected with the local committee, and on no account to be used for other purposes, to the injury of private interests.

Art. 20 prescribed the payments to be made to each of the crew for going afloat in the lifeboat to save life at different times and seasons, and provided that a similar variation in pay should be allowed to the helpers as the launchers were called in the regulations.

24. When a lifeboat has been launched for the purpose of saving life, and it is found on arriving at the vessel in danger that the master or other responsible person in charge wishes to engage the services of the lifeboat's crew to endeavour to save the vessel, the lifeboat's crew are at liberty to accept an engagement with such master or other responsible person in charge for this purpose and to make use of the lifeboat under the following conditions: (*a*) That all reasonable care be taken of the lifeboat and its gear. (*b*) That it be clearly understood that the position of the lifeboat's crew towards the institution is changed from a lifeboat crew endeavouring to save life, and entitled to be paid for such endeavours by the institution, to a party of salvors who have borrowed the lifeboat for property salvage purposes, for the remuneration of which services they are to look to the person in charge of the vessel who has engaged them. Should the boat be damaged while rendering such services the cost of repair to be met by the salvors. (*c*) Should the attempts of the lifeboat crew to salve the vessel be successful, but the amount of salvage money paid them be less than the amount the crew, helpers, &c., would have been entitled to for an endeavour to save life, the difference will be made good by the institution. Should, however, they be unsuccessful in salving the vessel they will be paid by the institution as though they had launched for the purpose of saving life.

Evidence was also given that when the crew of the lifeboat was paid by the institution for going afloat for the purpose of saving life each of the launchers was also paid by the institution a sum equal to one-fifth of the sum paid to each of the crew.

Laing, K.C. and *L. Batten* for the plaintiffs the crews of the lifeboats.

A. Adair Roche for the plaintiffs in the second suit, the launchers.—The first defence is that the launchers were employed and entitled to be paid by the institution. That is not the fact, for when the lifeboats are engaged to salve property the position of the launchers as well as of the crews of the lifeboats is changed under rule 24 (*b*) of the general regulations, and they have to look to a salvage award for their remuneration. The second defence is that the lifeboat crews undertook to remunerate the launchers, but they did not do so, though if they received the whole sum awarded as salvage, they would pay over something to those who assisted to launch the boats. Those who assist in launching are salvors because without their assistance the salvage services could never have been rendered, and in such cases not only those actually employed but those who stay behind are entitled to salvage:

The Enchantress, 2 L. T. Rep. 574; Lush 93;
The Cadiz and The Boyne, 35 L. T. Rep. 602; 3 Asp. Mar. Law. Cas 332.

The position of those who launch is analogous to that of the lifeboat men who were treated as part of the crew of a tug:

The Auguste Legembre, 86 L. T. Rep. 358; 9 Asp. Mar. Law. Cas. 279; (1902) P. 123.

Aspinall, K.C. and *R. H. Balloch* for the defendants.—As no leave had been given under rule 18 of the general regulations, these lifeboats must have been launched to salve life and not property. The subsequent engagement of the lifeboat by the master of the *Cayo Bonito* to salve property cannot convert the launching of the lifeboats into a salvage service rendered to property. Those who launch the boat cannot render their services *de bene esse*. They are not acting on the salvage principle of no cure no pay, because even if property was not salved they would be paid something by the institution.

A. Adair Roche, in reply.—The reference to helpers in rule 24 (*c*) of the general regulations of the National Lifeboat Institution shows that the engagement of the lifeboat to salve the vessel entitles the launchers to salvage. Under rule 24 (*b*) if the lifeboat had been damaged in rendering the services to the property salved the launchers as well as the crew would have been liable for the cost of repairing it.

BARNES, J.—In this case Thomas Langlands and twenty-seven others, who formed the crews of the lifeboats *Robert and Mary Ellis* and the *Upgang*, and Thomas Day Cass and ninety-eight others, who assisted in launching the two lifeboats, claim against the owners of the *Cayo Bonito* for salvage services, which it is said were rendered to that vessel on the night of the 21st Jan. and the morning of the 22nd Jan. 1904. The *Cayo Bonito* is a steamship of 3427 tons gross register, with engines working up to 1800 horse power effective, and was on a voyage from South Shields to Galveston in water ballast with some further ballast on deck and in her hold, manned by a crew of thirty-two hands all told. An accident of a somewhat extraordinary character appears to have happened in the course of the voyage coming down the coast when nearly off Whitby, because the captain says that the ship was put ashore owing to the fact that the North Sea pilot, who was in charge of her at the time, had ported for several vessels, thus getting rather near the coast, and finally mistook the Whitby lights for the lights of fishermen. The first the captain appears to have known of it was when the ship was on the ground. At that time he seems to have been told by the pilot that the ship was on the sand—she was in fact on the rocks, and that is clear from the extent of the damage which the vessel's bottom received. The accident happened about 9.45 p.m. on the 21st Jan., and the *Robert and Mary Ellis* reached the ship about two hours afterwards. The other boat—the *Upgang*—reached the vessel somewhat later. The vessel appears to have gone aground on the last of the ebb, she was hard and fast on the rocks, and the steps taken to get her off appear to have been that the lifeboat first on the spot had an anchor put on board her, and laid it out to the north-east, and then the other lifeboat, assisted by the first, laid out a second anchor. Afterwards, when the tide made sufficiently, with the working of her own engines, and the heaving on the anchors the vessel came off. The ropes attached to the second anchor parted almost immediately when hove on; but as the Court is not asked to apportion between the two lifeboats, it does not matter whether one rendered assistance as long as the other did. The captain of the *Cayo Bonito* says he could himself have put out anchors with the assistance of his crew, and that the vessel could have got off without assistance by working her own engines. The plaintiffs contention is that they were asked and engaged to put out the anchors although the vessel had been some time aground, and that they were doing that which relieved those on the ship from making any effort to put out anchors even if they could have done it, and that the heaving on the anchor was of substantial benefit in assisting this vessel off, and that in any event it kept the vessel from swinging and getting into a worse position. I think it is exceedingly difficult to be sure of the precise benefit which the services rendered by the lifeboats conferred on the ship; but it is clear from the facts that they were engaged and did the work, and were offered remuneration for it at the time, and that, as there has been a tender of 250*l.* to the members of the lifeboat crews, even the defendants think there was a certain benefit conferred upon the steamer by the services of the lifeboats. I have discussed the matter with the Elder Brethren, and they think that the anchors and warps were of slight benefit to the vessel and also that the lifeboats being there, standing by engaged to assist would also be of benefit to the crew of the *Cayo Bonito*. That being so it is really for the court to consider what, apart from any question of tender, would have been the award made in such circumstances as these to the lifeboat men for the services which they actually performed.

The other point in the case is that of the claims I have mentioned, the claims made by Thomas Day Cass on behalf of himself and others who launched the lifeboats. They seek to obtain salvage remuneration as having been the instruments by which the salvage services were enabled to be performed. The defendants contend that they are not in fact salvage services at all, because they say, having regard to the rules of the Lifeboat Institution, that, if those rules are considered, the first launching of the lifeboat is for the purpose of saving life, and if, when the lifeboat gets to the

vessel in distress, it is found that she is not required for the purpose of saving life but for the purpose of saving property the services then become changed to salvage services to property, and only those who are actually engaged in performing the services are entitled to salvage remuneration. I am by no means sure, it is very material, in the circumstances, to consider that point, because as I have already shown, if the salvors in the lifeboats are entitled to salvage remuneration, it seems to be suggested, even on the defendants' contention, that they must pay the launchers something for assisting them to earn the money which they get as salvage. Therefore it is obvious that the court, if that is the right position, in making an award to those in the lifeboats would simply have to add so much to the award as would enable the crews of the lifeboats to pay the launchers sufficient to remunerate them properly. If the other view is the correct one—namely, that the launchers, having taken part in launching the lifeboats for the purpose originally of saving life, afterwards, having regard to the rules of the institution, when the boats are engaged to salve property have enabled the crews of the lifeboats to render services to property—then taking the launchers and the crews together, the judgment would simply be a divided judgment—namely, so much to the crews of the lifeboats and so much to the launchers. My own inclination is that the true view to take is that under these rules those who launch the boats must contemplate that one of two things may happen, that there may be only life salvage or there may be a change later on into a salvage of property, and when they assist in the launching they take their chance which of those things may result. I think it is clear from sub-sect. (c) of rule 24 that that idea is in contemplation in these rules. It certainly is in accordance with the commonsense view of the matter. I think, therefore, that, strictly speaking, the men who assist in launching the lifeboat have a right to claim salvage. That being so, whether you treat the remuneration of the launchers as coming directly through the lifeboat crews or not, one has to consider what the proper remuneration for them to receive would be. I think it is clear that those who assisted in the launch have endeavoured to put their case too high because the weather records show that the weather could not have been of any very real severity, and that nothing like a sea could have been produced. I have considered these matters with the Elder Brethren with considerable care, and my opinion is that the tender is not quite adequate, and that, having regard to the benefit which I think to some extent was received by the ship, a proper award to make in this case is the sum of 400*l.* to the crews of the lifeboats and 100*l.* to those engaged in launching them.

Solicitors: for the lifeboat crews, *Dubois* and *Williams*, agents for *H. Chamberlin*; for the launchers, *Botterell* and *Roche*, agents for *Tasker Hart*; for the defendants, the owners of the *Cayo Bonito*, *Hollams, Sons, Coward*, and *Hawksley*.

June 23 and 25, 1904.

(Before BARNES, J.)

THE ELMVILLE; CEYLON COALING COMPANY LIMITED v. GOODRICH. (a)

Necessaries—Disbursements—Liability of master—Bill of exchange—Notice of dishonour—Reasonable time—Special circumstances excusing delay in notice—Bills of Exchange Act 1882 (45 & 46 *Vict. c.* 61), *ss.* 49, 50.

A ship arrived at Colombo in want of coal, and her master needed cash for disbursements. The coals were supplied and the money was advanced by the ship's brokers, and the master drew a bill on the managing owners of the ship for the amount of the coal bill and the advance. The bill, which contained the words ". . . . value received on 300 *tons of coal and disbursements and place the same with or without advice to account of coals and necessary disbursements to my vessel . . . for which I hold my vessel, owners, and freight responsible" was accepted, and was dishonoured on maturity.*

The plaintiffs (the holders of the bill) knew of the dishonour on the 18*th April, and on the same day were told that the vessel was in the Tyne. Being uncertain of the whereabouts of the vessel, they made further inquiries, but, getting no further information, they sent notice of dishonour to the master as drawer of the bill on the* 21*st April. The notice reached the master on the* 23*rd April.*

Held, that the captain was personally liable on the bill, for the form in which it was drawn did not give the holder a right only against the ship, her owners, and freight.

Held, further, that though under ordinary circumstances the notice of dishonour which was given would have been too late, yet the delay was to be excused, as it was caused by circumstances beyond the plaintiffs' control, and not imputable to their default, misconduct, or negligence.

ACTION by the Ceylon Coaling Company against the master of the steamship *Elmville*, the drawer of a bill of exchange to recover 303*l.* 19*s.* due under the bill.

The *Elmville* was owned by the Agenoria Steamship Company Limited; F. Childs and Co., Cardiff, being the managing owners.

In Feb. 1904 while on a voyage from Melbourne to Hull, the *Elmville* put into Colombo for coal, and while there her master needed cash for disbursements.

On the 8th Dec. 1903 F. Childs and Co. had entered into a contract with Mann, George, and Co., of London, as agents for the sellers, that the latter should supply all bunker coal which F. Childs and Co. might require at certain ports for steamships managed by them. Colombo was one of the ports.

In pursuance of this agreement Aitken Spence and Co., of Colombo, supplied the *Elmville* with bunker coal to the value of 270*l.* and 33*l.* 19*s.* was also advanced by them to the master to meet some disbursements.

In respect of these two sums the master, W. Goodrich, drew a bill of exchange for 303*l.* 19*s.*, dated the 23rd Feb. 1904, on the Agenoria Steamship Company Limited, F. Childs and Co.,

(a) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law.

managers, Cardiff, payable in London at thirty days sight, to the order of Aitken Spence and Co. The bill contained the following words:

In London the sum of 303*l.* 19*s.* only value received on 300 tons coal and disbursements, and place the same with or without advice to account of coals and necessary disbursements to my vessel to enable her to complete this voyage from Melbourne to Hull, for which I hold my vessel, owners, and freight responsible.

On the 25th Feb. Aitken Spence and Co. indorsed the bill to the Ceylon Coaling Company.

On the 15th March the bill was accepted by F. Childs, as director and manager of the Agenoria Steamship Company payable at the London, City, and Midland Bank, London.

The bill became due on the 16th April, and was presented for payment. It was not met and was duly protested.

On the 18th April, about midday, the plaintiffs heard that the bill had been dishonoured. The bill stated that the vessel was on a voyage from Melbourne to Hull, and the plaintiffs then had to inquire where the drawer of the bill, the master, was.

The secretary of the Ceylon Coaling Company inquired of Mann, George, and Co., on the 18th April as to the whereabouts of the *Elmville*. Telegrams passed between Mann, George, and Co.'s house in London and their house in Cardiff, and finally a telegram reached London on the 18th April stating that the *Elmville* was in the Tyne in the hands of mortgagees, that the owners were endeavouring to make arrangements and advising that the account should be held for a few days. Letters confirming the telegrams also passed, and the information as to the whereabouts of the *Elmville* reached the secretary of the plaintiff company on the 19th April. As the bill stated that the vessel was on a voyage to Hull the secretary was not satisfied that the information he had received as to the whereabouts of the vessel was correct; so he made some further inquiry of Mann, George, and Co., and searched the Newcastle papers to see if the ship was in that port, but was unable from them to find that she was in the Tyne.

Having failed to learn anything definite as to the whereabouts of the vessel, on the 21st April the secretary of the plaintiff company posted a registered letter containing notice of dishonour, and addressed the letter: "The Master of the *Elmville*, Newcastle-upon-Tyne," and that letter was delivered by the post-office on board the *Elmville* on the 23rd April.

A firm of solicitors acting for the plaintiff company also gave the master notice that the bill had not been met on the same day.

The master not having met the bill, the writ in the action was issued on the 25th April.

Dunlop for the plaintiff company.—The master is liable on the bill, the object of the bill given in payment being the same in this case as in the case of *The Ripon City* (77 L. T. Rep. 98; 8 Asp. Mar. Law Cas. 304; (1897) P. 226). The circumstances of the case excuse the delay in giving the notice of dishonour, for the whereabouts of the vessel had to be discovered before it could be given, and, while the bill stated that Hull was the destination of the vessel, the vessel had gone to the Tyne.

Balloch for the master, the drawer of the bill.—The facts show that there has been undue delay in giving the notice of dishonour, and the master is therefore discharged. The holders might have sent the registered letter on the 18th April, for they got no further information between that date and the 21st April, the date on which it was ultimately sent; or they might have caused some inquiry to have been made by their agents or some ship broker in Newcastle. Further, the form of the bill itself shows that the master is not liable. The form of the bill given by the master in the case of *The Ripon City* (*ubi sup.*) was not given in the report; in this case the form is peculiar, and shows that the coal was supplied upon the credit of the ship alone. The master is not liable under the bill, for it imposes an obligation on the ship and her owners and freight alone.

BARNES, J., after stating the facts which led up to the giving of the bill, proceeded:—I do not require to repeat what I said in *The Ripon City* (*ubi sup.*), but I think in that case I went through the ordinary course of business and pointed out how a draft given by the master in such circumstances was part of the consideration for the supply of the coal, because it enabled the suppliers to use the master's name for the purpose of enforcing his lien against the ship. [The learned judge then stated the facts showing what efforts had been made to find the ship and give notice of dishonour, and proceeded:] The plaintiff company is now suing the master on the bill, and the master has already brought an action in this court against the ship in which he seeks to recover his wages and disbursements, and amongst other things he seeks to recover the amount of this bill if he is liable upon it. That suit has been before the court, and a decree for his wages and disbursements has been made, and the matter has been referred to the registrar to ascertain what those wages and disbursements amount to; and if this bill is one for which he is liable, no doubt it will fall within what is due from the defendant shipowners or rather their ship, for the suit by the master is a suit *in rem*, to the present defendant in this case. He is really defending this action, because if he is made liable he will have a right to recover against the ship, but if he is not liable and did not defend this case it might be said in his suit against the ship, you ought to have fought the claim made against you, and you cannot now recover against the ship.

The first point made is that the master did not have due notice of dishonour of the bill. I do not think there is any dispute about the law. The law is contained in sects. 49 and 50 of the Bills of Exchange Act 1882. In the absence of special circumstances there is no doubt that the notice of dishonour would be too late. Sub-sect. 12 of sect. 49 and sub-sect. 1 of sect. 50 have been read, and I think the substance of the matter is this, that the notice of dishonour would be too late unless the circumstances of the case are such that there has been no delay, beyond what is reasonable in the circumstances, in giving notice of dishonour to the master. That depends upon the set of circumstances which I have referred to—namely, that the plaintiff company holding the bill did not

know what the real address of the master was and had to find it out, and they never did find it out properly. They took their chance on the 21st April of the letter which was sent to "The Master of the *Elmville*, Newcastle-upon-Tyne," reaching the defendant, in the expectation that it might possibly do so. I think it is quite clear they had to act with promptness and within a reasonable time, and they had to make due inquiries, and as soon as they reasonably could give notice. It is simply a question of fact, and I think, having regard to the times I have mentioned and to the circumstances of the case, that the plaintiff company acted with due diligence in making inquiries and sending their notice, and I think it was, in the circumstances, sent within a time entitling them to sue the master upon the bill. The other point is rather more a point of law. If this bill were in the ordinary form counsel for the defendant does not dispute that it would be a bill upon which the master could be sued. The matter has been considered in the case of *The Ripon City* (*ubi sup.*) very fully, and there is no doubt that a master ordering coal and having to give his draft, under a contract for them, makes himself personally liable. That would be so on a bill where there is no qualification, but it is said that this bill is qualified so as not to make the master liable at all. The words relied on are as follows: "In London the sum of 303*l.* 19*s.* only value received on 300 tons coal and disbursements, and place the same with or without advice to account of coals and necessary disbursements to my vessel to enable her to complete this voyage from Melbourne to Hull, for which I hold my vessel, owners, and freight responsible." In some way counsel for the defendant suggests that those are words which release the master from personal liability and impose the obligation upon the ship, her owners, and freight only, and that that is what the owners of the coal looked to when they supplied it. I fail to see there is any such limitation upon the bill, and it seems to me that the words leave the master just as liable as if the words were not there. It is a mere statement of what has happened and the position of the master, and represents, I think truly, that he is personally liable, but that he will look himself to the vessel, his owners, and freight. I think, therefore, that the plaintiff company is entitled to judgment against the master, the defendant, for the sum of 303*l.* 19*s.* with interest from the date of dishonour until judgment.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.

Solicitors for the defendant, *Stokes* and *Stokes*, agents for *Ingledew* and *Fenwick*.

END OF VOL. IX.